



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 146

Robert E. Blue
Rawlins County Attorney
Rawlins County Courthouse
Atwood, Kansas 67730

Re: Counties and County Officers -- General Provisions --
Elections; Private Hospital Corporations

Synopsis: A county may agree to terms and conditions in a hospital lease agreement between the county and a private corporation which establish requirements for the selection of the board of directors of the private corporation. However, the county may not conduct an election at public expense utilizing the state and local election machinery to select the members of the board of directors of the private corporation. Cited herein: K.S.A. 19-101a, 19-1846.

* * *

Dear Mr. Blue:

In your capacity as Rawlins County Attorney you request the Attorney General's opinion concerning the Rawlins County Hospital Board of Directors. Specifically you ask:

"a. Does the Board of County Commissioners have the authority to provide for the election of the Board of Directors of Rawlins County Hospital Inc.?"

"b. If hospital board members can be elected, could a geographic distribution of board members be used in lieu of apportionment according to population of the county?"

In your letter of April 22, 1982, you advise us that the County Commission has opted to lease the hospital pursuant to K.S.A. 19-1346 to Rawlins County Hospital, Inc., a private non-profit corporation. This enabling statute provides in pertinent part:

"[s]uch board of county commissioners may in its discretion . . . lease unto any . . . corporation . . . for the purpose of maintaining and operating said county hospital upon such terms and conditions as the commissioners deem to the best interests of said county." (Emphasis added.)

In addition to the broad grant of authority contained in the above-quoted statute, counties derive much power from their use of home-rule. Pursuant to K.S.A. 19-101a, counties are empowered to "transact all county business and perform such powers of local legislation as they deem appropriate." However, in regard to elections, clause seven (7) of K.S.A. 19-101a provides that counties are subject to "all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers."

As a general rule of law relevant to your inquiry, it is stated in 26 Am. Jur. 2d, Elections, §183:

"It is fundamental that a valid election cannot be called and held except by authority of the law. There is no inherent right in the people, whether of the state or of some particular subdivision thereof, to hold an election for any purpose. Accordingly, an election held without affirmative constitutional or statutory authority, or contrary to a material provision of the law, is a nullity, notwithstanding the fact that such election was fairly and honestly conducted." (Footnotes omitted.) (Emphasis added.)

This general rule of law has been followed in Kansas. Mathews v. Commissioners of Shawnee County, 34 Kan. 606 (1886); State, ex rel., v. Deck, 106 Kan. 518 (1920). In State, ex rel., v. Deck, supra, the Kansas Supreme Court was asked to decide if county commissioners were empowered to call a special election concerning the recall of a county commissioner. In deciding that such an election could not be held, the Court stated:

"The board of county commissioners is authorized to call special elections on various propositions, but each specific instance is under

a special grant of statutory power
These instances may not exhaust the list, but
in each of such special elections, positive,
complete, and specific authority is granted to
the board of county commissioners. Where such
authority is not expressly conferred, it would
not exist." (Emphasis added.) Id. at 522,
523.

More recently, though, this office concluded that a county may, in the exercise of its statutory home rule powers, conduct an advisory election which was not otherwise authorized by law. See Kansas Attorney General Opinion No. 79-44. Such authority is limited, however. As noted in the Attorney General's opinion, the election must be for a public purpose and must be held independently of statutorily authorized elections, since such additional elections interfere with state elections and the duties of election officers contrary to K.S.A. 19-101a Seventh, quoted supra. In this context we return to your specific inquiry.

We have little question that the county commission might require as a "term" or "condition" of the lease, that a corporation provide in its by-laws for the election of its own board of directors upon almost any terms that are agreeable to the corporation and where corporate funds would be used to conduct the election. However, it does not follow that the county commission, pursuant to either K.S.A. 19-101a or 19-1846, may authorize an expenditure of public funds to conduct the election of the board of directors of a private corporation utilizing the state and local election machinery. No such election is authorized by the Kansas Constitution or by statute. Moreover, we have been unable to find any authority whereby state or local officials have ever been granted the authority to provide for the election of the governing body of a private corporation, as would be the case in the situation you describe.

We must conclude from the foregoing that a public election at taxpayer expense cannot be called and held absent express constitutional or statutory authority. Accordingly, we believe the County Commission to be without authority to provide by resolution or agreement for the public election of the governing body of a private corporation absent express statutory authorization.

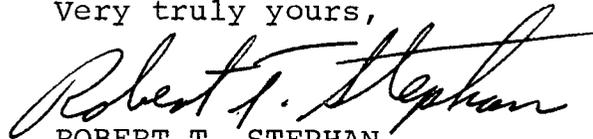
In view of our response to your first question, your second question is easily answered. To the extent that the county and the private corporation, which is to manage the hospital, can agree on the terms for the selection of the corporate directors, the corporate bylaws may be changed in accordance

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therewith. We are aware of no constitutional or statutory mandate that private corporations doing business with county government must select their governing boards by the constitutional standards concerning elections applicable to governmental units.

Therefore, in our opinion a county may agree to terms and conditions in a hospital lease agreement between the county and a private corporation which establish requirements for the selection of the board of directors of the private corporation. However, the county may not conduct an election at public expense utilizing the state and local election machinery to select the members of the board of directors of the private corporation.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:hle