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October 9, 1991

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ATTORNEY GENERAL OPINION NO. 91- 126

Ted D. Ayres
General Counsel
Kansas Board of Regents
Suite 609, Capitol Tower
400 S.W. Eighth
Topeka, Kansas 66603-3911

Re: State Departments; Public Officers and
Employees--Kansas Tort Claims Act--Tort Claims Fund
for Payment of Claims and Defense Expenses

Synopsis: Settlements of tort claims against a state agency
or its employees must be approved by the state
finance council only if payment of the settlement
is to be made from the tort claims fund. Finance
council "approval" of a settlement not paid from
the tort claims fund has no binding effect. Cited
herein: K.S.A. 75-3711c; 75-6106; 75-6109; K.S.A.
1990 Supp. 75-6117, as amended by L. 1991, ch.
182, § 6.

* * *

Dear Mr. Ayres:

On behalf of Kansas State University, you request our opinion
regarding payment of settlement agreements entered into under
the Kansas tort claims act, K.S.A. 75-6101 et seq.
Specifically your questions are as follows:

"1. Under the pertinent provisions of the Kansas Tort Claims
Act, may the Finance Council approve a proposed settlement of
a claim without authorizing payment from the Tort Claims Fund?

"2. Whether the Finance Council is authorized to require that settlements of tort claims be paid out of funds within the agency budget rather than out of the Tort Claims Fund?"

K.S.A. 75-6106(a) speaks to the ability to settle or compromise claims brought against the state or its employees under the tort claims act:

"Subject to the terms of an insurance contract, if any, a claim against the state or employee thereof acting within the scope of the employee's office or employment may be compromised or settled for and on behalf of the state and any such employee by the attorney general, with the approval of the state finance council. The approval of settlements and compromises by the state finance council is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c, except that such approval also may be given when the legislature is in session." (Emphasis added.)

Thus, subject to the terms of any applicable insurance contract, such claims may be settled with the approval of the state finance council. This is but one alternative for the settlement of claims; the statute does not indicate that this is the exclusive method. The council's authority to approve a settlement is guided by K.S.A. 75-3711c(c) which states:

"[S]uch approval, authorization or direction shall be given only when the legislature is not in session, upon findings, in addition to any enhancement or alteration thereof by legislative enactment, that:

"(1) Unforeseeable occurrence or unascertainable effects of a foreseeable occurrence characterize the need for the requested action, and delay until the next legislative session on the requested action would be contrary to paragraph (3) of this subsection.

"(2) The requested action is not one that was rejected in the next preceding session of the legislature, and is not contrary to known legislative policy.

"(3) In cases where the action is requested for a single state agency, the requested action will assist the state agency in attaining an objective or goal which bears a valid relationship to powers and functions of the state agency."

Payment of claims from the tort claims fund is addressed in K.S.A. 1990 Supp. 75-6117, as amended by L. 1991, ch. 182, § 6:

"(a) There is hereby established in the state treasury the tort claims fund which shall be administered by the attorney general. All expenditures from such fund shall be made upon warrants of the director of accounts and reports pursuant to vouchers approved by the attorney general or by a designee of the attorney general.

"(b) Moneys in the tort claims fund shall be used only for the purpose of paying (1) compromises, settlements and final judgments arising from claims against the state or an employee of the state under the Kansas tort claims act or under the civil rights laws of the United States or of the state of Kansas and (2) costs of defending the state or any employee of the state in any actions or proceedings on those claims. Except for claims against the state or an employee of the state in any actions or proceedings arising from rendering or failure to render professional services by a charitable health care provider to a medically indigent person or by a charitable health care provider who has contracted with a local health department that is part of the pilot programs established under section 1 of 1991 House Bill No. 2019 and amendments thereto to medically indigent

persons or persons receiving medical assistance from the programs operated by the department of social and rehabilitation services, to the extent that payment cannot be made from insurance coverage obtained therefor, payment of a compromise or settlement shall be made from the fund if the compromise or settlement has been approved by the state finance council as provided in K.S.A. 75-6106 and amendments thereto."
(Emphasis added.)

This provision describes when and how payments are to be made from the fund. Clearly payment of settlements out of the tort claims fund requires state finance council approval. The question is whether the finance council may "authorize" a settlement without approving payment from the tort claims fund. We believe that it may do so. Historically the finance council and various agencies have taken the position that approval of the state finance council is not required for settlements which are properly paid out of existing agency funds. The legislature has been aware of and has acquiesced in this practice. In 1985, in an attempt to put a stop to this practice, the senate committee on ways and means introduced a bill to amend K.S.A. 75-6106(a) to require that the finance council approve settlements "whether or not payment . . . is made or is to be made from the tort claims fund." 1985 Senate Bill No. 387. This bill passed the senate without amendment, but died in the house. The state finance council continues to hold the position that settlements require approval of that body only if made from the tort claims fund. See Robert L. Rieke Bldg. Co., Inc. v. City of Overland Park, 232 Kan. 634 (1983) (the interpretation placed on legislation by the administrative agency whose duties are to carry the legislative policy into effect is entitled to great weight). Thus, if payment from the fund is not approved, any "approval" by the finance council of a settlement has no effect. Such an "approval" or "authorization" would be merely gratuitous, given only to share the council's thought or belief that the agency still has the option of settling the claim with its own funds.

This leads to your second question, whether the finance council may require payment of settlement out of funds within the agency budget. In our opinion, it may not. The state finance council is a creature of statute and as such has only such powers as are expressly granted or necessarily

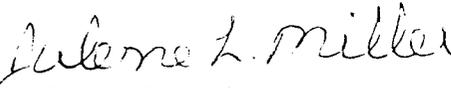
implied from the statutes. Pork Motel, Corp. v. Kansas Dept. of Health & Environment, 234 Kan. 374, 378 (1983). The powers and duties of the state finance council are set forth at K.S.A. 75-3708 et seq. and various other statutes. The Kansas Supreme Court discussed the authority of the finance council most recently in State ex rel. v. Bennett, 222 Kan. 12 (1977). There is no discussion of authority to require an agency to settle a claim using funds in the agency's budget. On the other hand, we know of nothing which would prohibit the finance council from suggesting this option. We note that agency employees are protected from liability for acts or omissions within the scope of their employment under K.S.A. 75-6109 regardless whether the finance council approves or disapproves a settlement.

In conclusion, settlements of tort claims against a state agency or its employees must be approved by the state finance council only if payment of the settlement is to be made from the tort claims fund. Finance council "approval" of a settlement not paid from the tort claims fund has no binding effect.

Very truly yours,



ROBERT T. STEPHAN
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Julene L. Miller
Deputy Attorney General

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