



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

December 20, 1976

ATTORNEY GENERAL OPINION NO. 76- 371

Ms. Shelley D. G. Bloomer
Osborne County Attorney
Osborne County Courthouse
Osborne, Kansas 67473

Re: County Hospitals--Boards of Trustees--Requirement
for Appointment

Synopsis: Requirement to appoint board of hospital trustees
is not mandatory but directory. Board of county
commissioners having entered into agreement with
a corporation pursuant to K.S.A. 19-1846 for the
operation and maintenance of hospital need not ap-
point new board of trustees.

* * *

Dear Ms. Bloomer:

You request the opinion of this office relative to the appoint-
ment of a board of hospital trustees after the hospital has
been leased to a corporation pursuant to the authority vested
in the board of county commissioners under K.S.A. 19-1846.
You advise that Osborne County has established a public hos-
pital under K.S.A. 19-1801 and that the board of trustees was
originally appointed as required by K.S.A. 19-1803. Sometime
later the board of county commissioners along with the board
of trustees entered into a lease and management agreement with
the Great Plains Lutheran Hospital, Inc. for the express pur-
pose of "maintaining, managing and operating" the Osborne
County Memorial Hospital. At the present all five positions
on the board of trustees for the hospital for one reason or
another stand vacant. Specifically you ask whether the board
of county commissioners must now reconstitute the board of
trustees by making the necessary appointments to fill these
board vacancies.

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K.S.A. 19-1803 provides in pertinent part:

"Should a majority of all the votes cast upon the question be in favor of establishing such county hospital, the board of county commissioners *shall proceed within thirty days to appoint five trustees* chosen from the citizens at large with reference to their fitness for such office . . . , who shall constitute a board of trustees for said public hospital" [Emphasis supplied.]

The foregoing clearly manifests a legislative intent to require the appointment of trustees to act in behalf of the county commissioners in carrying out the mandate of the election held per K.S.A. 19-1801, *et seq.* It is equally apparent that the functions of the board of trustees [as delineated in K.S.A. 19-1804(6)] are directed to the establishment and maintenance of the county public hospital.

However, K.S.A. 19-1846 provides an independent alternative for delegating the responsibilities for maintaining and operating the county public hospital. K.S.A. 19-1846 authorizes:

"Whenever in any county having a population of less than forty thousand (40,000) a county hospital has been or may hereafter be established under the provisions of K.S.A. 19-1801 to 19-1820, both inclusive, or 19-1820a, 19-1820b, 19-1820c and acts amendatory thereof and supplementary thereto, the board of county commissioners may, by resolution declare that it is to the best interests of such county to rent, lease or let the said hospital; thereupon such board of county commissioners may in its discretion rent, let or lease unto any person, persons, corporation or society for the purpose of maintaining and operating said county hospital upon such terms and conditions as the commissioners may deem to the best interests of the said county. Notwithstanding any such lease, the board of county commissioners of any such county make [sic] make such tax levies for the benefit of the hospital as are authorized by law."

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As we noted earlier the above option was in fact exercised by the Osborne County Board of Commissioners, and the management and operation of the hospital has been transferred via a lease and management agreement to a corporation. On its face this agreement appears to authorize the corporation to perform all of the duties which were originally carried out by the board of trustees. So, it is reasonable to conclude that the board of trustees may no longer exercise any element of official control over the management and operation of the hospital by virtue of the execution of the lease and management agreement by the board of commissioners. The purpose for which the board of trustees was created has thus been eliminated which raises the question: must the board of trustees still be appointed? The answer to this issue necessarily pivots upon whether K.S.A. 19-1803, directing the appointment of the trustees, gives the board of commissioners any choice in the matter. In other words are the provisions of K.S.A. 19-1803 mandatory or directory?

K.S.A. 19-1803 employs the term "shall" in directing the commissioners to proceed with the appointment of the trustees and raises a rebuttable presumption that the statute is mandatory. The term "shall" thus appears as the single most important textual factor to be considered in ascertaining the actual mandatory or directory character of the statute. In *Jersey City v. State Board of Tax Appeals*, 133 NJL 202, 43 A.2d 799 (1945) the New Jersey Supreme Court postulated that

"[o]rdinarily, the use of the word 'shall' in a statute carries with it the presumption that it is used in the imperative rather than in the directory sense. But this is not a conclusive presumption. Both the character and context of the legislation are controlling."

See, *City of Kansas City v. Board of County Commissioners of Wyandotte County*, 213 Kan. 777, 518 P.2d 403 (1974).

The Kansas Supreme Court examining this issue observed that

"[i]n determining whether statutory provisions are mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected

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and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory. . . ." Syl. ¶ 1, *City of Hutchinson v. Ryan*, 154 Kan. 751, 121 P.2d 179 (1942).

See, *City of Manhattan v. Ridgeway Bldg. Co., Inc.*, 215 Kan. 606, 527 P.2d 1009 (1974); *Spalding v. Price*, 210 Kan. 337, 502 P.2d 713 (1972). See generally, 2A *Sutherland Statutory Construction* §§ 57.01 - 57.04.

In *State v. Brown*, 205 Kan. 457, 470 P.2d 815 (1970) the Court also noted that

"[w]here the direction of a statute is given with a view to the proper, orderly and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition."

In our judgment the presumption that the legislative direction to the board of commissioners in K.S.A. 19-1803 is mandatory does not prevail when compared with the discretion afforded the board via K.S.A. 19-1846 and the remaining provisions of the county public hospital act (K.S.A. 19-1801, *et seq.*). K.S.A. 19-1846 in fact provides a separate management and operation alternative to the board of trustees. Further the provisions of K.S.A. 19-1803 and 1804 appear essentially to fix a mode of proceeding and a time within which to act to provide "order, system and dispatch" to the establishment and operation of the hospital. (*City of Hutchinson, supra*). And, too these two statutes also address themselves to the "proper, orderly and prompt conduct of the hospital's business." (*Brown, supra*). In view of the nature of K.S.A. 19-1803 and -1804 as construed in light of the above cited cases and coupled with the manifest intent of the legislature in enacting K.S.A. 19-1846 we are constrained to conclude that this requirement to appoint a board of trustees for the hospital is directory and not mandatory.

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Accordingly it is the opinion of this office that since the board has carried out the spirit and true intent of the county hospital act via the agreement entered into pursuant to K.S.A. 19-1846 and since the requirement to appoint trustees is directory and not mandatory the board of county commissioners of Osborne County need not fill the vacancies now existing on the board of trustees eventhough it means the board shall be thus nonexistent.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JPS:kj