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October 5, 2018

ATTORNEY GENERAL OPINION NO. 2018- 14

The Honorable Bradley C. Ralph
State Representative, 119th District
State Capitol, Room 512-N
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: Procedure, Civil—Asset Seizure and Forfeiture—Disposition of Forfeited
Property; Use of Proceeds of Sale; Salary

Synopsis: Asset forfeiture funds credited to a special prosecutor's trust fund pursuant to K.S.A. 2017 Supp. 60-4117(c)(3)(A) may be used to pay for salaries only if the county or district attorney or other governmental agency's attorney determines the expenditure is for an appropriate and additional law enforcement and prosecutorial purpose, and the expenditure is supplemental to, but does not supplant, normal operating expenses. However, if such salary subsequently becomes a "normal operating expenditure," then such salary shall not be paid from the special prosecutor's trust fund. Cited herein: K.S.A. 60-4102; K.S.A. 2017 Supp. 60-4107; 60-4117; K.S.A. 1993 Supp. 65-4173.

* * *

Dear Representative Ralph:

As State Representative for the 119th District, you ask for an opinion regarding whether moneys contained in the special prosecutor's trust fund, pursuant to the Kansas Standard Asset Seizure and Forfeiture Act (Act)¹ may be used to pay for salaries. If so, you ask whether there are any limitations on the payment of such salaries. For the reasons described below, we believe the answer to your first question is yes, but only if the county or district attorney or other

¹ K.S.A. 60-4101 *et seq.*

governmental agency's attorney determines the expenditure is for an appropriate and additional law enforcement and prosecutorial purpose, and the expenditure is supplemental to, but does not supplant, normal operating expenses. The answer to your second question regarding limitation on the payment of such salaries is, if such salary subsequently becomes a "normal operating expenditure," then such salary shall not be paid from the special prosecutor's trust fund.

Disposition of forfeited property and the use of proceeds of the sale is authorized and controlled by K.S.A. 2017 Supp. 60-4117. K.S.A. 2017 Supp. 60-4117 allows the law enforcement agency to (1) retain for official use, (2) destroy or use for investigative or training purposes, (3) sell if not required by law to be destroyed and not harmful to the public, or (4) salvage property forfeited under the act.²

Subsection (c) of K.S.A. 2017 Supp. 60-4117 controls the distribution of the proceeds of any *sale* of property forfeited pursuant to the Act. The distribution, in order of priority, is as follows: (1) satisfaction of any court preserved security interest or lien,³ (2) payment of all proper expenses of the forfeiture and disposition of the forfeited property,⁴ (3) reasonable attorney fees,⁵ and (4) repayment of law enforcement funds expended in purchasing of contraband or controlled substances, subject to any interagency agreement.⁶

Because your question asks specifically about the special prosecutor's trust fund and whether it can be used to pay for salaries, we believe your question is limited to interpreting K.S.A. 2017 Supp. 60-4117(c)(3)(A).⁷ This provision states:

The proceeds of any sale shall be distributed in the following order of priority:

...

(3) reasonable attorney fees:

(A) If the plaintiff's attorney is a county or district attorney, an assistant, or another governmental agency's attorney,⁸ fees shall not exceed 15% of the total

² K.S.A. 2017 Supp.60-4117(a). We note that sale of forfeited firearms is not authorized. K.S.A. 2017 Supp.60-4117(b).

³ K.S.A. 2017 Supp.60-4117(c)(1).

⁴ K.S.A. 2017 Supp.60-4117(c)(2).

⁵ K.S.A. 2017 Supp.60-4117(c)(3).

⁶ K.S.A. 2017 Supp.60-4117(c)(4). Any proceeds remaining after the distribution under subsection (c) is fulfilled are distributed under subsection (d) of K.S.A. 2017 Supp. 60-4117. Moneys distributed under subsection (d) are not credited to the special prosecutor's trust fund.

