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ATTORNEY GENERAL OPINION NO. 2020- 3

The Honorable Julia Lynn
State Senator, 9th District
State Capitol, Rm. 445-S
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees—Department for Children and Families—Kansas Commission for the Deaf and Hard of Hearing; Duties; Management Functions; Executive Director, Employment, Compensation and Expenses, Duties, Qualifications; Reception of Funds, Gifts, Grants, Bequests; Expenditures

Synopsis: The Kansas Commission for the Deaf and Hard of Hearing selects and employs the executive director and sets the duties and responsibilities of the executive director. The Commission is required to maintain some form of list or registry of persons it has determined are qualified interpreters and to provide a program for the regulation and certification of interpreters. Any expenditure of funds by the Commission is subject to budgeting directed and supervised by the Secretary of the Kansas Department for Children and Families and appropriation made by law. The Commission must coordinate with the Governor to determine the manner in which it is to submit its annual report reviewing the status of state services to the deaf and hard of hearing and recommending priorities to the Governor. Cited herein: K.S.A. 8-2412; K.S.A. 2019 Supp. 22a-243; K.S.A. 47-2003; 47-2303; 65-3506; 74-5,126; 74-5603; 74-6614; 74-6701; 74-9904; 75-2237a; 75-2929b; 75-3780; 75-4351; 75-4352; 75-4353; 75-4355; 75-4355a; 75-4355b; 75-4355d; K.S.A. 2019 Supp. 75-5310; 75-5391; K.S.A. 75-5392; K.S.A. 2019 Supp. 75-5393; K.S.A. 75-5395; 75-5396; K.S.A. 2019 Supp. 75-5397a; 75-5712; 75-5713; K.S.A. 75-6503; K.S.A. 2019 Supp. 75-7427; Kan. Const., Art. 2, §§ 18, 24; Kan. Const., Art. 15, § 1.

* * *

Dear Senator Lynn:

As State Senator for the Ninth District, you request our opinion regarding the functions of the Kansas Commission for the Deaf and Hard of Hearing (Commission). Your concerns are: whether the Commission is authorized to select an executive director and determine the duties of such officer; whether the Commission is responsible for registering persons who are qualified interpreters; whether the Commission is responsible for determining how monies received through gifts, grants and user fees are expended; and whether the Commission is responsible for submitting an annual report to the Governor and, if so, whether the Kansas Department for Children and Families (DCF) may withhold the report.

The Commission is a 17-member board established within DCF.¹ It is comprised of five ex officio members² and 12 members appointed by the governor.³ The Commission “advocate[s] for and facilitate[s] equal access to quality, coordinated and comprehensive services that enhance the life of Kansans who are deaf and hard of hearing.”⁴

Executive Director

We first address whether the Commission is authorized to select an executive director and determine the duties of such officer. The Kansas Constitution confers upon the Legislature the authority to provide for the election or appointment of officers not otherwise provided for in the Constitution.⁵ “The creation of various offices and departments of government not otherwise provided for in the Kansas Constitution is a legislative function. It is also a legislative function to determine the qualifications of the officers and by whom they shall be appointed and in what manner they shall be appointed.”⁶

K.S.A. 2019 Supp. 75-5393 states:

(a) The Kansas commission for the deaf and hard of hearing shall employ an executive director and shall fix the duties, responsibilities and qualifications thereof. The executive director shall be a full-time

¹ K.S.A. 75-5391(a).

² The five ex officio members are “the administrative head, or a designee, of (A) vocational rehabilitation services, (B) social services, (C) the department of health and environment, (D) the state board of education, and (E) the state school for the deaf.” K.S.A. 75-5392(a)(1).

³ K.S.A. 75-5392.

⁴ <http://www.dcf.ks.gov/services/RS/Pages/KCDHH.aspx> (accessed January 3, 2020). See also K.S.A. 2019 Supp. 75-5391(a).

