



STATE OF KANSAS

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CURT T. SCHNEIDER
Attorney General

February 14, 1975

Opinion No. 75- 66

The Honorable Lynn W. Whiteside
State Representative
3rd Floor - State Capitol Building
Topeka, Kansas 66612

Dear Representative Whiteside:

You inquire concerning Resolution HR-2-75, recently adopted by the Board of County Commissioners of Shawnee County in the exercise of county home rule powers granted by K.S.A. 19-101a, exempting Shawnee County from a substantial portion of K.S.A. 19-3419, which provides in pertinent part thus:

"In counties of this state having a population of over one hundred thirty thousand (130,000), there is hereby created the office of commissioner of elections, which shall be in charge of an election commissioner who shall be appointed by the secretary of state, subject to confirmation by the senate, and shall hold his office for a term of four (4) years The person so appointed may, for official misconduct, be removed by the secretary of state. The secretary of state . . . shall appoint his successor for the same term of years Such election commissioner shall have been a qualified elector and a resident of said county at least two (2) years prior to his appointment" [Emphasis supplied.]

By the terms of the resolution, Shawnee County is exempted from all of K.S.A. 19-3419 save and except for the underscored language

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above, and substitute provisions are enacted in lieu of the balance of the section, providing, insofar as pertinent hereto, thus:

"(A) From and after the effective date of this resolution the Shawnee County Election Commission shall be appointed by the Shawnee County Board of Commissioners to serve at the pleasure of the Board of County Commissioners.

(B) In the event the Election commissioner is removed by the Board of County Commissioners, dies or resigns, a successor shall be appointed immediately by the Board."

In addition, the oath of office of the election commissioner is required to be filed with the county clerk, rather than with the Secretary of State. The resolution also exempted Shawnee County from K.S.A. 19-3419a(a), and provided in lieu thereof that the salary of the office shall be not less than \$9,368 per annum, that the salary and budget of the election commissioner shall be set by the board of county commissioners, and that the commissioner shall receive mileage and other allowances as provided by county resolution for county employees.

This resolution was adopted in the exercise of county home rule powers under K.S.A. 19-101a, which provides in pertinent part thus:

"(a) Counties are hereby empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate, subject only to the following limitations, restrictions, or prohibitions:

"First, counties shall be subject to all acts of the legislature which apply uniformly to all counties; . . . seventh, counties shall be subject to all acts of the legislature concerning general elections and the election of county officers" [Emphasis supplied.]

You inquire, first, whether the resolution in question is an exercise of power prohibited by item seventh, underscored above.

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The breadth to be given the restriction imposed by item seventh was considered in Opinion No. 74-141, issued by Attorney General Vern Miller under date of May 8, 1974. The question discussed there was whether a county was prevented by item seventh from abolishing an elective county office prescribed by state law. This statutory limitation was construed together with 1974 Senate Bill 59, now found at K.S.A. 12-3901 et seq., which expressly authorizes political and taxing subdivisions, which includes counties and cities, to eliminate elective offices created by state law under the circumstances prescribed therein. Attorney General Miller concluded that the power of self-government granted by K.S.A. 19-101a did not include the power to abolish an elective office which was created by an act of the legislature applicable uniformly to all counties, but that the limitation imposed by item seventh, above, did not inhibit the exercise of power expressly granted by § 3 of 1974 Senate Bill 59, now K.S.A. 12-3903, to eliminate such an elective office by consolidation. He stated further:

"We further conclude that if a county office is created by an act of the legislature which is not applicable uniformly to all counties, that office may be abolished by charter resolution in the exercise of the powers granted by Senate Bill 175, upon which resolution an election is not required unless ordered by the board of county commissioners or unless called for by a sufficient petition filed as provided in Senate Bill 175."

Item seventh, above, was construed to require only that

"in the conduct of elections of county officers who are required to be elected, whether by state statute or as determined by the county in the exercise of any lawful powers granted elsewhere, such elections as are held shall be conducted in accordance with applicable laws, such as art. 25, K.S.A."

and to forbid a county from providing, in the exercise of its statutory powers of self-government granted by K.S.A. 19-101a,

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that such elections as are held shall be held otherwise than in accordance with state laws governing the conduct of elections.

