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ATTORNEY GENERAL OPINION NO. 89-75

The Honorable Frank D. Gaines
State Senator, Sixteenth District
Box 219
Augusta, Kansas 67010

Re: Schools -- Food Service Programs -- Acceptance of
Benefits of Federal Acts; Administration of
Programs; Legal Expenses

Synopsis: Under the facts presented, legal expenses for
prosecuting a civil action against unfaithful
employees incurred by a Child Care Food Program
institution were not necessary to the planning,
organizing and managing of a food service, and
therefore were not reimburseable. Cited herein:
K.S.A. 72-5113; 7 C.F.R. §§ 226.2, 226.4 (1988).

* * *

Dear Senator Gaines:

As State Senator for the Sixteenth District, you have
requested our opinion regarding the use of Child Care Food
Program (CCFP) funds for legal expenses. Specifically, you
ask whether an institution receiving these funds may be
reimbursed for legal fees incurred when the institution
attempts to recover damages from unfaithful employees.

The United States Department of Agriculture assists states
through grants-in-aid for distribution to certain institutions
providing nutritious food for children. On the state level,
the federal program is administered by the state department of
education. K.S.A. 72-5113.

Institutions are reimbursed by the state agency for operating and administrative costs in connection with food service operations. 7 C.F.R. § 226.4 (1988). Operating costs are those expenses "incurred by an institution in serving meals to children under the Program, and allowed by the State agency financial management instruction." 7 C.F.R. § 226.2 (1988). Administrative costs are those "incurred by an institution related to planning, organizing, and managing a food service under the Program, and allowed by the State agency financial management instruction." 7 C.F.R. § 226.2 (1988).

As a guide for determining whether certain costs are allowable, the department of agriculture issued FNS Instruction 796.2 (1983). The guidelines include general factors affecting allowability of costs, including the necessity and reasonableness of the expense for proper and efficient program administration. FNS Instruction, at page 5. Regarding legal expenses, the instructions state in relevant part:

"The cost of legal expenses required in the administration of the program is allowable. . . .

"Legal expenses for the prosecution of claims against the Federal Government or the grantee are unallowable." FNS Instruction, at page 12.

You state that an institution incurred legal expenses in attempting to recover damages from employees who had "appropriated agency CCFP resources." The Department of Education denied reimbursement for the expenditure, and the institution requested a hearing. The hearing officer issued an order denying reimbursement, holding that under the specific facts, commencement of a civil action by the institution against the former employees was not necessary to the planning, organizing, or managing of the food service. The hearing officer found that two employees formed a not-for-profit corporation to compete with the institution. The employees then solicited the institution's contacts for participation in the program with the new corporation. In their answer to the petition, the employees alleged that the institution was aware that the new corporation was being formed by the employees, and that the institution acquiesced in their activities. The institution did not terminate the employees when it learned of their activities. The employees subsequently resigned their positions. The hearing officer

was informed that the dispute between the institution and the employees was settled. A rehearing on the decision was requested and denied, no further appeal was pursued.

While legal expenses may be allowed as administrative costs when necessary to the planning, organizing and managing of a food service, we do not believe the hearing officer incorrectly denied the institution's claim for reimbursement in this case. The federal agency's interpretation of its own regulation indicates that prosecuting certain claims is not a cost contemplated as being allowable. Application of this interpretation to the facts presented to the hearing officer is consistent with the purpose of the program.

In opining that the hearing officer did not incorrectly deny the claim for reimbursement, we do not imply that a program institution may never be entitled to reimbursement for legal expenses relating to the recovery of damages from unfaithful employees. Factual situations may arise in which the administration of the program requires pursuing a lawsuit against dishonest employees, and the legal expenses might be reimbursable.

In conclusion, it is our opinion that, under the facts presented, legal expenses for prosecuting a civil action against unfaithful employees incurred by a Child Care Food Program institution were not necessary to the planning, organizing and managing of a food service, and therefore were not reimburseable.

Very truly yours,



ROBERT T. STEPHAN
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