⁵ Kan. Const., Art. 2, § 18; Kan. Const., Art. 15, § 1.

⁶ *Leek v. Theis*, 217 Kan. 784, 808 (1975).

employee of the commission who shall be in the unclassified service under the Kansas civil service act

. . . .

(c) In selecting an executive director, the commission shall select an individual who is fluent in the American sign language of the deaf and shall give consideration and priority to qualified applicants who are deaf or hard of hearing.

In determining the authority of the Commission, we first note that, as an administrative agency, the Commission is a “creature[] of statute and [its] power is dependent upon authorizing statutes[;] therefore any exercise of authority claimed by the agency must come from within the statutes.”⁷ We then resort to the rules of statutory interpretation.

The fundamental rule of statutory interpretation is that legislative intent governs if it can be discerned. We begin this inquiry with the plain language of the statute. Indeed, statutory language is an appellate court’s paramount consideration because the best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language they have used. When . . . a statute is plain and unambiguous, th[e] court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.⁸

The plain language of K.S.A. 2019 Supp. 75-5393 states it is the Commission that selects and employs the executive director and sets the duties and responsibilities of the executive director. There is no requirement that the selection be approved by DCF.⁹

K.S.A. 2019 Supp. 75-5310 does authorize the Secretary for Children and Families to appoint commissioners and deputy commissioners as determined necessary by the secretary to effectively carry out the mission of DCF and “director[s] for each of the [DCF’s] management areas.” It is not clear whether the executive director of the Commission is a director of one of DCF’s management areas. If the Commission’s

⁷ *American Trust Administrators, Inc. v. Sebelius*, 273 Kan. 694, 698 (2002).

⁸ *In the Interest of T.S.*, 308 Kan. 306, 309-10 (2018) (internal citations and quotation marks omitted).

⁹ See, e.g., K.S.A. 47-2003 (“With the approval of the [Kansas sheep] council, the administrator may appoint such other personnel as is needed. . . .”); 47-2303 (“With the approval of the [Kansas dairy] commission, the administrator may appoint such other personnel as is needed. . . .”); 74-5,126 (“The executive director of the division of conservation shall be jointly appointed by the secretary of agriculture and the state conservation commission and shall serve at the pleasure of the secretary and the state conservation commission.”); 74-5603 (“The chancellor, upon consultation with and approval of the commission, shall appoint a director of police training.”); 74-9904 (“The advisory commission may appoint, subject to the approval of the governor, an executive director. . . .”).

executive director is a director of one of DCF's management areas, there could be an obligation to construe the provisions of K.S.A. 2019 Supp. 75-5310 and 75-5393 together. However, "[i]t is a cardinal rule of law that statutes complete in themselves, relating to a specific thing, take precedence over general statutes or over other statutes which deal only incidentally with the same question, or which might be construed to relate to it."¹⁰ K.S.A. 2019 Supp. 75-5310 deals generally with employment of directors by DCF. K.S.A. 2019 Supp. 75-5393 deals specifically with employment of the executive director of the Commission. K.S.A. 2019 Supp. 75-5393, as the specific statute, takes precedence over K.S.A. 2019 Supp. 75-5310.

Qualified Interpreters

We next address whether the Commission is responsible for registering persons who are qualified interpreters. Again, we rely on the plain language of the statutes.

In establishing the position of executive director of the Commission, K.S.A. 2019 Supp. 5393 states:

(b) The executive director, with the advice and consent of the commission shall:

. . . .

(6) maintain a listing of persons qualified in various types of interpreting and aural rehabilitation for the deaf and make this information available to local, state, federal and private organizations and to individuals; [and]

. . . .

(11) provide for a program of regulation and certification of interpreters. . . .

