



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

May 13, 1991

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 91- 53

The Honorable Bill Brady
State Senator, 14th District
1328 Grand
Parsons, Kansas 67357

Re: Counties and County Officers -- General Provisions
-- Home Rule Powers; Expenditures; Public Purpose

Synopsis: A county may, by resolution, pay for the legal fees incurred when an action is brought by a county employee if the commissioners determine that: the action arose out of the employee's scope of employment; the money is being spent for a public purpose; the funds expended are derived from an appropriate fund; and the expense has been submitted pursuant to the uniform procedure for payment of claims. Cited herein: K.S.A. 1990 Supp. 12-105b; 19-101a; K.S.A. 19-229; 19-236a; K.S.A. 1990 Supp. 79-1946; K.S.A. 79-2927; and 79-2934.

* * *

Dear Senator Brady:

As Senator of the Fourteenth District, you request our opinion as to whether a county, through the passage of a resolution, may be required to pay the legal fees incurred when actions are brought by a county employee as a result of their public employment.

The following statutes outline the power of municipalities and the county commissioners to pay claims:

K.S.A. 19-212 provides that "[t]he board of county commissioners of each county shall have the power, at any meeting: Second. To examine and settle all accounts of the receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county; and when so settled, they may issue county orders therefor, as provided by law. . . ." Through the county's home rule powers, a board of county commissioners is able to "transact all county business and perform all powers of local legislation and administration it deems appropriate. . ." with certain exceptions. K.S.A. 1990 Supp. 19-101a. Furthermore, K.S.A. 19-229 gives the county commissioners the "exclusive control" of county expenditures.

However, K.S.A. 1990 Supp. 12-105b(a) requires that "all claims against a municipality must be presented in writing with a full account of the item, and no claim shall be allowed except in accordance with the provisions of this section." Employees wishing payment of legal expenses are making a claim against the county for funds which are not otherwise available to them. Therefore, such employees or vendors would need to set forth in detail the amount they are requesting.

Through these statutes and other Kansas law the commissioners have been given broad and sweeping authority to decide how local financial matters will be handled. However, the general rule is that funds must be spent only for a "public purpose." Authority discussing the public purpose doctrine includes: Ulrich v. Board of Thomas County Commissioners, 234 Kan. 782, 789 (1984); Duckworth v. City of Kansas City, 243 Kan. 386 (1988); Savings and Loan Association v. Topeka 87 U.S. 655, 22 L.Ed. 455 (1875). See also Gold, Economic Development Projects: A Prospective, 19 Urban Lawyer 193 (1987); Leavenworth County v. Miller, 7 Kan. 479 (1871); and McQuillin, 15 Municipal Corporations § 39.19 (3d Ed.).

The courts will generally defer to the commissioners' determination as to whether or not the expenditure is for a public purpose. However, the courts will step in if it is clear that the funds will only benefit a private entity. The general law governing judicial scrutiny in the application of the "public purpose" doctrine is stated thus:

"Each case must be decided in the light of the existing conditions, with respect to the objects sought to be accomplished, the degree and manner in which that object affects the public welfare, and the nature and character of the thing to be done; but the court will give weight to a legislative determination of what is a municipal purpose, as well as widespread opinion and general practice which regard as city purposes some things which may not be such by absolute necessity, or on a narrow interpretation of constitutional provisions. When an appropriation of public funds is primarily for public purposes, it is not necessarily rendered violative of constitutional provisions against gifts and loans of public credit by an incidental result which may be of private benefit. On the other hand, if the result is chiefly that of private benefit, an incidental or even ostensible public purpose will not save its constitutionality. A purpose may be a public one so as to be within a municipal power to appropriate funds therefor, even though it is not a necessary purpose. It has been laid down as a general rule that the question whether the performance of an act or the accomplishment of a specific purpose constitutes a 'public purpose' for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused." Attorney General Opinion No. 82-229, 64 C.J.S. Municipal Corporations, § 1835 (1950), State ex rel., McClure v. Hagerman, 98 N.E.2d 835 (Ohio 1951).

If the commissioners determine that the legal expenses are a "public purpose" expenditure, they will then need to determine the proper source of funds to pay for these expenses. Funding for such payments must be derived from appropriate tax levies

which authorize or approve of such expenditures. See K.S.A. 79-1946; 75-6110; 19-236a; 79-2927; 79-1951; and Attorney General Opinion No. 88-65.

Based on the above, the general rule seems to be that the commissioners may pay for legal expenses of an employee as long as they comply with the following rules:

1. The public money is spent for a public purpose, as determined on a case-by-case basis by the county commission, and not a private purpose. Ulrich v. Board of Thomas County Commissioners, 234 Kan. 782, 789 (1984); Duckworth v. City of Kansas City, 243 Kan. 386 (1988) and Attorney General Opinions No. 80-19, 84-116, 87-164 and 88-65;
2. the expenses are submitted to the county pursuant to the uniform procedure for payment of claims. K.S.A. 1990 Supp. 12-105b;
3. no funds are diverted from an inappropriate fund for use in paying these expenses. K.S.A. 79-2934.

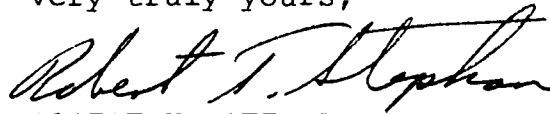
Because of the public purpose doctrine and the claims procedure we do not believe that it is possible to generally "preapprove" all legal expenses. The county commissioners will need to look at each case and determine if the employee's claim is derived from his or her scope of employment, if the expense is for a valid public purpose, if appropriate funds are available, and then deny or approve each claim based on its specific facts. It would be unreasonable and fiscally impossible with a balanced budget requirement to give a blanket approval to all actions the county employees may file. This review is especially necessary since the Labette county resolution does not include such things as a statement regarding a settlement of claims procedure and what effect the settlement by the claimant would have on the county, nor a maximum liability statement.

Moreover, the resolution in question does not address certain situations, e.g. (1) one county employee wishes to bring suit against another; will the county pay for attorney fees incurred by an employee seeking to sue their supervisor for discrimination?; (2) if an employee sues a citizen for slander as a result of the citizen's disparaging remarks about that employee's job performance, will the county automatically be required to fund that suit? We suggest you consider the

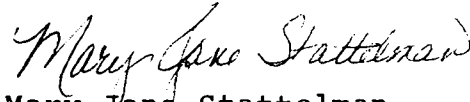
ramifications of these and other situations arising from the policy adopted by the proposed resolution.

In conclusion, it is this office's opinion that the Labette county resolution does not and cannot permissibly require the county to pay for all legal expenses incurred by a Labette county public officer or employee. Whether or not the county should pay such expenses should be left up to the discretion of the board of county commissioners, as long as their decisions are in compliance with the applicable statutes.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mary Jane Stattelmann
Assistant Attorney General

RTS:JLM:MJS:bas