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ATTORNEY GENERAL OPINION NO. 83- 133

Patrick J. Hurley  
Secretary of Administration  
Department of Administration  
Room 263-E  
State Capitol Building  
Topeka, Kansas 66612

Re: Cities--Officers--Social Security Benefits

Synopsis: A city ordinance which purports to authorize "independent contractors" to exercise the sovereign power of the city is contrary to state-wide public policy, and is void. However, individuals who act as city attorney and municipal judge, under such an ordinance, are de facto officers of the city, and their acts are valid insofar as they involve the public and third parties. Additionally, the legal and judicial services provided by said individuals constitute "employment," as said term is defined in the Old Age and Survivors Insurance Act, and social security contributions are payable by the city with respect to remuneration paid for such services. Cited herein: K.S.A. 40-2301, 40-2302, 40-2305, 60-1205, L. 1983, ch. 157, §1, Kan. Const., Art. 9, §5.

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Dear Mr. Hurley:

You request our opinion as to whether contributions for Old Age and Survivors Insurance are payable by the city of Nickerson

for remuneration paid to certain law firms providing legal and judicial services to the city pursuant to contract. You advise that Charter Ordinance No. 3 of the city of Nickerson (copy attached hereto) prescribes that individuals affiliated with said law firms, who perform legal or judicial services for the city, are neither employees or officers of the city, even though said individuals are exercising the powers of the city attorney and municipal judge. If the charter ordinance is valid, the legal and judicial services provided do not constitute "employment," as said term is defined in the Old Age and Survivors Insurance Act, and contributions are not due from the city with respect to remuneration paid for such services. See K.S.A. 40-2302 and 40-2305 (as amended by Section 1 of Chapter 157 of the 1983 Session Laws of Kansas).

In considering the validity of the subject charter ordinance, it must first be noted that one of the indispensable attributes of a public office is the right to exercise some definite portion of the sovereign power. Sowers v. Wells, 150 Kan. 630 (1939). As will be discussed below, the offices of city attorney and municipal judge possess this attribute with respect to some or all of the powers and functions of said offices. The public policy of this state clearly anticipates that persons who exercise some portion of the sovereign power, i.e. governmental officers, shall be subject to removal by civil action for misconduct or neglect of duty. See Kan. Const., Art. 9, §5; K.S.A. 60-1205. "Independent contractors" are not subject to ouster (under K.S.A. 60-1205) for misconduct or neglect of duty, and it is our opinion that a city ordinance which purports to authorize "independent contractors" to exercise the sovereign power of the city is contrary to statewide public policy, and is void.

Having concluded that the exercise of sovereign power by an independent contractor violates public policy, it is necessary to apply this principle to determine the validity of Charter Ordinance No. 3 of the city of Nickerson. In this regard, the ordinance contemplates that an independent contractor will "represent the city in a legal capacity," i.e. act as city attorney. A city attorney, as part of the duties of that position, is often called upon to advise the city governing body concerning legal affairs of the city, draft proposed ordinances and resolutions for the governing body, draft and review contracts proposed for the city, and act otherwise as an adviser and counselor. In this capacity, the city attorney does not exercise any independent sovereign power of the city, but merely serves as its counselor or adviser. As a prosecutor, however, the city

attorney does exercise, in the name of the city, independent power (prosecutorial discretion), prosecuting (in the name of the city) offenses against its ordinances and codes. As Charter Ordinance No. 3 of the city of Nickerson appears to authorize an independent contractor to act in the prosecutorial role, it is our opinion that it violates public policy, and is void in this respect.

As mentioned above, the Nickerson charter ordinance also authorizes an independent contractor to "represent the city in a judicial capacity," i.e. to act as municipal judge. A judge is a "public officer who presides over, conducts, and administers the law in a court of justice." 48 C.J.S. Judges §2. The Tennessee Supreme Court, in In re Lawyers' Tax Cases, 55 Tenn. 565 (1875), explained the function of a judge as follows:

"A judge is a public officer lawfully appointed to decide litigated questions according to law. He must not only be impartial, but he must pay a blind obedience to the law. Whether good or bad, he is bound to declare what the law is, and not to make it. He is not an arbitrator, but an interpreter of the law. It is his duty to be patient in the investigation of the case, learned in considering it, and firm in his judgment. He ought, according to Cicero, never to lose sight . . . that he is a man, and that he can not exceed the power given him by his commission, that not only power, but public confidence has been given him, that he ought always seriously to attend not to his wishes but the requisitions of law, [and] justice . . . ." Id. at 650.

Based on the foregoing, it is evident that one holding the position of judge at any level of government is vested with a part of the powers of the sovereign, and is entrusted with an important public responsibility. As Charter Ordinance No. 3 of the city of Nickerson authorizes an independent contractor to exercise sovereign power associated with the office of municipal judge, it is our opinion that it violates public policy, and is void in this respect.

Although, as we have concluded above, the Nickerson charter ordinance is void, with respect to the purported authority granted to independent contractors to exercise sovereign powers

traditionally exercised by the city attorney and municipal judge, it should be noted that the "legal and judicial services" already performed by individuals under the city contract are not necessarily invalid as to the public or third parties. An individual or law firm contracting to provide legal or judicial services may be a de facto officer, validating that person's acts insofar as they involve the interest of the public and third persons. See State v. Miller, 222 Kan. 405, 414 (1977).

