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February 28, 1979

ATTORNEY GENERAL OPINION NO. 79- 24

Honorable W. E. Schaiff, Mayor
City of Columbus
300 East Maple
Columbus, Kansas 66752

Re: Counties and County Officers--County Commissioners--Contracts to Provide Ambulance Service

Synopsis: A board of county commissioners has the authority to contract with profit or nonprofit corporations for ambulance service within the county, and may provide compensation for such services as the board deems necessary and appropriate under K.S.A. 19-261.

The board also may set standards for ambulance operations, set charges and audit an operator's records and books pursuant to K.S.A. 1978 Supp. 19-262. Such standards and charges established by duly adopted resolution of the board are public records open to inspection under K.S.A. 1978 Supp. 45-201, but such right of inspection does not extend to the audit of a private ambulance operator's financial records.

* * *

Dear Mr. Schaiff:

You have requested interpretation of two Kansas statutes pertaining to county ambulance service. Specifically, you have posed a series of questions regarding the Cherokee County Board of County Commissioners' proposed contracts with three different ambulance companies and the accompanying apportionment of tax levy funds under K.S.A. 19-261. Additionally, you have requested interpretation of K.S.A. 1978 Supp. 19-262 pertaining to the Board's duty to regulate the ambulance operators with whom it contracts and the availability of such regulations to the public for inspection.

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At the present time, three corporations provide ambulance service within Cherokee County. The Cherokee County Ambulance Service Association, Inc., a nonprofit corporation provides ambulance service to the city of Columbus and the northern and southwestern portions of the county. Derfelt Reliable Ambulance Service provides service to the city of Galena in the southeastern corner of Cherokee County, and Derfelt Emergency Medical Corporation of Baxter Springs serves the Baxter Springs area in the southern portion. Derfelt Emergency was formed in 1978, and is currently requesting county funds for its operations. Both Derfelt corporations are organized for profit.

The Cherokee Board of County Commissioners propose to offer contracts to the three above-named ambulance companies for their services within the county. The contracts are to be funded by a specific county ambulance service tax levy. Prior to the present time, the tax levy funds have been divided equally between Cherokee County Ambulance Service Association and Derfelt Reliable Ambulance Service. The question of proper apportionment of tax funds arose when the proposed contracts anticipated division of funds among the three companies.

Your questions under K.S.A. 19-261 relate to the propriety of apportioning county funds to a corporation, which derives profit from its operations, and to the proper amounts of such apportionment. The statute specifically allows the Board to "contract with any city, person, firm or corporation." It contains no limiting or prohibitory language and also provides that such contracts shall be "for such compensation as may be agreed upon."

Since the compensation to be paid is pursuant to a negotiated contract, it is within the Board's discretion to pay an agreed upon amount that is, in its judgment, reasonable and proper. We find nothing improper in the prospect that a private enterprise contracting with the county to provide ambulance service might derive a profit therefrom. Absent the ability to make a reasonable profit, we think it highly unlikely that any private entity (whether a profit or non-profit corporation, partnership or any other business form) would solicit contracts to provide goods or services to governmental bodies.

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The proper apportionment of county general fund moneys budgeted for ambulance service among various firms providing ambulance service remains in the Board's discretion. As previously noted, the Board has the authority to contract with corporations "for such compensation as may be agreed upon." The provisions in K.S.A. 19-261 for reimbursement to taxing districts for their "proportionate share of the county general fund budgeted for ambulance service" is inapplicable. Other taxing districts statutorily authorized to provide ambulance service and thereby entitled to reimbursement from the county fund include cities (K.S.A. 1978 Supp. 65-4302), townships (K.S.A. 80-1423) and fire district (K.S.A. 19-3623b, 19-3636a). The corporations with which the Board proposes to contract are not taxing districts entitled to reimbursement under the statute. The statutory formula for reimbursement, therefore, is irrelevant to the consideration of the contracts for such services.

