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ATTORNEY GENERAL OPINION NO. 91- 23

The Honorable Eric R. Yost
State Senator, Thirtieth District
State Capitol, Room 128-S
Topeka, Kansas 66612

Re: Crimes and Punishments; Kansas Criminal Code;
Prohibited Conduct--Crimes Affecting Public
Trusts--Bribery; Privatization Pledge

Legislature--State Governmental Ethics--Contingent
Fees for Lobbying Prohibited; Privatization Pledge

Synopsis: Funds conferred upon a candidate for the office of
state legislator only after the candidate pledges
to "get[] rid of the Bureaucratic Welfare State
[sic]" or return the funds constitutes a contingent
fee for lobbying. K.S.A. 46-267 prohibits payment
or acceptance of contingent fees for lobbying. If
the candidate should prove successful in seeking
the office of state legislator, acceptance of funds
subject to the pledge may result in a violation of
K.S.A. 46-232 as no state officer is permitted to
lobby his own state agency, including the
legislature, if he accepts compensation
specifically attributable to such lobbying. Cited
herein: K.S.A. 21-3901; K.S.A. 1990 Supp. 25-4143;
46-137a; K.S.A. 46-216; 46-225; 46-232; 46-267;
75-3252.

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Dear Senator Yost:

As senator for the thirtieth district, you have requested an opinion regarding the legality of a "privatization pledge" form which an individual seeking the office of state legislator apparently must sign in order for the individual to receive monetary assistance from the contributor. The privatization pledge further requires the individual to return the finances if he should "fail the pledge." Specifically you ask whether such an arrangement constitutes a violation of K.S.A. 21-3901.

Bribery is defined in K.S.A. 21-3901 as:

"(a) Offering, giving or promising to give, directly or indirectly, to any person who is a public officer, candidate for public office or public employee any benefit, reward or consideration to which the person is not legally entitled with intent thereby to influence the person with respect to the performance of the person's powers or duties as a public officer or employee; or

"(b) the act of a person who is a public officer, candidate for public office or public employee, in requesting, receiving or agreeing to receive, directly, or indirectly, any benefit, reward or consideration given with intent that the person will be so influenced."

Pursuant to K.S.A. 21-3901, all of the statutory elements within the definition of bribery must be satisfied by the privatization pledge before it can be considered violative of the Kansas bribery law.

In State v. Marshall and Brown - Sidorowicz, 2 Kan.App.2d 182 (1978), the Kansas Court of Appeals stated that "federal cases are persuasive authority because the federal bribery statute (18 U.S.C. § 201) is similar to the Kansas bribery statute." Id. at 208. Therefore, the foundation of the federal bribery statute which is described in United States v Muntain, 610 F.2d 964 (D.C. Cir. 1979) may be considered in determining whether the privatization pledge constitutes a bribe under K.S.A. 21-3901. The theory is described in the following terms:

"It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision. The statute plainly proscribes such corrupt interference with the normal and proper functioning of government." Id. at 968.

Primarily, K.S.A. 21-3901(a) requires an "offering, giving or promising to give, directly or indirectly, to any person who is a public officer, candidate for public office or public employer. . . ." Since the privatization pledge affects candidates for public office and these candidates directly or indirectly receive a payment after they sign the privatization pledge, the above elements of the bribery statute are satisfied. Furthermore, K.S.A. 21-3901(a) requires that the payment received by the candidate should be "any benefit, reward or consideration. . . ." Consideration exists if there is a benefit to the promisor or a loss or detriment to the promisee. Coder v. Smith, 156 Kan. 512, 513 (1943). Pursuant to the privatization pledge the candidate signs a pledge which indicates that the candidate is promising to ". . . strengthen Private Enterprise and economic growth by getting rid of the Bureaucratic Welfare State--cutting government bureaus, deficits, spending, tax, waste, fraud, abuse and regulation." Based on this pledge, the candidates would receive the payment. Therefore this payment satisfies the consideration element of K.S.A. 21-3901(a).

Pursuant to K.S.A. 21-3901(a), the consideration must be something "to which the person is not legally entitled. . . ." Correspondence dated October 9, 1990, to you indicates that the funds subject to the privatization pledge do not appear to constitute either a contribution or an expenditure under the campaign finance laws. We indicated that:

"The funds [subject to the privatization pledge form] appear to be expended to influence future activity of the candidate. The funds are not allocated

'for the purpose of influencing the nomination or election of any individual to state or local office,' but rather are allocated to ensure that the candidate, once elected, will work to strengthen private enterprise and economic growth. The funds subject to the 'privatization pledge' do not constitute a contribution under K.S.A. 1989 Supp. 25-4143(d)(1)(A), as amended, or an expenditure under K.S.A. 1989 Supp. 25-4143(f)(1)(A), as amended."