In addition, a person appointed under K.S.A. 75-4355a through 75-4355d to serve as an interpreter "shall be certified by or registered with the Kansas commission for the deaf and hard of hearing or an agency designated by the commission."¹¹ "No person shall serve as an interpreter pursuant to K.S.A. 75-4355a through 75-4355d, unless the commission makes the determination that the person is qualified to interpret."¹² The Commission "may fix, charge and collect reasonable fees for providing . . . interpreter certification."¹³ Lastly, of the members of the Commission

¹⁰ *Cochran v. Kansas State Dept. of Agriculture*, 291 Kan. 898,907 (2011), quoting *Chelsea Plaza Homes, Inc. v. Moore*, 226 Kan. 430, 432 (1979).

¹¹ K.S.A. 75-4355b(a).

¹² K.S.A. 75-4355b(d).

¹³ K.S.A. 2019 Supp. 75-5397a(a).

who are appointed by the governor, “one member [shall be] from the state registry of interpreters for the deaf.”¹⁴

Applying the plain language of the statutes, it is clear that the Commission is required to maintain some form of list or registry of persons the Commission has determined are qualified interpreters. The manner and method for meeting this obligation is left to the Commission.¹⁵

While the Commission is obligated to establish and maintain a list of interpreters, the Commission does not necessarily possess authority regarding the actual appointment or employment of interpreters. Two sets of statutes address appointment of interpreters: K.S.A. 75-4351 to 75-4355, which were enacted in 1972; and K.S.A. 75-4355a to 75-4355d, which were enacted in 1993. The former set of statutes will be referred to as the 1972 Act and the latter set will be referred to as the 1993 Act. The 1993 Act was first enacted in a bill that included amendments to the 1972 Act.¹⁶ While there are differences between the Acts regarding appointment of interpreters, there are provisions that are duplicative.

The 1993 Act requires the appointment of an interpreter “for any person who is deaf, hard of hearing or speech impaired in any grand jury, court or jury proceeding whether such person is a plaintiff, defendant, juror or witness in such action.”¹⁷ A person appointed as interpreter under the 1993 Act “shall be certified by or registered with the Kansas commission for the deaf and hard of hearing or an agency designated by the commission.”¹⁸ “No person shall serve as an interpreter pursuant to K.S.A. 75-4355a through 75-4355d, unless the *commission makes the determination* that the person is qualified to interpret.”¹⁹ Construing these provisions together, it is clear that, under the 1993 Act, the Commission is charged with determining whether an interpreter is qualified to be appointed to serve in that role.

However, the actual appointment of the interpreter and determination of fees fall to the body conducting the proceeding. “The chairperson of the governmental committee or commission, or the head of the agency or other entity, or the court is responsible for assuring the procurement of the interpreter.”²⁰ The Commission is

¹⁴ K.S.A. 75-5392(a)(2).

¹⁵ See K.S.A. 2019 Supp. 75-5393(b)(11) (executive director shall provide for a program of regulation and certification of interpreters); 75-5395 (“The . . . commission . . . may make arrangements with other state agencies, and may contract with other individuals, organizations, corporations, associations[,] other legal entities, including private agencies, or any department or agency of the federal government, state or any political subdivision of the state, to carry out the purposes of the commission.”). We note the Commission does not have rule and regulation authority pursuant to statute at this time. We recommend the Commission seek statutory authority from the Legislature.

¹⁶ See L. 1993, ch. 223, §§ 1-8.

¹⁷ K.S.A. 75-4355a.

¹⁸ K.S.A. 75-4355b(a).

¹⁹ K.S.A. 75-4355b(d) (emphasis added).

²⁰ K.S.A. 75-4355b(a).

authorized only to “recommend reasonable fees for the services of the interpreter”²¹ who is appointed under the 1993 Act.

The 1972 Act includes two additional circumstances in which an interpreter must be appointed, but does not explicitly state who determines the qualifications of the appointed person. K.S.A. 75-4351 states in relevant part:

A qualified interpreter shall be appointed in the following cases for persons whose primary language is one other than English, or who is a deaf, hard of hearing or speech impaired person:

. . . .

