



STATE OF KANSAS

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June 5, 1980

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ATTORNEY GENERAL OPINION NO. 80-127

Mr. Warren D. Andreas
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City of Winfield
200 East 9th Avenue
P. O. Box 646
Winfield, Kansas 67156

Re: Cities and Municipalities--Payment of Employee
FICA taxes

Synopsis: In the absence of any statutory enactments (applicable to a particular political subdivision) which would prohibit the same, and assuming no provisions of the federal-state agreement prescribed by K.S.A. 40-2303(a) are contravened, a political subdivision may pay an employee's FICA taxes as a part of the compensation due to the employee under an employment agreement. Any plan to pay the FICA taxes of an employee of a political subdivision must be submitted (to the Director of Accounts and Reports) by the political subdivision, as that term is defined in subsection (f) of K.S.A. 1979 Supp. 40-2302, and any such plan must be approved by the Director of Accounts and Reports pursuant to K.S.A. 1979 Supp. 40-2305(a)(4). Cited herein: K.S.A. 1979 Supp. 12-1615, K.S.A. 1979 Supp. 40-2302, K.S.A. 40-2303(a), K.S.A. 1979 Supp. 40-2305, 26 U.S.C.A. §3101, 26 U.S.C.A. §3102(a), 26 U.S.C.A. §3111, 26 U.S.C.A. §6672.

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Dear Mr. Andreas:

This will acknowledge your letter of November 27, 1979, wherein you request our opinion as to whether the William Newton Memorial Hospital may pay all of the FICA taxes for its employees as a "fringe benefit." The specific questions you pose, and our discussion and opinions relative thereto, are set forth below.

1. QUESTION: "May any political subdivision pay FICA taxes for its employees?" (Emphasis added.)

DISCUSSION: Our research has failed to locate any case, from Kansas or any other jurisdiction, which specifically addresses this issue. The "Federal Insurance Contributions Act," which Act provides funds to implement the old-age, survivors, and disability insurance benefits prescribed in the Social Security Act, imposes both an employee and an employer tax. 26 U.S.C.A. §§3101, 3111. The employee tax is "imposed on the income of every individual," 26 U.S.C.A. §3101, and the Act states that such tax "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." 26 U.S.C.A. §3102(a). Pursuant to 26 U.S.C.A. §6672, an employer who willfully fails to collect and pay over the employee tax is "liable to a penalty equal to the total amount of the tax . . . not collected . . . or not . . . paid over."

As was stated in U.S. v. New York, 315 U.S. 510, 515 (1941), the burden of the employee tax provided for in 26 U.S.C.A. §3101 will normally rest upon the employee. However, §1406 of the Social Security Handbook [DHEW No. (SSA) 77-10135, 1979], promulgated by the Social Security Administration, specifically provides that an employer may pay the "employee contribution" out of his own funds, instead of deducting it from his employee's wages. Under such circumstances, the payment of the tax constitutes additional compensation and is includible in the employee's gross income. IRS Rev. Rul. 74-75. While these interpretations by federal agencies charged with administering the Social Security Act and the Federal Insurance Contributions Act would undoubtedly constitute sufficient authority to protect an employer in the private sector who chose to pay the employee tax prescribed by the above-cited statutes, there are additional questions which are raised in considering the propriety of such a course of action by a unit of local government.

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The procedure whereby a political subdivision of the state of Kansas may elect to extend the benefits of Title II of the Social Security Act to its employees are set forth in K.S.A. 1979 Supp. 40-2305. Subsection (a) thereof requires that a plan for the extension of such benefits be submitted to the Director of Accounts and Reports of the State of Kansas, and also enumerates certain mandatory provisions which must be included in the plan. Subsection (c) of said statute relates to payments by a political subdivision into the state "contribution fund" and provides as follows:

"Each political subdivision as to which a plan has been approved under this section shall pay into the contribution fund, with respect to wages, as defined in subsection (a) of K.S.A. 1979 Supp. 40-2302, or amendments thereto, at such time or times as the state agency may by regulation prescribe, contributions in the amounts and at the rates specified in the applicable agreement entered into by the state agency under K.S.A. 40-2303, or amendments thereto. (2) Each political subdivision required to make payments under paragraph (1) of this subsection is authorized, in consideration of the employee's retention in, or entry upon, employment after enactment of this act, to impose upon each of its employees, as to services which are covered by an approved plan, a contribution with respect to such employee's wages, as defined in subsection (a) of K.S.A. 1979 Supp. 40-2302, or amendments thereto, not exceeding the amount of the employee tax which would be imposed by the federal insurance contributions act if such services constituted employment within the meaning of that act, and to deduct the amount of such contribution from such employee's wages as and when paid. Contributions so collected shall be paid into the contribution fund in partial discharge of the liability of such political subdivision or instrumentality under paragraph (1) of this subsection. Failure to deduct such contribution shall not relieve the employee or employer of liability therefor."