⁷ We exclude K.S.A. 2017 Supp. 60-4117(c)(3)(B) and (C) from our analysis because those moneys are not credited into the special prosecutor's trust fund as specified in your question. K.S.A. 2017 Supp. 60-4117(c)(3)(B) provides for credit of moneys to the medicaid fraud prosecution revolving fund when the "plaintiff's attorney" is the Attorney General. As negotiated by the employing law enforcement agency, K.S.A. 2017 Supp. 60-4117(c)(3)(C) authorizes the payment to a private attorney who is hired by the seizing law enforcement agency to be the "plaintiff's attorney".

⁸ "Plaintiff's attorney" means a county or district attorney, or the attorney general, such attorney's assistant, or another attorney approved, pursuant to subsections (h) and (i) of K.S.A. 60-4107, employed by a law enforcement

proceeds, less the amounts of subsection (c)(1) and (2), in an uncontested forfeiture nor 20% of the total proceeds, less the amounts of subsection (c)(1) and (2), in a contested forfeiture. Such fees shall be deposited in the county or city treasury and credited to the special prosecutor's trust fund. Moneys in such fund shall not be considered a source of revenue to meet normal operating expenditures, including salary enhancement. Such fund shall be expended by the county or district attorney, or other governmental agency's attorney through the normal county or city appropriation system and shall be used for such additional law enforcement and prosecutorial purposes as the county or district attorney or other governmental agency's attorney deems appropriate, including educational purposes. All moneys derived from past or pending forfeitures shall be expended pursuant to this act. The board of county commissioners shall provide adequate funding to the county or district attorney's office to enable such office to enforce this act. Neither future forfeitures nor the proceeds therefrom shall be used in planning or adopting a county or district agency's budget.

K.S.A. 2017 Supp. 60-4117(c)(3)(A) authorizes a county or district attorney, an assistant county or district attorney, or another governmental agency's attorney to collect an amount certain as calculated by the statutory formula, and that amount is to be deposited into the city or county treasury and credited to the special prosecutor's trust fund. The remaining five sentences in this provision are dedicated solely to setting the standard that must be met in order for the county or district attorney to expend moneys credited to the fund. In other words, these five sentences will control whether the special prosecutor's trust fund may be used to pay for salaries.

We have found no cases deciding the questions you pose. Therefore, to interpret whether payment of salaries is an appropriate use of forfeiture proceeds pursuant to K.S.A. 2017 Supp. 60-4117(c)(3)(A), we rely upon the court's guidance for statutory interpretation:

An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislature's intent.⁹

agency to litigate a forfeiture on behalf of the agency." K.S.A. 60-4102. K.S.A. 2017 Supp. 60-4107(h) and (i) provide that "another governmental agency's attorney" includes a state law enforcement agency's attorney or an attorney engaged, with the approval of the county or district attorney, to represent the seizing law enforcement agency in the forfeiture proceeding. We assume for the purposes of this opinion, that "another governmental agency's attorney" may also include the county counselor if the county has this position, or the city attorney.

⁹ *State v. Barlow*, 303 Kan. 804, 813 (2016) (internal citations omitted).

The first sentence states, “[m]oneys in such fund shall not be considered a source of revenue to meet normal operating expenditures, including salary enhancement.”¹⁰ “Normal operating expenditures” is not defined in the Act, nor is the phrase defined in the Merriam-Webster dictionary. “Normal” means “a: according with, constituting, or not deviating from a norm, rule, or principle; b: conforming to a type, standard, or regular pattern.”¹¹ “Operating” means “of, relating to, or used for or in operations.”¹² “Expenditure” means “something expended: disbursement, expense.”¹³ We conclude that the common and ordinary meaning of a “normal operating expenditure” pursuant to K.S.A. 2017 Supp. 60-4117(c)(3)(A) is a standard or regular expense related to the operation of the city, county or district attorney’s office.

The statute does not provide a definition of “salary enhancement,” but the term is specifically included by the Legislature as a normal operating expenditure which the special prosecutor’s trust fund cannot be used to pay. Salary enhancement is not defined *per se*. The common definition of salary is a “fixed compensation paid regularly for services.”¹⁴ The term enhancement means “heighten, increase; *especially*: to increase or improve in value, quality, desirability, or attractiveness; *obsolete*: raise.”¹⁵ We conclude that salary enhancement refers to moneys paid to increase or improve a salary, regardless whether the salary is paid as a normal operating expenditure or not.

