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January 24, 2019

ATTORNEY GENERAL OPINION NO. 2019- 3

The Hon. Vicki Schmidt, Commissioner of Insurance
Kansas Insurance Department
420 SW 9th Street
Topeka, Kansas 66612-1678

Re: State Departments; Public Officers and Employees—Public Officers and Employees—Miscellaneous Provisions; Appointment of Acting State Officers to Certain Positions; Authority: Securities Commissioner

Synopsis: The Commissioner of Insurance may appoint an acting securities commissioner to exercise all of the powers, duties and functions of the office for not longer than six months pursuant to K.S.A. 2018 Supp. 75-4315a. Cited herein: K.S.A. 40-102; 46-2601; K.S.A. 2018 Supp. 75-4315a; K.S.A. 75-4315b; 75-4315d; K.S.A. 2018 Supp. 75-6301; L. 2017, Ch. 81, § 11; L. 2008, Ch. 121, §§ 2, 3, 6 through 36.

* * *

Dear Commissioner Schmidt:

As Commissioner of Insurance, you ask for an opinion on two questions related to whether you may appoint an acting securities commissioner pursuant to K.S.A. 2018 Supp. 75-4315a. First, you ask “whether an acting securities commissioner can be appointed under the authority of K.S.A. 75-4315a, to serve for a period not [to] exceed six months.” Second, you ask whether “an acting securities commissioner appointed under K.S.A. 75-4315a has the authority to exercise all the powers, duties, and functions of the office of securities commissioner. . . .” For the reasons that follow, we believe the answer to both questions is yes.

K.S.A. 2018 Supp. 75-4315a, provides authority for the appointment of acting state officers to certain positions. The section establishes two alternative circumstances in

which this authority applies. First, it applies to certain appointments by the governor. Second, and pertinent to your questions, it provides that:

Whenever it is provided by law that . . . the secretary of any department of state government shall appoint the director of a division, . . . the . . . departmental secretary may appoint an acting . . . chief administrative or executive officer or director to serve for a period not greater than six months. Any acting state officer appointed under authority of this section shall have and exercise all of the powers, duties and functions of the office in which he or she is acting.¹

Prior to 2017, the Office of the Securities Commissioner was a freestanding state agency under the jurisdiction of the governor, and the governor had authority to appoint the securities commissioner. In 2017, the Legislature relocated the Office of the Securities Commissioner to be a division under the jurisdiction of the Commissioner of Insurance.² The Insurance Department is a “department of state government.”³ The statute further provides that the division is “administered” by the securities commissioner;⁴ thus, the securities commissioner is the functional “director” of that division and, in any event, is the “chief administrative or executive officer or director” of that division, within the meaning of K.S.A. 2018 Supp. 75-4315a. We conclude that the Commissioner of Insurance appoints the securities commissioner to be the chief administrative or executive officer or director of a division within the meaning of K.S.A. 2018 Supp. 75-4315a.

Thus, it is apparent that all of the requirements for triggering the authority of K.S.A. 2018 Supp. 75-4315a are present except possibly one: is the *Commissioner* of Insurance a “*secretary* of any department of state government” within the meaning of that statute? If so, then the Commissioner of Insurance may appoint an acting securities commissioner under the authority of K.S.A. 2018 Supp. 75-4315a; but if not, then the statute is inapplicable and no acting securities commissioner may be appointed under this authority.

To resolve that question, we first look to the most fundamental rule of statutory interpretation that a court would use to ascertain legislative intent.⁵

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 does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's

¹ K.S.A. 2018 Supp. 75-4315a.

² See L. 2017, Ch. 81, § 11; codified at K.S.A. 2018 Supp. 75-6301(a).

³ See K.S.A. 40-102.

⁴ K.S.A. 2018 Supp. 75-6301(a).

