

MINUTES

House Select Investigative Committee

March 23, 2010
Room 159-S, State Capitol

Members Present

Representative Clark Shultz, Chair
Representative Carl Holmes, Vice-Chair
Representative Nile Dillmore, Ranking Minority
Representative Bob Grant
Representative Jeff King
Representative Jerry Henry

Members Absent

None

Staff

Raney Gilliland, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Norm Furse, Revisor of Statutes Emeritus
Jason Long, Revisor of Statutes' Office
Gary Deeter, Committee Secretary

Conferees

Representative Mike O'Neal, Speaker, Kansas House of Representatives

Others Attending

See attached sheet

The Chairman called the meeting to order at 1:32 p.m. and welcomed Representative Mike O'Neal, Speaker of the Kansas House of Representatives.

In his introductory remarks, Speaker O'Neal requested that the Committee dismiss the Complaint, saying that, of the six members who signed the Complaint, only one appeared to testify, a failure which suggests an inadequate substantiation for the Complaint. Further, he stated that the Complaint failed to state a cause of action specific enough to show any basis for misconduct, a further reason to dismiss the Complaint. In addition, Speaker O'Neal observed that, although the Minority Leader labeled the Speaker's actions as "the appearance of impropriety," he acknowledged that the Speaker had violated no statute, no House rule, no ethics canon, and no

professional code of conduct, all of which should give the Committee reason to dismiss the Complaint.

Speaker O’Neal then traced the events that led to the filing of a lawsuit in Shawnee County on January 21, 2010, a lawsuit which contested the right of the State of Kansas to “sweep” fee funds from private entities and private citizens, an act which requires agencies to assess its members a second time to replenish the funds, an assessment which creates a double taxation. He stated that he has complied with all statutory and regulatory requirements. He noted that **K.S.A. 46-233** contains a provision for legislators who seek to challenge a provision in the State Constitution: the legislator must have voted “No” on the relevant issue, and the legislator must file a formal protest regarding the issue, both of which he has done, adding further that the statute not only is not prohibitive, but contemplates such a challenge. He summarized his remarks by saying that, both as an attorney and as a legislator, he has been careful to follow all the statutory and professional rules in filing the lawsuit.

Speaker O’Neal referenced a set of documents (Attachment 1). He observed that the legislature frequently transfers funds from one agency to another—from the Highway Fund to the State General Fund (SGF) or to counties through demand transfers—most of which leave no constitutional shadow. However, when the legislature takes funds provided by fees assessed on private citizens, requiring an agency to re-assess these same citizens, the action appears to violate the state constitution; the lawsuit attempts to ascertain whether or not such actions pass constitutional muster. Speaker O’Neal noted a 1958 Kansas Supreme Court case (*Panhandle Eastern Pipe Line Company v. Fadely*, 183 K. 803 [1958]) that struck down fee sweeps, an action which led to the state charging a 20% administrative fee paid into the SGF; he said the lawsuit does not reference the administrative fee. He acknowledged that he often voted for these kinds of sweeps. However, when a 2002 Kansas Attorney General’s opinion upheld the court’s 1958 decision, an attempt in 2003 by the legislature to sweep funds was countered by the O’Neal amendment to make the sweeps into loans to be repaid. Therefore, when the Governor’s 2009 budget not only recommended sweeps, but halted repayments, Representative O’Neal voted against the sweeps because they created inequities for private citizens. He explained that at first he tried to correct the fee sweeps through the Kansas Department of Insurance, but finally decided, upon the urging of long-time clients, to seek a declaratory judgment to test the constitutionality of the practice.