We note that salaries are not included specifically in the statute as a *per se* normal operating expense like salary enhancement is. Thus, depending on the facts, a salary may meet the standard for use of moneys from the special prosecutor’s trust fund.

The second sentence states, “[s]uch fund shall be expended by the county or district attorney, or other governmental agency’s attorney through the normal county or city appropriation system and shall be used for such additional law enforcement and prosecutorial purposes as the county or district attorney or other governmental agency’s attorney deems appropriate, including educational purposes.” “Additional law enforcement and prosecutorial purposes” is not defined by statute. “Additional” means “more than the usual or expected: added.”¹⁶ “Law enforcement” means “: the department of people who enforce laws, investigate crimes, and make arrests: the police.”¹⁷ “Prosecutorial” means “of, relating to, or being a prosecutor or prosecution.”¹⁸ “Purposes” means “1. a: something set up as an object or end to be attained: intentions, b: resolution, determination, 2: a subject under discussion or an action in course of execution.”¹⁹ We conclude that “additional law enforcement and prosecutorial purposes” pursuant to K.S.A. 2017 Supp. 60-4117(c)(3)(A) is an unusual or unexpected expense, not covered under normal operating expenditures, which must serve a law enforcement and

¹⁰ K.S.A. 2017 Supp. 60-4117(c)(3)(A).

¹¹ <https://www.merriam-webster.com/dictionary/normal>.

¹² <https://www.merriam-webster.com/dictionary/operating>.

¹³ <https://www.merriam-webster.com/dictionary/expenditure>.

¹⁴ <https://www.merriam-webster.com/dictionary/salary>.

¹⁵ <https://www.merriam-webster.com/dictionary/enhancement>.

¹⁶ <https://www.merriam-webster.com/dictionary/additional>.

¹⁷ <https://www.merriam-webster.com/dictionary/law%20enforcement>.

¹⁸ <https://www.merriam-webster.com/dictionary/prosecutorial>.

¹⁹ <https://www.merriam-webster.com/dictionary/purpose>.

prosecutorial objective as deemed appropriate by the county or district attorney or other governmental agency's attorney.

The third sentence states, “[a]ll moneys derived from past or pending forfeitures shall be expended pursuant to this act.” This is intended to make clear that the standard to be used to expend funds for forfeitures that were pending at the time of the passage of K.S.A. 60-4117 in 1994, or for forfeiture funds already deposited into the special prosecutor’s trust fund, is the standard found in K.S.A. 60-4117(c)(3)(A) and not the repealed statute, K.S.A. 65-4173.²⁰

The fourth sentence states, “[t]he board of county commissioners shall provide adequate funding to the county or district attorney’s office to enable such office to enforce this act.” The fifth sentence states, “[n]either future forfeitures nor the proceeds therefrom shall be used in planning or adopting a county or district attorney’s budget.” The intent of the Legislature is unmistakable in the plain language that is used in these last two sentences: that is, moneys in the special prosecutor trust fund cannot be used to reduce or supplant appropriations that would normally exist in the city, county, or district attorney’s budget.²¹

Read together, the provisions of K.S.A. 2017 Supp. 60-4117(c)(3)(A) will allow the expenditure of forfeiture funds held in a special prosecutor’s trust fund on salaries only if such salary is not a standard or regular expense related to operation of the city, county or district attorney’s office, is not being used to reduce or supplant appropriations that would normally exist in the city, county, or district attorney’s budget, and serves an additional law enforcement and prosecutorial objective, as deemed appropriate by the county or district attorney or other governmental agency’s attorney. However, if the salary becomes a normal operating expenditure, then such salary shall not be paid from the special prosecutor’s trust fund.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Athena E. Andaya

Athena E. Andaya
Deputy Attorney General

DS:AA:sb

²⁰ Repealed by L. 1994, Ch.339, §28.

²¹ See *generally*, Kansas Attorney General Opinion No. 07-15 and 13-10.