



STATE OF KANSAS

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August 4, 1980

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ATTORNEY GENERAL OPINION NO. 80- 177

Mr. L. Franklin Taylor  
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P.O. Box 191  
The Tower Building  
200 S. Chestnut  
Olathe, Kansas 66061

Re: Cities--Officers--Social Security Benefits

Synopsis: Even though moneys paid pursuant to city ordinance to the city attorney and municipal judge of DeSoto, Kansas, may commonly be referred to as "fees," they are nonetheless "wages," as that term is defined in K.S.A. 1979 Supp. 40-2302(a), and are subject to withholding for social security purposes. Cited herein: K.S.A. 1979 Supp. 40-2302, 42 U.S.C.A. §409.

\* \* \*

Dear Mr. Taylor:

You have requested our opinion on the propriety of the City of DeSoto withholding contributions for Old Age and Survivors Insurance from amounts paid to its part-time city attorney and municipal judge. According to the facts as outlined in your opinion request, the city has retained two attorneys--both employed by separate private Johnson County law firms--one to serve as city attorney, the other as municipal judge. You have explained that all remuneration earned by these attorneys in their separate stations is deposited with the employing law firms of each. The firms, in turn, compensate the attorneys by paying them wages as employees of the firm. Both the City of DeSoto and the private employers withhold contributions for Old Age and Survivors Insurance from

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the amounts each pays to those persons serving as city attorney and municipal judge. You inquire as to the necessity of this "double withholding," and contend that "the contributions made by the City of DeSoto are excess contributions." The gist of your argument is that the monthly amounts paid to the city attorney and municipal judge are "fees" and not "wages," as defined by the Social Security Act. Payment in the form of "fees" is not subject to withholding requirements by virtue of K.S.A. 40-2302(b)(3). For several reasons, listed below, we must respectfully disagree with your position.

You have directed our attention to Attorney General Opinion No. 77-112, issued April 11, 1977, by the Attorney General Curt T. Schneider, which concluded that:

"The compensation prescribed by city ordinance to be paid to the city attorney, which includes both a monthly retainer and an hourly rate of compensation, is subject to withholding for Social Security benefits under K.S.A. 1976 Supp. 40-2302 et seq."

DeSoto Ordinance No. 490 provides that the City Attorney is to be paid \$125.00 per month, an amount which, the ordinance indicates, is to include "retainer fees, attending one council meeting a month, preparing ordinary ordinances, conferences, and advice." The ordinance specifically states that "all other services are to be paid for on a contract basis." The amount allocated for the remuneration of the municipal judge is \$125.00 per month for "one court night per month." We feel that both the wording of the ordinance and the types of payments specified therein are in the nature of "wages" as defined by the Old Age and Survivors Insurance Act. We see no reason to disagree with either the rationale or the conclusion of Attorney General Opinion No. 77-112 on the propriety of the state withholding in these circumstances.

The term "wages" as used in the Old Age and Survivors Insurance Act is defined as meaning

"all remuneration for employment as defined herein, including the cash value of all remuneration, paid in any medium other than cash, except that such term shall not include that part of such remuneration which, even if it were for 'employment' within the meaning of the federal insurance contributions act, would not constitute 'wages' within the meaning of that act."  
K.S.A. 1979 Supp. 40-2302(a).

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The definition of "wages" found in the federal insurance contributions act is substantially the same:

"[T]he term 'wages' means remuneration . . . for employment, including the cash value of all remuneration paid in any medium other than cash; . . . ." 42 U.S.C.A. §409.

Several court decisions have interpreted the definition of "wages." For example, the California Court of Appeals held that an employee's part of a profit-sharing arrangement constituted "wages" within the meaning of the California Labor Code. In Ware v. Merill, Lynch, Pierce, Fenner, & Smith, Inc., 24 Cal.App.3d 41, 100 Cal. Rptr. 791 (1972), the court interpreted "wages" thusly:

"[P]ursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation.

. . . .

"In its legal sense, the word 'wage' has been given a broad, general definition so as to include compensation for services rendered without regard to the manner in which such compensation is computed." 24 Cal.App.3d at 44, 100 Cal.Rptr. at 797.

