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July 25, 1979

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ATTORNEY GENERAL OPINION NO. 79- 156

Kim D. Ramey
Seward County Attorney
415 North Washington
Liberal, Kansas 67901

Re: Public Health--Local Boards of Health--Review of
Joint Boards of Health Actions by City and County
Commissions

Synopsis: Governing bodies of cities and counties under 300,000 population which voluntarily create joint boards of health may not review the actions of such boards absent the reservation of such authority in the agreements or ordinances creating the board. Cities and counties, in counties under 300,000 population, may provide by rule and regulation for the conduct of the joint board of health providing such authority is reserved in the agreement or ordinances creating a joint board of health. Cities and counties may, by exercising their respective home rule powers, exempt themselves from the requirements of K.S.A. 1978 Supp. 65-205.

* * *

Dear Mr. Ramey:

Although the problems giving rise to your opinion request of March 8, 1979, have now been resolved in accordance with our earlier advice, we have reduced our legal conclusions to writing for your future use. You inquire first whether the joint commissions of the city and county may review actions of the joint board of health and overrule specific board actions. You refer in your letter to the language in K.S.A. 1978 Supp. 65-205 which provides:

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"The actions of said board shall be subject to the approval of the governing bodies of the city and county sitting en banc and such governing bodies may while sitting en banc, provide by mutual agreement and resolution rules and regulations for the operation of said board of health."

The question is whether this express statutory authorization for review of the actions of a joint health board applies to the Seward County/Liberal Joint Board of Health which was voluntarily created in 1974.

A careful reading of the statute reveals that the legislature, pursuant to K.S.A. 1978 Supp. 65-205, made clear distinction between joint boards of health created by the terms of the statute itself in counties over 300,000, and all other joint boards of health voluntarily created pursuant to the enabling language of this same statute. In our opinion, the context of the above-quoted language, which authorizes review, makes it clear that the legislature provided for such review only in counties over 300,000. The language in question which refers to "said board" is contained between two sentences which unequivocally relate to joint boards of health in counties over 300,000. Further, the legislative history of these provisions supports the proposition that the language authorizing review refers only to joint boards of health in counties over 300,000 which are created by the statute itself.

The original act which authorized the creation of joint boards of health made no distinction, as does the current statute, between counties of different population, nor was there any provision regarding review of the joint health board's actions. (L. 1943, ch. 223.) However, in 1961, the legislature amended the act, adding the provisions which distinguish between counties of differing populations. It was in this same amendment to the act that the legislature first authorized review of the joint health board's actions, providing:

"The actions of said board shall be subject to the approval of the governing bodies of the city and county sitting en banc"
(Emphasis added.) L. 1961, ch. 282, §1.

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As the distinction between counties and the right of review derive from the same source, and as that enactment provided for review of "[t]he actions of said board" only, we are of the opinion that the statutory right to review actions of a joint city/county board of health extends only to counties over 300,000 population created specifically by K.S.A. 1978 Supp. 65-205. In all other counties, the creation of a joint board of health authorizes the transfer of all powers from the municipal or county health board to the joint health board. K.S.A. 1978 Supp. 65-205 provides, in part:

"Upon the creation of any such joint board of health all the jurisdiction, powers and duties now conferred by law upon any local, municipal or county board of health shall be withdrawn from such local, municipal or county board of health and conferred upon the joint board of health."

Had the legislature intended city/county governing bodies of other counties to have such review it could have so provided. Correspondingly, if counties and cities inherently or impliedly retained the authority for such review of administrative decisions delegated to joint health boards, the specific authorization for review in counties over 300,000 would not have been necessary for any county. Thus, we must conclude that other cities and counties do not possess such authority, either inherently or by statute.

You also inquire whether the joint commissions may provide rules and regulations for the conduct of the joint board of health. Again, it is important at the outset to keep in mind the basic distinction between joint health boards established by cities and counties pursuant to the enabling language in K.S.A. 1978 Supp. 65-205, and those joint health boards created by the statute itself in counties over 300,000 in population. Regarding joint boards established voluntarily, the statute does not dictate the form or composition that such boards shall take. This is a matter left to the discretion of cities and counties in the creation of the joint health boards. It is a general principle of law that:

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"The legislature may delegate to governmental subdivisions or agencies the power to create administrative agencies, but, where the legislature has placed certain conditions and restrictions on the exercise of this power, these conditions and restrictions must be observed if the authority is to be exercised." 73 C.J.S. Public Administrative Bodies and Procedure, §7 (1951).

With regard to voluntarily created joint boards of health, the legislature provided only that cities and counties "may, by agreement with each other, establish a joint board of health with the same powers, duties and limitations as are now or hereafter may be provided by law." K.S.A. 1978 Supp. 65-205.

Since the legislature did not provide specific restraints upon cities and counties as to the organizational structure or mode of operation for joint health boards which would preclude the cities and counties from dictating the conduct of such boards, cities and counties may, by agreement, structure the joint health boards in the manner they deem to be in their best interests. Thus, the powers, duties and limitations of such administrative bodies will be determined from the terms of ordinances or agreements conferring authority upon them. See 73 C.J.S. Public Administrative Bodies and Procedures, §49 (1951).

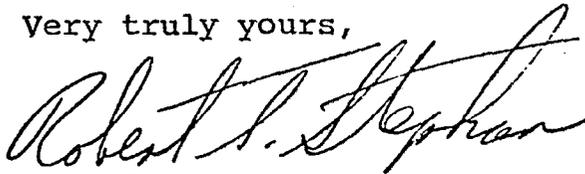
Therefore, even though in the case of voluntarily created joint health boards, the power to review administrative decisions of a joint board of health is not inherently or statutorily reserved to the governing bodies of the city and county, such power may be reserved by the terms of the agreements and ordinances establishing such boards. Obviously, these agreements and ordinances may be amended to provide the powers and duties that the such cities and counties choose to confer or impose on the joint health board. Likewise, the rules and regulations governing the conduct of the joint health board may be promulgated by agreement of the city/county governing bodies. However, such restrictions on the powers delegated to the joint health board must be reserved by the agreement or ordinance establishing the board or by amendment to such agreement or ordinance.

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You also inquire as to whether or not the joint commissions of the city and county could, by agreement, dissolve the existing joint board of health and, under their home rule powers, exempt themselves from K.S.A. 1978 Supp. 65-205 and then reestablish a joint board of health with different powers. Such actions are certainly possible but, in our opinion, probably unnecessary, for whatever limitations or powers are sought to be imposed upon the joint health board may be accomplished by amendment of the resolutions, ordinances or agreements which established the board, so long as those limitations or powers are not proscribed by K.S.A. 65-201 et seq.

Thus, governing bodies of cities and counties under 300,000 population which voluntarily create joint boards of health may not review the actions of such boards absent the reservation of such authority in the agreements or ordinances creating the board. Cities and counties, in counties under 300,000 population, may provide by rule and regulation for the conduct of the joint board of health, providing such authority is reserved in the agreement or ordinance, creating the joint board of health. Cities and counties may, by exercising their respective home rule powers, exempt themselves from the requirements of K.S.A. 1978 Supp. 65-205.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk