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July 24, 2013

ATTORNEY GENERAL OPINION NO. 2013-12

Kim Borchers, Director of Appointments  
Office of Governor Sam Brownback  
Capitol Building  
Room 259-S  
Topeka, KS 66612

Re: State Boards, Commissions and Authorities—Court of Tax Appeals—Membership; Qualifications; Chief Hearing Officer

Synopsis: The chief hearing officer of the Court of Tax Appeals is not subject to the provision in K.S.A. 2012 Supp. 74-2433(a) prohibiting the appointment of more than two judges from the same political party. Cited herein: K.S.A. 2012 Supp. 74-2433; 74-2434.

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Dear Ms. Borchers:

On behalf of the Office of Governor Sam Brownback, you ask whether the chief hearing officer of the Court of Tax Appeals (COTA) is subject to the provision in K.S.A. 2012 Supp. 74-2433(a) prohibiting the appointment of more than two COTA judges from the same political party. That statute states in relevant part:

The court shall be composed of three tax law judges who shall be appointed by the governor . . . . In addition, the governor shall also appoint a chief hearing officer, subject to confirmation by the senate . . . who, in addition to other duties prescribed by this act, shall serve as a judge pro tempore of the court. . . . *Not more than two judges of the court shall be of the same political party.* . . . Judges of the court, including the chief hearing officer, shall be residents of the state. . . . Judges of the court, including the chief hearing officer, shall hold office for terms of four years

and until their successors are appointed and confirmed. . . . If a vacancy occurs on the court, or in the position for chief hearing officer, the governor shall appoint a successor to fill the vacancy for the unexpired term. Nothing in this section shall be construed to prohibit the governor from reappointing any judge of the court, including the chief hearing officer, for additional four-year terms.<sup>1</sup>

At issue is whether the chief hearing officer, who among other duties serves as a judge pro tempore of the COTA, is a “judge” subject to the partisan limitation. The plain language of K.S.A. 2012 Supp. 74-2433(a) does not resolve the question because the statute implies that the chief hearing officer is a judge (“[j]udges of the court, *including the chief hearing officer*, shall be residents of the state. . . .”), but the statute also implies that the chief hearing officer is separate and distinct from the COTA judges (“[i]f a vacancy occurs on the court, *or in the position for chief hearing officer*, the governor shall appoint a successor to fill the vacancy for the unexpired term. . . .”).<sup>2</sup>

When a statute is plain and unambiguous, a court will not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.<sup>3</sup> However, if a statute’s language or text is unclear or ambiguous we may apply rules of statutory construction or consider legislative history to construe the legislature’s intent.<sup>4</sup> The primary rule of statutory construction is that the legislature’s intent governs if it can be ascertained.<sup>5</sup>

In this case, we note that K.S.A. 2012 Supp. 74-2433(a) was last amended in 2008 by Substitute for House Bill 2018 (HB 2018).<sup>6</sup> That bill abolished the Board of Tax Appeals and created the COTA, and also created the position of chief hearing officer of the COTA.

HB 2018 added the phrase “including the chief hearing officer” after many instances of the word “judge” in both K.S.A. 74-2433 and 74-2434, thereby clarifying when a statutory provision applies to the chief hearing officer as well as COTA judges. Notably, however, the legislature did not add this phrase in the context of the partisan limitation. This indicates that the legislature did not intend to subject the chief hearing officer to this limitation.

In our opinion, because the legislature specified that particular uses of the word “judge” include the chief hearing officer, the word “judge” standing alone does not. Therefore, we opine that the chief hearing officer of the COTA is not subject to the provision in K.S.A. 2012 Supp. 74-2433(a) prohibiting the appointment of more than two judges from the same political party.

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<sup>1</sup> Emphasis added.

<sup>2</sup> K.S.A. 2012 Supp. 74-2433(a) (emphasis added).

<sup>3</sup> See, e.g., *State v. Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc.*, 291 Kan. 322 (2010).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *Brennan v. Kansas Ins. Guar. Ass’n*, 293 Kan. 446 (2011).

<sup>6</sup> L. 2008, Ch. 109, § 2.

Sincerely,

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Attorney General

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Assistant Attorney General

DS:AA:SF:sb