Also, the payment fails to qualify as compensation to which a state legislator would be legally entitled. See K.S.A. 46-137a et seq.; K.S.A. 75-3252 et seq. Therefore, the candidates are not otherwise legally entitled to the payment they receive after they sign the pledge. Thus, this element of the Kansas bribery law is also satisfied.

K.S.A. 21-3901(a) further requires the consideration to be given in order ". . . to influence the person with respect to the performance of the person's powers or duties as a public officer or employee. . . ." Pursuant to Kansas case law, ordinary words are to be given their ordinary meaning when the statute is being interpreted. State v. Bowers, 239 Kan. 417, 422 (1986). In applying the literal meaning of these words to the privatization pledge, it logically follows that pledging to "work to strengthen Private Enterprise and Economic growth by getting rid of the Bureaucratic Welfare State--cutting government bureaus deficits, spending, tax waste, fraud, abuse, and regulation" satisfies the definition of an official act.

The last element of the Kansas bribery statute is the intent requirement. K.S.A. 21-3901(a) requires that the consideration be given to the candidate for public office ". . . with the intent thereby to influence that person. . . ." Furthermore, in United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 822 (9th Cir. 1985), the district court held that "bribery requires 'corrupt intent', which is a higher degree of intent than is required under the provision outlawing gratuities to public officials."

Because intent is a matter of fact, our office is unable to issue an opinion as to whether this essential element of the crime of bribery is satisfied. Therefore, we are unable to reach a definitive conclusion as to whether the privatization pledge violates the Kansas bribery law.

However, during research of the issue you present, it was determined that the privatization pledge could result in a violation of Kansas law which prohibits acceptance of contingent fees for lobbying. K.S.A. 46-267 states:

"No person shall pay or accept or agree to pay or accept compensation, or any part thereof, for lobbying which is contingent upon the result achieved or attained."

It is argued that:

"Agreements under which the compensation for procuring or influencing legislative action is made contingent upon the success of the undertaking furnish the strongest incentive to the exertion of corrupting and sinister influences to the end that the desired legislation may be secured, and there is a long line of cases which hold that if the agreement is one in which the compensation is contingent upon success in accomplishing the end sought, it is utterly void as against public policy. 51 Am.Jur.2d Lobbying 995, § 4 (1970).

Lobbying is "promoting or opposing in any manner (1) action or non-action by the legislature on any legislative matter or (2) the adoption or non-adoption of any rule and regulation by any state agency." K.S.A. 46-225. The privatization pledge requires the recipient of the funds to work to strengthen private enterprise and economic growth by getting rid of the bureaucratic welfare state. If the recipient fails to fulfill the pledge, the funds extended to the recipient are to be returned to the individual who conferred those funds upon the recipient. Therefore, retention of those funds is contingent upon the success of the recipient in getting rid of the bureaucratic welfare state. Because the funds conferred pursuant to the privatization pledge constitute compensation, see K.S.A. 46-216, payment or acceptance of the funds results in a violation of K.S.A. 46-267.

Although K.S.A. 46-267 does not include the statutory requirement of intent, there is a tendency in the courts:

"To break away from the strict rule above and to adopt the view that if nothing

improper or immoral was contemplated by the parties at the time the agreement was entered into and the services rendered thereunder did not partake of anything in the nature of lobbying or other improper influences, the mere fact of the contingency of the compensation does not of itself make the agreement void." 51 Am.Jur.2d supra at 995.

There is no case law in Kansas which exemplifies this tendency.

The recipient should be aware that, as a state officer, acceptance of the funds may also result in a violation of K.S.A. 46-232. K.S.A. 46-232 states:

"No state officer or employee shall engage in lobbying his own state agency, if he accepts compensation specifically attributable to such lobbying, other than that provided for by the performance of his official duties. Nothing in this section shall prohibit a state officer or employee from lobbying without compensation other than that which he is entitled to receive for performance of his official duties."

State agency includes the legislature, legislators, legislative committees and councils and all executive departments, institutions, offices, officers, commissions, boards and authorities of the state. K.S.A. 46-224.

In review, we are unable to express an opinion regarding whether funds allocated pursuant to the privatization pledge constitute a bribe as such an issue involves a question of fact. However, payment or acceptance of funds pursuant to the privatization pledge will result in a violation of K.S.A. 46-267 as retention of the funds is dependent upon the

recipient's success in getting rid of the bureaucratic welfare state. Retention of the funds may also result in a violation of K.S.A. 46-232.

Very truly yours,



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