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.

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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
Robert E. Blue  
Page Three

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.)  

More recently, though, this office concluded that a county  
may, in the exercise of its statutory home rule powers, con-  
duct 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 elec-  
tions, 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 re-  
quire as a "term" or "condition" of the lease, that a corpora-  
tion 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 con-  
duct 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 au-  
thority 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 be-  
lieve the County Commission to be without authority to pro-  
vide 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
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