



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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CURT T. SCHNEIDER  
ATTORNEY GENERAL

November 20, 1978

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ATTORNEY GENERAL OPINION NO. 78- 369

Mr. W. Keith Weltmer  
Secretary of Administration  
Department of Administration  
2nd Floor - State Capitol  
Topeka, Kansas 66612

Re: Counties--Health Officers--Nurses

Synopsis: Skilled professional nurses employed by the Sheridan County health officer are employees of the county, and are not independent contractors, for the purpose of determining liability for Social Security contributions.

\* \* \*

Dear Secretary Weltmer:

You request my opinion whether public health nurses of Sheridan County, Kansas, are employees of the county or independent contractors, the question having arisen in respect to the determination of liability for Social Security contributions.

You enclose a photocopy of an agreement dated January 12, 1976, between John Rand Neuenschwander, county health officer, and the board of county commissioners. The agreement appears to be little more than a recital that Mr. Neuenschwander has submitted to the board a proposal for the funding of the county Public Health Service in the amount of \$5,000, to be derived from revenue-sharing monies; that the board has accepted the proposal, and that this amount shall be deposited in a local bank in a fund designated the Sheridan County Public Health Service; that disbursements therefrom shall be made by checks cosigned by Dr. Neuenschwander and Flo Mense, the county health nurse, and that a monthly itemized

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statement of expenditures shall be submitted to the board of county commissioners. It states that no vouchers need be submitted to the board of county commissioners. It should be noted that this extraordinary procedure for the disbursement of funds does not comply with either the Uniform Procedure for the Payment of Claims and Other Indebtedness by Municipalities, K.S.A. 10-801 *et seq.*, and K.S.A. 12-105, *et seq.*, or other provisions governing the disbursement of county funds generally.

You advise that the public health officer, Dr. Neuenschwander, employs public health nurses, without a written contract, as authorized by K.S.A. 1977 Supp. 65-202. These nurses are paid from the Sheridan County Public Health Service fund described above. The public health officer establishes all conditions of employment, including hours of work. The public health officer supervises the public health nurses who are so employed. The services provided by these nurses are those set out in K.S.A. 1977 Supp. 65-202, and are generally performed in schools, homes, and residences of the county, as well as courthouse space provided by the county commissioners.

Clearly, the county health officer is just that, an officer of the county, and not an employee. K.S.A. 1977 Supp. 65-202 commences thus:

"The county health officer in each county throughout the state, immediately after his or her appointment, shall take the same oath of office prescribed by law for county officers, and shall give bond of five hundred dollars (\$500), conditioned for the faithful performance of his or her duties, to keep an accurate record of all the transactions of his or her office, and to turn over to his or her successor in office or to the county or local board of health selecting such officer, on the expiration of his or her term of office, all records, documents and other articles belonging to the office, and to faithfully account to said board and to the county and state for all moneys coming into his or her hands by virtue of the office."

The duties of the office are set out in this section likewise:

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"Such officer shall upon the opening of the fall term of school, make or have made a sanitary inspection of each school building and grounds, and shall make or have made such additional inspections thereof as are necessary for the protection of the public health of the students of the school.

Such officer shall make or have made an investigation of each case of smallpox, diphtheria, typhoid fever, scarlet fever, acute anterior poliomyelitis . . . ., epidemic cerebro-spinal meningitis and such other acute infections, contagious or communicable diseases as may be required, and shall use all known measures to prevent their spread, and shall perform such other duties as this act, his or her local board, or the secretary of health and environment may require."

The section is specific as to his or her authority to employ others to assist in the performance of the duties of the office:

"Such officer . . . with the approval of his or her local board of health may employ a skilled professional nurse and other additional personnel whenever deemed necessary for the protection of the public health."

You point out that the Social Security administration Handbook for State Social Security Administrators, at page 273, states thus:

"Usually a public official is provided with either expressed or implied statutory authority to engage others to assist him in the performance of his duties. Under these circumstances the State or political subdivision, is the employer."

20 C.F.R. § 404.1004 states in pertinent part thus:

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"(c) (1) Every individual is an employee if under the usual common-law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally, such relationship exists when the person for whom services are performed has the right to control and direct, the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished; that is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer."

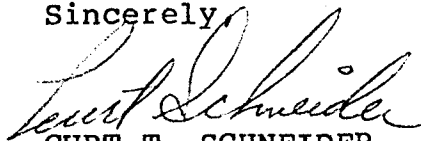
As county health officer, Dr. Neuenschwander is himself an officer of the county. He holds that office not by any contractual claim, or contractual relationship with the board of county commissioners, but solely by virtue of his appointment by the board of county commissioners, sitting as the board of health. The duties of the office are his, and his alone. He may employ skilled professional nurses to assist him in the performance of his duties as county health officer. However, both as a public officer, and as a licensed physician and surgeon, he cannot delegate to such skilled professional nurses the sole and exclusive control over how and in what manner they will assist him in his duties. He has no statutory authority to employ them for any purpose other than assisting him in the performance of his duties as county health officer. By law, sole responsibility for the assistance they provide, and for the manner in which that assistance is provided, continues to rest with him, as the county health officer. It is settled law that a public officer cannot contract away the responsibility of his or her office or, likewise, the responsibility for directing and supervising those who act to assist in the performance of statutory duties. Likewise, as a physician it is difficult to conceive that he, together with nurses which he has employed, have purposely created an independent contractor relationship between them, whereby he has surrendered the authority to direct them not only as to the tasks which they shall perform, but as to what means and methods they shall employ in performing

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those tasks. One of the duties of the county health officer, as pointed out above, is to investigate cases of the several contagious and communicable diseases enumerated in the statute, and to "use all known measures to prevent their spread . . . ." Apparently, it is suggested that the nurses employed by the county health officer are not in fact subject to his direction and supervision as to the steps to be taken in the event, e.g., of a case of poliomyelitis in the county, in order to prevent its spread, and that they exercise their independent professional judgment as to the prophylactic measure to be taken to prevent the spread of this and other communicable and dangerous diseases in the county, free from the supervision and direction of a licensed physician and surgeon. K.S.A. 1977 Supp. 65-202 authorizes the county health officer only to "employ" skilled professional nurses, and when he does so, they must act at all times subject to his express direction and supervision, as employees, and not as independent contractors. Otherwise, certainly, serious questions might arise whether the nurses were in fact acting improperly, by virtue of the fact that they were engaged in public preventive medicine, without the supervision and direction of a licensed physician and surgeon.

In my judgment, the professional nursing personnel employed by the county health officer are clearly just that, employees, who act at all times under the supervision and direction of the county health officer, not only as to the responsibilities which they must meet, but as to the means and methods which they are properly authorized to employ in the performance of those duties. If the nursing personnel involved are in fact acting otherwise, the matter should be drawn to the attention of the State Board of Nursing and the State Board of Healing Arts.

Sincerely,



CURT T. SCHNEIDER  
Attorney General

CTS:JRM:kj