As is apparent from the above-quoted statutory excerpt, there is no affirmative duty imposed upon a political subdivision, by the statute, to deduct FICA taxes from an employee's wages.

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However, there is case law which would clearly invalidate, as against public policy, any contract or agreement to pay the FICA taxes of a public officer or employee where the compensation of such officer or employee is fixed by law. See 63 Am.Jur.2d, Public Officers and Employees, §393. Also, it has been held that the governing body of a political subdivision has no authority to pay a "bonus" (defined as "money, or an equivalent, given in addition to an agreed compensation"), or any gift or gratuity, to a public employee. Joint Consolidated School District No. 2 v. Johnson, 163 Kan. 202, 208 (1947).

Although it is clear that a political subdivision may not pay employee FICA taxes under the circumstances enumerated above, it is less clear as to whether any prohibition applies where a political subdivision lawfully contracts, in advance of the applicable period of employment, to pay an employee's FICA taxes as a part of the compensation due under the employment agreement. Under such circumstances, the payment would not appear to be a bonus, gift or gratuity. Numerous cases have upheld the authority of a governing body to make expenditures of public moneys to adopt and carry into effect a system of group life and hospitalization insurance for the benefit of public employees. Nohl v. Board of Education, 199 Pac. 373 (1921); Bowers v. Albuquerque, 200 Pac. 421 (1921); State ex rel. Thompson v. Memphis, 251 S.W. 46 (1923); Opinion By The Justices, 30 So.2d 14 (1947); and Bussie v. McKeithen, 259 So.2d 345 (1971). Payment of employee FICA taxes, in some respects, is similar to payments for group hospitalization and life insurance, in that it is another method of compensating employees in addition to a straight wage payment. Additionally, it would seem that a political subdivision having the power to increase the wages of its employees would also have the authority to pay the employee tax imposed by the Federal Insurance Contributions Act (as such act is extended to apply to political subdivisions through K.S.A. 1979 Supp. 40-2305), if there is a determination that such an indirect increase in compensation will result in better public services. See Thompson v. Memphis, supra. Accordingly, it is our opinion that, absent any statutory enactments applicable to a particular political subdivision which would prohibit the same, and assuming no provisions of the federal-state agreement prescribed by K.S.A. 40-2303(a) are contravened, a political subdivision may pay an employee's FICA taxes as a part of the compensation due to the employee under an employment agreement.

2. QUESTION: "May the William Newton Memorial Hospital, or any municipal, county, or district hospital make such a payment?"

DISCUSSION: We are informed that the William Newton Memorial Hospital was established pursuant to the provisions of K.S.A. 1979 Supp. 12-1615. Said statute does not restrict the methods whereby hospital employees may be compensated, and the conclusion reached in Question 1 (above) would, therefore, apply. Likewise, the same conclusion would be applicable to other hospitals and political subdivisions.

3. QUESTION: "Must such a plan [i.e. to pay employee FICA taxes], if allowed, be submitted to the Department of Administration of the State of Kansas, and if so, would the plan need to be submitted by the municipality or could the plan be submitted by the hospital?"

DISCUSSION: In our judgment, the plan would have to be submitted to the Director of Accounts and Reports for approval pursuant to K.S.A. 1979 Supp. 40-2305(a)(4). Said statutory provision specifies that,

"[N]o such plan shall be approved unless:

. . . .

"(3) it provides for such methods of administration of the plan by the political subdivision as are found by the state agency to be necessary for the proper and efficient administration of the plan;"

It is also our opinion that the plan would have to be submitted by the city rather than the hospital. Only a "political subdivision" is authorized to submit a plan under K.S.A. 1979 Supp. 40-2305, and the term "political subdivision" is defined as follows in subsection (f) of K.S.A. 1979 Supp. 40-2302:

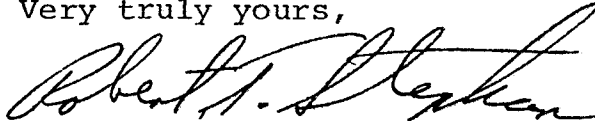
"[T]he term 'political subdivision' includes every taxing district in this state and also includes an instrumentality of the state, of one or more of its political subdivisions, or of the state and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision

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and only if its employees are not by
virtue of their relation to such juristic
entity employees of the state or subdivision;"
(Emphasis added.)

It has been held that individuals and corporations are the only strictly legal entities in this state in the absence of qualifying statutes. Kansas Private Club Assn. v. Londerholm, 196 Kan. 1, 3 (1965). In our judgment, K.S.A. 1979 Supp. 12-1615 is not such a statute as will qualify the hospital board as a separate and distinct legal entity. See Attorney General Opinion No. 79-126. Therefore, it is our opinion that the plan would have to be submitted by the municipality.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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RTS:BJS:TRH:jm