



STATE OF KANSAS

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December 19, 1988

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ATTORNEY GENERAL OPINION NO. 88-168

Michael W. Ryan
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P.O. Box 205
509 Court Street
Clay Center, Kansas 67432

Re: Counties and County Officers -- Hospitals and
Related Facilities -- County Hospitals;
Organization of the Board

Synopsis: County hospital board members which are selected by the election method begin their official duties on the second Monday in January next following the election. The newly elected members must take the oath prescribed by law within ten days after the election. While taking the oath is a prerequisite to assuming the duties of the office, failure to accomplish the task within the ten day period does not create a vacancy. Cited herein: K.S.A. 13-14b10; 14-605, as amended by L. 1988, ch. 147, § 11; 19-1980 (Ensley) (repealed, L. 1984, ch. 98, § 28); K.S.A. 1987 Supp. 19-4605; 19-4607; K.S.A. 25-313; 25-2010; 25-2023; 25-2107; 25-2120; K.S.A. 1987 Supp. 80-2508; K.S.A. 80-2509.

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Dear Mr. Ryan:

As attorney for Clay County Hospital, you have requested our opinion regarding the hospital board. Specifically, you ask whether board members' terms of office commence on the second Monday in January following their election.

The general rule for determining the commencement date of elected offices is established by K.S.A. 25-313, which states:

"The regular term of office of all state, district, county and township officers shall begin on the second Monday in January next after the election, except as otherwise provided by law." K.S.A. 25-313.

Our inquiry is whether the statutes governing county hospitals provide a different date for beginning terms of office.

County hospitals are governed by K.S.A. 1987 Supp. 19-4601 et seq. The procedure for selecting hospital board members is established by K.S.A. 1987 Supp. 19-4605. Subsection (b) of that statute states that the system used for selecting board members prior to the effective date of Article 46 continues in effect unless changed by referendum. You state that the board members of Clay County Hospital are elected pursuant to K.S.A. 19-1890 (Ensley) (repealed by L. 1984, ch. 98, § 28). That statute outlines the method of electing board members in designated positions with staggered terms of office. In addition, provisions are made for commencing a term of office, for announcing candidacy and selection in the primary election, and for filling vacancies.

Concerning organization of the board, K.S.A. 1987 Supp. 19-4607(a) provides in part:

"Members of the board, within 10 days after their selection, shall qualify by taking the oath or affirmation of civil officers as provided in K.S.A. 54-106 and amendments thereto, and shall organize the board by election of one of their number as chairperson, one as secretary and one as treasurer and by the election of such other officer or officers as deemed necessary. Every two years thereafter, a reorganization meeting shall be held and officers shall be selected as provided in this subsection. . . ." K.S.A. 1987 Supp. 19-4607(a).

We do not believe that this subsection provides a commencement date for terms of office which is contrary to the date established by K.S.A. 25-313. Language nearly identical to that which appears in K.S.A. 1987 Supp. 19-4607(a) appears in numerous other statutes, but which do not establish a date for

beginning a term of office. Elections for members of boards of unified school districts are conducted on the first Tuesday in April of odd-numbered years. K.S.A. 25-2010. Within ten days following the election date, or five days following election certification, each board member is required to qualify by taking the prescribed oath. However, the member does not take office until the following July 1. K.S.A. 25-2023. General elections for city officers, and the effect of charter resolutions establishing different election dates, are governed by K.S.A. 25-2107 and are conducted on the first Tuesday in April. Officers' terms commence upon the next regularly scheduled meeting following election certification. K.S.A. 25-2120. However, board members are required to qualify by taking the oath within ten days following the election. K.S.A. 13-14b10 (cities of the first class), K.S.A. 14-605, as amended by L. 1988, ch. 147, § 11 (cities of the second class). Board members for township health care facilities are selected pursuant to K.S.A. 1987 Supp. 80-2508, and if the election method is applicable it is to be conducted on the first Tuesday in April. The term of office commences on May 1 following the date of election. K.S.A. 1987 Supp. 80-2508(a)(3)(A). The oath of office is to be taken within ten days following the election. K.S.A. 80-2509(a). In summary, the requirement that a newly elected member take an oath within ten days following the election does not establish a date for taking office, but rather prescribes a method of qualifying for office. Therefore, the act governing hospitals does not provide a commencement date which is different from that prescribed in K.S.A. 25-313, and the latter statute controls.

You also ask when the oath of office is to be taken. On its face, K.S.A. 1987 Supp. 19-4607 indicates that the oath is to be taken within ten days after a board member is selected. In light of the different statutory schemes previously discussed, we believe that the legislature used the term "selected" as applying to either election or appointment. If the board members are elected, then within ten days following the election, they are to qualify as elected board members by taking the oath.

In State, ex rel. v. Stewart, 70 Kan. 778 (1913), the Court denied a petition in quo warranto which attempted to remove a school board treasurer. The defendant had failed to timely qualify by giving a bond required by statute, but had subsequently tendered a bond with an official oath attached. The bond was returned as insufficient. The Court noted that the officer was required to qualify prior to taking office. 90 Kan. at 779. Relying on a statute regarding forfeiture

for failing to qualify within twenty days after election, the Court held that the defendant had forfeited his right to office, but no vacancy was created without notice and an opportunity to be heard. Syl. ¶ 1. The Court further stated that, "if the officer should tender a good and sufficient bond so worded as to cover the current term from its beginning, the county superintendent might deem it proper to permit the one chosen by the electors of the district to complete his term rather than to declare the office vacant and place his own appointee therein." 90 Kan. at 781. Our survey of the relevant statutes does not reveal a forfeiture provision for failing to qualify by taking the oath. However, we do believe that, following Stewart, taking the oath is a prerequisite to acting in an official capacity.

We note that K.S.A. 1987 Supp. 19-4607(a) states that the oath "shall" be taken within ten days of selection. However, it is a well established rule of statutory construction that "shall" frequently means "may."

"In determining whether a legislative provision is mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory.

"Factors which would indicate that a statute or ordinance is mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated, or (2) a provision for a penalty or other consequence for noncompliance." Paul v. City of Manhattan, 212 Kan. 381 (1973) Syl. ¶ 1,2.

Applying the foregoing rules of construction, we believe that the ten day requirement of K.S.A. 1987 Supp. 19-4607(a) is directory. The statute lacks negative words requiring that the oath shall be taken at no other time, and unlike the

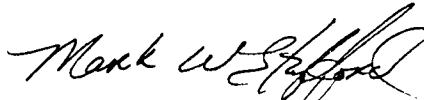
statutes discussed in Stewart, supra, there is no penalty for noncompliance. This is not to say that the oath is optional. It is a prerequisite to assuming the official duties of a board member. If the oath is not taken within ten days following the election, we believe that it may be taken within a reasonable time. c.f., State v. Nelson, 200 Kan. 411, 414 (1968).

In conclusion, it is our opinion that county hospital board members which are selected by the election method begin their official duties on the second Monday in January next following the election. The newly elected board members must take the oath prescribed by law within ten days after the election. While taking the oath is a prerequisite to assuming the duties of the office, failure to accomplish the task within the ten day period does not create a vacancy.

Very truly yours,



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Mark W. Stafford
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