⁵ *State v. Davey*, 306 Kan. 814, 820 (2017).

language or text is unclear or ambiguous does the court use canons of construction or legislative history or other background considerations to construe the legislature's intent.⁶

The term “secretary” as used in K.S.A. 2018 Supp. 75-4315a is not defined. “Secretary” generally means “an officer of state who superintends a government administrative department.”⁷ By comparison, “commissioner” means “the officer in charge of a department or bureau of the public service.”⁸ In our opinion, the two definitions are functionally the same; therefore, for the purpose of answering your specific questions, we conclude the terms may be reasonably construed as interchangeable as applied here.

There is no language in either K.S.A. 2018 Supp. 75-4315a or K.S.A. 2018 Supp. 75-6301 that would require a different conclusion. We point out that K.S.A. 2018 Supp. 75-4315a provides no limitation from which a restrictive meaning could be inferred that only a secretary of any department of state government *under the jurisdiction of the governor* may appoint an acting chief administrative or executive officer or director. To the contrary, the statute, in the second of the two alternative circumstances in which K.S.A. 2018 Supp. 75-4315a may apply, provides that the secretary of “any” department of state government may appoint an acting director, chief administrative, or executive officer of the division. If it were the legislative intent to limit K.S.A. 2018 Supp. 75-4315a to departments of state government under the jurisdiction of the governor, then the legislature could easily have restricted the phrase “any department of state government” to mean only those departments *under jurisdiction of the governor*. But the legislature did not do so; rather, it used language that extends the authority of K.S.A. 2018 Supp. 75-4315a to *any department* of state government, and, as noted above, expressly provided that the Insurance Department is a “department” within state government.⁹ Thus, the Legislature must have intended the acting-appointments authority to apply to a department of state government outside the jurisdiction of the governor.

Finally, we point out that to conclude otherwise would produce an absurd result, and Kansas courts generally construe statutes, even if they are otherwise clear, to avoid absurd results.¹⁰ K.S.A. 2018 Supp. 75-6301 ensures that the public office of securities commissioner will be vacant every four years, concurrently with the public office of the insurance commissioner. As in the case at bar, the public office of securities commissioner logistically cannot be immediately filled because of the timing of the end of the term with the start of a new Insurance Commissioner’s term, plus the delays inherent

⁶ *State v. Keel*, 302 Kan. 560, Syl. ¶ 6 (2015).

⁷ <https://www.merriam-webster.com/dictionary/secretary>, accessed January 18, 2019.

⁸ <https://www.merriam-webster.com/dictionary/commissioner>, accessed January 18, 2019. As noted above, the 2017 statutory change also provides that the division of the Office of the Securities Commissioner is “administered” by the securities commissioner.

⁹ See K.S.A. 40-102.

¹⁰ *N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 918 (2013).

in the Senate confirmation process,¹¹ regardless of whether it is conducted by the confirmation oversight committee¹² or otherwise by the Senate.¹³

We find no indication in the legislative record that the legislature intended to create a recurring circumstance every four years in which the office of securities commissioner is vacant and no person can exercise the powers, duties and functions of the office of securities commissioner. To the contrary, the Kansas Supreme Court has explained that the legislative intent and purpose for the Kansas Securities Act, which is administered by the office of securities commissioner, is to “place the traffic of promoting and dealing in speculative securities under rigid governmental regulation and control to protect investors and to prevent, to the extent possible, the sale of fraudulent or worthless speculative securities” and must be liberally construed for that purpose.¹⁴ We fail to see how prohibiting any person from exercising the powers, duties and functions of the securities commissioner for an undetermined period of time every four years would serve that purpose, nor can we discern any reasonable explanation for why the legislature would have done so. In short, to construe the statutes to prevent application of K.S.A. 2018 Supp. 75-4315a to the appointment of the securities commissioner would produce the absurd result of leaving no person immediately able to exercise the powers, duties and functions of the securities commissioner once every four years, and we think that absurd result was not intended by the legislature.