Several Kansas cases provide guidance concerning the status of de facto officers. In State v. Roberts, 130 Kan. 754 (1930), a criminal defendant was convicted and sentenced by a judge pro tem. The defendant appealed, alleging error because election of the judge pro tem was defective. The court held the judge pro tem to be a de facto officer and stated:

"The contention of the appellant may readily be conceded that the election of a judge pro tem in this case was not within the provisions of the statute (R.S. 20-305), but whether properly and legally elected or not, he assumed the duties of the office, was accepted and reputed as being such officer, and was in possession of the office under a fair color or title thereto, which would make him a de facto officer regardless of the legality of his election.

"'An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer for such a length of time, and under such circumstances or reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, and induce people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action . . . .' (46 C.J. 1053.)

"'The acts of an officer de facto are as valid and effectual where they concern the public or

the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party.' (46 C.J. 1060, 1061.)" Id. at 756, 757.

See also, Parvin v. Johnson, 110 Kan. 356 (1922).

A more recent Kansas Supreme Court case addressing the issue of de facto officers is Olathe Hospital Foundation, Inc. v. Extencicare Inc., 217 Kan. 546 (1975). In Olathe, the Court considered the status of two members of an appeals panel convened under provisions of the Regional Health Programs Act. These members were challenged on the grounds their terms had expired and they had not taken oaths of office prior to participating in the hearing in question. In concluding that these persons were de facto officers, the Court stated:

"[T]he persons designated as members of the appeals panel assumed their duties as such under color of authority, performed those duties, and were recognized and accepted as public officers by all who dealt with them. These are the classic characteristics of a de facto officer." Id. at 558.

In support of this conclusion, the Court quoted its prior opinion in Railway Co. v. Preston, 63 Kan. 819 (1901). In that case, the Court determined a judge pro tem who continued to act in such capacity after his term of office had expired was a de facto officer. Such determination was predicated on the application of the principles announced in the "landmark" decision of State v. Carroll, 38 Conn. 449, 9 Am.Rep. 409 (1871), from which the Court quoted as follows:

"'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

"'1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce

people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be.

"'2. Under color of a known and valid appointment or election, but where the officer had filed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

"'3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or, by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.'" 217 Kan. at 559.

Clearly, the first principal stated in the foregoing is relevant to the particular factual situation presented here. Even though one performs "judicial services" through contract rather than appointment or election, he is involved in circumstances which induce people without inquiry to submit to his action, supposing him to be an officer. Therefore, persons performing judicial services in this instance are, in our opinion, de facto officers and their actions are valid insofar as they involve the public and third parties.

This same analysis is applicable to persons performing legal services. Having served in the capacity of city attorney, the individuals are de facto officers. Being de facto officers, their acts are, in our judgment, valid and effectual to the same extent as if these individuals were de jure officers. See also Attorney General Opinion No. 81-113.

The final issue concerns whether the law firms, contracting to perform judicial and legal services, should be considered public officers for social security purposes under K.S.A. 40-2301 et seq.

K.S.A. 40-2301 provides:

"In order to extend to certain employees of the state and its political subdivisions and to the dependents and survivors of such employees, the basic protection accorded to others by the old-age and survivors insurance system embodied in the social security act, it is hereby declared to be the policy of

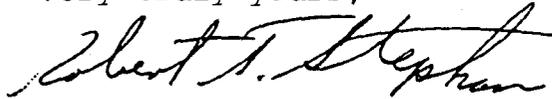
the legislature, subject to the limitations of this act, that such steps be taken as to provide such protection to employees of the state and its political subdivisions on as broad a basis as is permitted under the social security act. It is also the policy of the legislature that the protection afforded employees in positions covered by a retirement system on the date an agreement under this act is made applicable to service performed in such positions, or receiving periodic benefits under such retirement system at such time, will not be impaired as a result of making the agreement so applicable or as result of legislative enactment in anticipation thereof."

The term "employee," as used in K.S.A. 40-2301, is defined in K.S.A. 40-2302(c), which states:

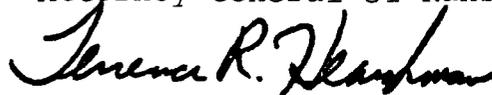
"[T]he term 'employee' includes an officer of the state or political subdivision thereof: Provided, That the term 'employee' shall not include elected officials of a political subdivision other than the state or counties unless the elected officials of such political subdivisions are covered by a plan which is in conformity with the terms of the agreement of such political subdivision approved by the state agency under K.S.A. 40-2305."  
(Emphasis added.)

Although the individuals who acted as city attorney and municipal judge (under the subject contract) were not de jure officers, they were, as we have concluded above, de facto officers, and their acts are valid insofar as they involve the public and third parties. Based upon these considerations, it is our opinion that the legal and judicial services provided by said individuals constitute "employment," as said term is defined in the Old Age and Survivors Insurance Act, and that contributions are due from the city with respect to remuneration paid for such services.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
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