(d) in any proceeding before a board, commission, agency, or licensing authority of the state or any of its political subdivisions, when such person is the principal party in interest;

(e) prior to any attempt to interrogate or take a statement from a person who is arrested for an alleged violation of a criminal law of the state or any city ordinance.

Under the 1972 Act, the interpreter “shall be appointed by the judge if the appearance is before any court²² or by the chairman or presiding or executive officer of any board, commission or agency by which the proceeding involving the person is being conducted.”²³ Prior to appointing a person to serve as interpreter, the appointing authority is required to make “a preliminary determination that the interpreter is able to readily communicate with the person whose primary language is one other than English and is able to accurately repeat and translate the statement of such person.”²⁴ The person appointed as an interpreter must be qualified, as defined by the criteria listed in K.S.A. 75-4353(c)(1) through (4).²⁵ Unlike the 1993 Act, there is no explicit requirement in the 1972 Act that the person be certified by or registered with the Commission.

²¹ K.S.A. 75-4355b(b).

²² The appointment of an interpreter for court proceedings is also subject to the requirements of the 1993 Act.

²³ K.S.A. 75-4352 (emphasis added).

²⁴ K.S.A. 75-4353(b).

²⁵ The criteria include: (1) A general understanding of cultural concepts, usage and expressions of the foreign language being interpreted, including the foreign language's varieties, dialects and accents; (2) the ability to interpret and translate in a manner which reflects the educational level and understanding of the person whose primary language is other than English; (3) basic knowledge of legal rights of persons involved in law enforcement investigations, administrative matters and court proceedings and procedures, as the case may be; and (4) sound skills in written and oral communication between English and the foreign language being translated, including the qualified interpreter's ability to translate complex questions, answers and concepts in a timely, coherent and accurate manner.

The 1972 Act further provides that “[t]he court or agency conducting the proceeding shall determine and fix a reasonable fee for the services of the interpreter and may provide for the payment of such costs out of funds appropriated for the operation of the courts and agencies.”²⁶ The court or agency determines whether the person is qualified and fixes the fee to be paid.

It makes sense for any court or agency to consult with the Commission to determine whether a person is qualified to act as a sign language interpreter. However, it is only when those services will be provided for any person who is deaf, hard of hearing or speech impaired in any grand jury, court or jury proceeding, whether such person is a plaintiff, defendant, juror or witness in such action, that the statute makes explicit that it is the Commission that determines whether the interpreter is qualified. The Commission may recommend the amount of fees to be paid for the sign language interpreter services, but it is left to the court or agency to actually fix the fees.

Gifts, Grants and User Fees

You ask whether the Commission is responsible for determining how monies received through gifts, grants and user fees are expended.

“The [] commission . . . is authorized to receive moneys from any source, including federal funds, gifts, grants and bequests which shall be expended for the purposes designated in [K.S.A. 75-5391 *et seq.*].”²⁷ In addition, the Commission may collect fees for providing interpreter services,²⁸ interpreter certification and sign language instruction,²⁹ such fees to be remitted by the Secretary for DCF to the State Treasurer for deposit in the Kansas Department for Children and Families Enterprise Fund.³⁰

Although the Commission receives moneys from outside sources and collects fees, it is not authorized to make expenditures without statutory authorization. All budgeting, purchasing and related management functions of the Commission “shall be administered under the direction and supervision of the secretary for children and families,” unless there is a specific exception in K.S.A. 75-5391 *et seq.*³¹ Placement of budgeting, purchasing and related management functions under the

²⁶ K.S.A. 75-4352(a). See also K.S.A. 75-4352(b) (“Fees for interpreters paid by the state board of indigents' defense services shall be in accordance with standards adopted by such board.”).

²⁷ K.S.A. 75-5396.

²⁸ K.S.A. 2019 Supp. 75-5393(b)(9); 75-5397a(a).