The Kansas Supreme Court has defined "compensation" as "remuneration in whatever form it may be given, whether it be salaries and fees or both combined." The State v. Bland, 91 Kan. 160, 167, (1913). In Bland, the court was considering a provision in a criminal statute which allowed the attorney general to collect a fee for every conviction of a defendant for a liquor law violation. Faced with the question of whether such an arrangement violated the Kansas constitutional provision which mandated a fixed compensation rate for named state officers, (Kan. Const., Art. 1, §15), the court explained:

"Salary is generally regarded as a periodical payment dependent upon time, while fees depend on services rendered, the amount of which is fixed by law and made payable at fixed times. There is nothing in the provision indicating that the stated times must be of equal duration, nor that the times fixed for one kind of compensation shall be the same as that of another." 91 Kan. at 168.

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If seems, therefore, that the Kansas Court considers both fees and salaries to be forms of remuneration for services rendered. Cases from other jurisdictions also support the view that "fees" are compensation. For example, in State ex rel. Colorado River Commission v. Frohmiller, 46 Ariz. 413, 52 P.2d 483, (1935), the court said:

"'Salaries' are fixed compensations based on services for definite and regular periods of time and paid at regular and fixed intervals, while 'fees' are compensation for particular services rendered at irregular and uncertain periods." 52 P.2d at 488.

Further, in Reynolds v. Reynolds, 14 Cal.App.2d 481, 58 P.2d 660 (1936), it was stated:

"The 'fee' of a lawyer or doctor is compensation; it is remuneration for services rendered in the line of their respective professions. A 'fee' is a reward or compensation for services rendered or to be rendered; a payment in money for official or professional services, whether the amount be optional or fixed by custom or law." 58 P.2d at 661.

Based on the foregoing, it is our opinion that the sums paid to the city attorney and municipal judge of DeSoto are "wages," as that term is defined in K.S.A. 1979 Supp. 40-2302(a) and in the federal insurance contributions act. It is your contention, however, that by virtue of the statutory definition of "employment" found at K.S.A. 1979 Supp. 40-2302(b), the DeSoto city employees are serving in a "class or classes of positions, the compensation for which is on a fee basis" and, therefore, are not employed by the state--or any political subdivision thereof--and their wages are not subject to the provisions of the Old Age and Survivors Insurance for Public Employees Act.

We cannot concur in this conclusion. In our judgment, the above-referenced exception in K.S.A. 1979 Supp. 40-2302(b) was not created for the fact situation outlined by your request. Neither the position of city attorney nor that of municipal judge, as you have explained them, falls within a class of employees compensated strictly on a fee basis. It is our opinion that this exemption was created to provide for those appointed or elected public officers whose compensation was in the form of fees for specific services rendered. For example, a justice of the peace was an elected municipal officer whose compensation was in the form of fees paid by the parties who sought his services.

Thus, in our judgment, the compensation prescribed by city ordinance to be paid to the city attorney and municipal judge, which includes a monthly retainer and a separate amount for additional services is subject to withholding for Social Security purposes.

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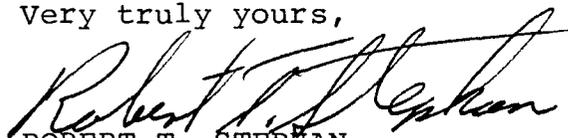
The amount set by ordinance for the remuneration of these officers is not a fee within the context of the state and federal statutes discussed herein, but is the compensation prescribed by law, i.e., by municipal ordinance, to be paid for services rendered to the city. That the compensation provided for by ordinance is termed a "fee" does not affect its characterization as wages for social security purposes. The federal interpretation of the term "wages" supports this conclusion:

"(2) The term 'wages' means all remuneration for employment unless specifically excepted under section 209 of the Act (see §404.1027).

"(3) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums are wages within the meaning of the Act if paid as compensation for employment." 20 C.F.R. 404.1026(a)(2), (3) (1979).

We hope this sufficiently addresses those questions posed by your request. Should any further explanation or interpretation be necessary, please feel free to contact this office again.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



W. Robert Alderson  
First Deputy Attorney General

RTS:WRA:phf