Regarding your second question, K.S.A. 2018 Supp. 75-4315a provides that an acting state officer “shall have and exercise all of the powers, duties and functions of the office in which he or she is acting.” Thus, because we have concluded K.S.A. 2018 Supp. 75-4315a authorizes the Commissioner of Insurance to appoint an acting securities commissioner, it follows that the acting securities commissioner appointed by the Commissioner of Insurance has and may exercise all of the powers, duties, and functions of the office of the securities commissioner. Even though K.S.A. 2018 Supp. 75-6301(a) provides that “no person appointed as securities commissioner shall exercise any power, duty or function as securities commissioner until confirmed by the senate” when the statutes are read *in para materia*,¹⁵ it is clear the legislature intended to create three (and only three) circumstances in which a person may exercise the powers, duties and functions of certain state offices: (1) upon confirmation by the senate, (2) upon approval by the senate confirmation oversight committee as provided by K.S.A. 46-2601, or (3) by

¹¹ For appointments by an authority other than the governor, K.S.A. 75-4315d requires submission of paperwork including any required nomination form of the confirmation oversight committee, statement of substantial interest, consent to a background investigation and consent to the release of tax certification. K.S.A. 75-4315d(b) and (c). It also requires the chairman of the confirmation oversight committee to request a Kansas Bureau of Investigation background investigation of the nominee and requires the KBI to conduct such an investigation. K.S.A. 75-4315d(d). This process requires considerable time to complete it.

¹² K.S.A. 46-2601.

¹³ K.S.A. 75-4315b.

¹⁴ *State ex rel Mays v. Ridenhour*, 248 Kan. 919, 934 (1991).

¹⁵ This canon of construction provides that statutes dealing with the same subject should be interpreted harmoniously when possible. *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1066 (2017).

appointment as an acting officer as provided by and under authority of K.S.A. 2018 Supp. 75-4315a.¹⁶

For the reasons stated, we conclude that the Commissioner of Insurance may appoint an acting securities commissioner to exercise all of the powers, duties and functions of the office for not longer than six months pursuant to K.S.A. 2018 Supp. 75-4315a.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Athena E. Andaya

Athena E. Andaya
Deputy Attorney General

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¹⁶ The language prohibiting exercise of the powers, duties and functions of certain state offices appears in numerous places in the statutes in conjunction with the authority to appoint certain state officials. For example, Senate Bill No. 21 in 2008 inserted that restriction in connection with the appointment of the credit union administrator, the secretary of wildlife and parks, the adjutant general, military general officers, the executive director of the Kansas Board of Healing Arts, members of the central interstate low-level radioactive waste commission, the secretary of agriculture, the superintendent of the highway patrol, the director of the Kansas water office, the secretary of commerce, the executive director of the Kansas lottery, the executive director of the Kansas racing and gaming commission, the executive director of the state gaming agency, the director of the Kansas bureau of investigation, the state banking commissioner, the state fire marshal, the state librarian, the executive director of the state historical society, the secretary of administration, the secretary of transportation, the secretary of revenue, the director of property valuation, the director of alcoholic beverage control, the secretary of corrections, any acting secretary of corrections, the secretary of social and rehabilitation services, the secretary of health and environment, the secretary of labor, the secretary of aging, the securities commissioner, the state long-term care ombudsman, and the executive director of the health policy authority. L. 2008, Ch. 121, §§ 2, 3, 6 through 35. That same bill also amended K.S.A. 75-4315a to shorten from a year to six months the duration of any acting appointment. L. 2008, Ch. 121, § 36.

Thus, it appears the legislature intended the provisions of K.S.A. 2018 Supp. 75-4315a to work together with each of these other restrictions for the purpose of enacting an overall structure for the handling of nominations and confirmations that prohibits any person from exercising the powers, duties and functions of any of the listed offices unless such person is granted authority to do so either through senate confirmation, action of the confirmation oversight committee, or appointment of an acting official for a period not to exceed six months. Although we think the rules of statutory construction lead to this conclusion, we recommend the legislature consider making this interaction between K.S.A.2018 Supp. 75-4315a and the statutes governing appointment to these various offices explicit through future statutory clarification.