Thus, if a county office is created by a state statute not uniformly applicable to all counties, that office may be abolished by the board of county commissioners in the exercise of powers granted by K.S.A. 19-101a. Item seventh provides, of course, that notwithstanding the statutory powers of self-government granted thereby, that counties shall be subject "to all acts of the legislature concerning general elections," whether such acts are or are not uniformly applicable to all counties. The question arises whether K.S.A. 19-3419 and -3419a are acts "concerning general elections." These sections were first enacted as §§ 1 and 2 of ch. 203, L. 1947, § 4 of which, now appearing as K.S.A. 19-3422, now states thus:

"All the jurisdiction, powers and duties now or hereafter conferred by law upon the county clerks and city, school and township officers relating to the conduct, supervision and control of elections, are hereby withdrawn from said county clerks and city, school and township officers, in all counties having a population of more than one hundred thousand (100,000), and the same are conferred upon the election commissioner appointed as provided in K.S.A. . . . 19-3419 and all laws of the state relating to the registration, qualification, challenging and voting of electors at any election in any such county are conferred upon and made applicable to the county election commissioner."

K.S.A. 19-3424, originally enacted as § 6 of ch. 203, L. 1947, prescribes certain official duties of the election commissioner, which include the fixing of ward and precinct boundaries; filing of declarations of candidacy, nomination papers and party affiliations; publishing official notices of all elections; the printing of all ballots; the publication of notices of the names and addresses of candidates, the offices sought, the location of voting places, the dates of election and the hours of voting. The purpose of the entire act is summarized at K.S.A. 19-3434 thus:

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"The purpose of this act is to take from the county clerks, city, school and township officers, in the counties to which this act applies, all power and authority now exercised by them in relation to the supervision, conduct and control of elections within each county to which this act applies, and it is hereby made the duty of all public officials to cooperate fully with the election commissioner in response to any written request made to them by said election commissioner to the end that the declared purposes of this act be made fully effective."

Clearly, the entire enactment, K.S.A. 19-3419 through -3435, is one "concerning general elections," as well as all other elections held in the county. Certainly, it may be argued that K.S.A. 19-3419 and -3419a are not themselves, considered alone, provisions concerning general elections, for these sections merely establish an office of election commissioner and provide for the compensation thereof. However, these sections are part of an enactment which does clearly concern general elections, and as such, it is an enactment from which a county may not exempt itself in the exercise of those statutory powers of self-government granted by K.S.A. 19-101a. Counties are subject to such acts concerning elections whether the acts do or do not apply uniformly to all counties.

In addition, it must be pointed out that the eight express statutory restrictions and limitations set out in K.S.A. 19-101a are not the only limitations upon the powers of self-government granted by that provision. It empowers counties to "transact [only] all county business," and to perform only such powers of "local legislation and administration" as they deem appropriate. No matter of legislative or administrative concern is an appropriate subject for the exercise of the statutory powers of self-government granted by this section unless it is local in nature and pertains locally to the county. Certainly, the election commissioner of the county is empowered to conduct elections only in the county. In substantial measure, it may be said that her duties are local in nature. The office itself is created, like most other offices within the county, by state law. Unlike most other offices in the county government, however, it is filled by appointment by a state officer, the Secretary of State, subject to confirmation by the Senate. If the office were merely created by a state law

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not applicable uniformly to all counties, and the statutory restrictions such as item seventh considered above were not applicable it could reasonably be argued that the office was one of local concern. Here, however, the office is not only created by state law, as are all other elective county offices presently, but the office is filled by appointment by a state officer, with the approval of a state legislative body. Thus, it is not easily concluded that the filling of the office of election commissioner is a subject of merely local county legislative or administrative concern. Indeed, in our view, the contrary is true. Although the duties of the office do not extend beyond the territorial limits of the county and are substantially "local" in a territorial sense, the office itself, and the manner in which it is required to be filled by state law, compel the conclusion that the power to provide for the appointment of the holder of the office is not a local legislative matter.

You also inquire concerning the application of Article 2, § 18 of the Kansas Constitution to the resolution in question. That section provides thus:

"The legislature may provide for the election or appointment of all offices and the filling of all vacancies not otherwise provided for in this constitution."
[Emphasis supplied.]

The language of this section appears to be a grant of authority which is permissive in nature. Certainly, the legislature would have such power whether this provision were in the constitution or were omitted. It is permissive in nature, and certainly, any power which the legislature enjoys, it may delegate, within constitutional limits, of course. It does not expressly, or by necessary or reasonable implication, forbid the delegation to a county of the power to create such local legislative or administrative officers as the governing body may deem appropriate to the conduct of local county governmental business. Similarly, neither section 2 nor 5 of Article 9 prohibits the delegation of such power, in our view.

To recapitulate, it is our view that Resolution HR-2-75, adopted by the Shawnee County Board of County Commissioners in the exercise

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of the statutory powers of self-government granted by K.S.A. 19-101a, exceeds the authority granted thereunder, for the reasons that the enactment containing the sections from which the resolution purports to exempt Shawnee County is one "concerning general elections," to which the county is subject, and secondly, for the reason that K.S.A. 19-3419 and -3419a(a) set forth matters which are not properly the subject of purely local county legislative action.

Yours very truly,


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