²⁹ K.S.A. 2019 Supp. 75-5397a(a).

³⁰ K.S.A. 2019 Supp. 75-5397a. “Enterprise funds are funds established to account for the financing of self-supporting activities of governmental units which ‘render services on a user charge basis to the general public.’” Attorney General Opinion No. 81-52, quoting *Governmental Accounting, Auditing, and Financial Report* (Eleventh Printing, 1968).

³¹ K.S.A. 2019 Supp. 75-5391(b).

direction and supervision of another entity is not a unique setup.³² In addition, “[n]o money shall be drawn from the treasury except in pursuance of a specific appropriation made by law.”³³

We find no exceptions within K.S.A. 75-5391 *et seq.* that would allow the Commission to bypass the State’s normal budget process. Any expenditure of funds is therefore subject to budgeting directed and supervised by the Secretary for Children and Families and appropriation made by law.

Annual Report

The last inquiry regards whether the Commission is responsible for submitting an annual report to the Governor and, if so, whether DCF may withhold the report.

K.S.A. 2019 Supp. 75-5391 provides, in part, that:

The commission shall . . . (9) serve as an advisory board to the governor on the needs of the deaf and hard of hearing by preparing an annual report which reviews the status of all state services to the deaf and hard of hearing within Kansas, and to recommend priorities to the governor for the development and coordination of services to the deaf and hard of hearing. . . .

The executive director of the Commission is obligated “to assist the commission in the preparation of its report to the governor.”³⁴

The plain language of the statutory provisions is clear that the Commission is obligated to prepare an annual report. The statutes do not address the form of the report or the manner for submitting it to the Governor. While the Commission is established within DCF, submission of the report does not appear to fall within the budgeting, purchasing and related management functions of the Commission that are administered under the direction and supervision of DCF. Thus, DCF has no authority to determine the report is to be withheld from the governor, although the governor has authority to direct that the report be submitted to and held by DCF on

³² See K.S.A. 8-2412 (dealer review board by secretary of revenue); K.S.A. 2019 Supp. 22a-243 (child death review board by attorney general); K.S.A. 65-3506 (board of adult care home administrators by secretary for aging and disability services); K.S.A. 74-6614 (natural and scientific areas advisory board by state biological survey); K.S.A. 74-6701 (commission on disability concerns by office of the governor); K.S.A. 75-2237a (capitol area plaza authority by secretary of administration); K.S.A. 75-2929b (civil service board by secretary of administration); K.S.A. 75-3780 (state building labor advisory commission by secretary of administration); K.S.A. 2019 Supp. 75-5712 (agricultural labor relations board by secretary of labor); K.S.A. 2019 Supp. 75-5713 (public employees relations board by secretary of labor); K.S.A. 75-6503 (employees health care commission and technical administrator by secretary of administration); K.S.A. 2019 Supp. 75-7427 (inspector general by attorney general).

³³ Kan. Const., Art 2, § 24.

³⁴ K.S.A. 2019 Supp. 75-5393(b)(5).

the governor's behalf. The Commission will need to coordinate with the Governor to determine the manner in which it is to submit its report.

Review

In review, the Commission selects and employs the executive director and sets the duties and responsibilities of the executive director. The Commission is required to maintain some form of list or registry of persons it has determined are qualified interpreters and is required to provide a program for the regulation and certification of interpreters. The authority to appoint a person to serve as an interpreter and determine the compensation for such person is determined by the specific act under which the person is appointed. Any expenditure of funds by the Commission is subject to budgeting directed and supervised by the Secretary for Children and Families and appropriation made by law. The Commission will need to coordinate with the Governor to determine the manner in which it is to submit its annual report reviewing the status of state services to the deaf and hard of hearing and recommending priorities to the Governor.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Richard D. Smith

Richard D. Smith
Assistant Attorney General

DS:AA:RDS:sb