Speaker O’Neal explained that, before he filed the lawsuit, he checked with his clients and with various authorities to be assured that he was complying with relevant rules. Noting the Complaint’s use of media editorials, he commented that the Complaint ignored an article in the Lawrence *Journal-World* from legal-ethics law professor Michael Hoeflich (University of Kansas School of Law) that finds the Complaint to be groundless and sets a dangerous precedent for other legislator-lawyers. Speaker

O'Neal also referenced a letter from the lead plaintiff in the lawsuit (Janet Stubbs, Administrator, Kansas Building Industry Workers' Compensation Fund) to the Topeka *Capital-Journal*, a letter which declares that private attorney O'Neal made no solicitation for clients, is not representing lobbyists, and is being compensated only for actual time at less than his standard rate. The letter notes that the 17 plaintiffs are not seeking additional money from the taxpayers, only the return of their own money which was allegedly illegally taken.

Speaker O'Neal, commenting on the Complaint's implication that the Barton County letter represents an indirect attempt by the Speaker to solicit clients on a contingency fee basis, replied that the letter from Richard Boeckman invited any counties who chose to join the proposed lawsuit to pay a percentage of the attorney's hourly rate based on the apportionment each county had in the fund. Speaker O'Neal said the counties chose to pursue a claims process first rather than join the lawsuit; in so doing, the counties could protect their administrative remedies.

Commenting from prepared remarks, Speaker O'Neal stated that the Complaint is not only meritless, but represents a concerted and vindictive campaign against him, invective using malicious and hostile words that abuse the legislative process and border on defamation of character. He said that the behavior of the complainants has been unprofessional, untruthful, uncivil, and unbecoming members of the House of Representatives. Noting that filing complaints in order to distract the work of the House in order to achieve a political advantage sets a dangerous precedent, and he asked that the Committee dismiss the Complaint.

Answering members' questions, Speaker O'Neal replied that:

- Misconduct is not subjective; but if remedies exist outside, there is no need for additional House rules to address the issue.
- Misconduct must be actionable in some fashion; there must be a line clear enough that notice can be given regarding specific actions.
- As Professor Hoeflich indicated, current ethical rules have not been violated. The complainants are entitled to their own opinions, but do not have a right to their own facts.
- The lawsuit is asking the court to recognize the 17 plaintiffs as sufficient to be certified as a class-action lawsuit. The intent of the lawsuit is to reclaim only the \$5 million that was swept from those specific fee funds.
- There was a meeting with the Kansas Department of Insurance legal counsel, but not with Commissioner Praeger. Speaker O'Neal said he recommended that his clients pay the fees under protest.
- The statutorily required protest was filed in order for attorney O'Neal to qualify to represent the clients.
- Janet Stubbs initiated contact regarding the lawsuit, with continuing

conversations from May through December 2009, during which time other administrators of fee funds expressed interest in the lawsuit.

- The lawsuit does not object to all fee sweeps, only to those fee funds originating directly from private assessments.
- One of the decisions of the court will be to determine what fees can and cannot be swept.
- As indicated by the 2002 Attorney General's opinion, the issue is not a statutory question, but whether or not the issue falls under the Kansas Constitution's prohibition against double taxation. A statutory remedy for the problem would not prohibit future sweeps.
- Clear statutes prohibit a lawsuit against the Kansas legislature; however, lawsuits against the state are allowed.
- The focus of the lawsuit addresses a narrow aspect of the constitution; the Schools for Fair Funding (Montoy lawsuit), if it addressed the narrow constitutional aspect, would be similar. Within certain parameters, there is no statutory prohibition for a legislator to be lead attorney in such a case.
- Regarding moral or ethical standards, there is no distinction between being in legislative leadership and being a legislator.
- Perhaps it would be wise to clarify what constitutes misconduct, since formal complaints can be a distraction or used as harassment.
- The 2002 Attorney General's opinion (#45) was comprehensive, thorough, and well reasoned, but it stopped short of declaring sweeps unconstitutional.
- Since the lawsuit would raise questions when being brought by a lawyer-legislator, Speaker O'Neal said he made sure from the outset that there were no ethical, statutory, or professional barriers prohibiting his filing the lawsuit.

A member noted a request for certain documents from the Speaker and asked that the same documents be provided by the Minority Leader.

The meeting was adjourned at 3:44 p.m. The next meeting is scheduled for Monday, March 29, 2010.

Prepared by Gary Deeter

Approved by the Committee on:

March 30, 2010