Another question raised relates to county funding of an ambulance service previously included in another ambulance operator's area. K.S.A. 19-261 provides that the board "shall not provide ambulance service. . . in any part of the county which receives adequate ambulance service, but the county shall reimburse any taxing district which provides ambulance services to such district." While it is not settled that "adequate ambulance service" under this statute would include only service provided by taxing districts, it is within the Board's discretion to determine that an area is or is not receiving "adequate" service. Robinson v. Board of County Commissioners, 210 Kan. 684, 690 (1972). In our judgment, the provisions of this statute allow the Board to provide ambulance service to any or several parts of the county, as long as such areas are not currently receiving, in the Board's judgment, "adequate ambulance service." It is our opinion, then, that the Board was acting within its discretionary authority in determining that one area, previously included by contract in another operator's area, was no longer receiving adequate service and should be provided with another source of ambulance service.

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It should be noted that in the Robinson case, the Court stated:

"One obvious purpose. . . is to provide relief from double taxation to residents of a city, fire district, hospital district or other taxing subdivisions which is already furnishing adequate ambulance service at public expense. The county is not to invade those areas with its service, and is to reimburse such a taxing subdivision its pro rata share of the county-wide taxes levied by the county for ambulance service. It may be that this was all that was intended, for we note that the reimbursement provision is part of the same sentence which prohibits the county from providing service in areas already served. However, we are not prepared to so hold, for such a construction might mean that the legislature had authorized counties to provide service in competition with private entrepreneurs who were furnishing adequate service." Id. at 689.

Under K.S.A. 1978 Supp. 19-262, the Board is directed to set minimum standards for ambulance operation, equipment and personnel. The Board also has the authority to set the charges for ambulance service and to audit the books and records of the ambulance operators with whom it has contracted. You have raised the issue as to the mandatory nature of these provisions and the subsequent availability of such records for public inspection.

K.S.A. 1978 Supp. 19-262 states that "the board of county commissioners shall by resolution establish a minimum set of standards for the operation and equipping of said ambulances and for the qualifications and training of any personnel." In our opinion, this provision is directory, rather than mandatory. The distinctions between directory and mandatory statutory provisions are discussed in Wilcox v. Billings, 200 Kan. 654, 438 P. 2d 108 (1968). There, the court stated:

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"No absolute test exists by which it may be determined whether a statute is directory or mandatory. . . . Consideration must be given to the entire statute, its nature, its object, and the consequences which would result from construing it one way or the other. It has been said that whether the thing is directory or mandatory depends on whether the thing to be directed to be done is of the essence of the thing to be done, or is a mere matter of form. . . . [W]here the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally directory, unless followed by words of absolute prohibition; and a statute is regarded as directory where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislation can be accomplished in a manner other than that prescribed with substantially the same result." Id. at 657.

It also should be noted that under Kansas law, the use of the term "'shall' does not prevent a statute from being construed as a discretionary act." Curless v. Board of County Commissioners, 197 Kan. 580, 586 (1966).

The foregoing comments should not be construed as indicating our opinion that the Board is not statutorily required to establish such standards. Indeed, the Board may have, as in Robinson, supra, at 688, incorporated the standard of operation into the contract. We do find, however, that this requirement is directory only, since no penalty or other consequential action is prescribed for failure to establish the standards. Thus, it is our judgment that establishment of these standards is not a statutory condition precedent to other Board action, and the Board's failure to set such standards would not invalidate other actions by the Board to establish ambulance service pursuant to these statutes. 200 Kan. at 651.

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As to the inspection of any standards adopted by the Board, please note that the availability of government records for public inspection is governed, generally, by K.S.A. 1978 Supp. 45-201, which provides in pertinent part, as follows:

"(a) All official public records of the state, counties, municipalities, townships, school districts, commissions, agencies and legislative bodies, which records by law are required to be kept and maintained, . . . shall at all times be open for a personal inspection by any citizen, and those in charge of such records shall not refuse this privilege to any citizen." (Emphasis added.)

Once the Board adopts standards "by resolution," they would be open to public inspection pursuant to the foregoing quoted provisions. K.S.A. 19-304 requires the county clerk to "keep the seals, records and papers" of the board of county commissioners. Further, K.S.A. 19-305 requires the county clerk to record the proceedings of the board. Clearly, in our judgment, these statutory duties to make and keep certain county records fall within the purview of K.S.A. 1978 Supp. 45-201. Accordingly, a duly adopted resolution of the Board, being part of the Board's "proceedings," is open to inspection as a public record that is by law "required to be kept and maintained."

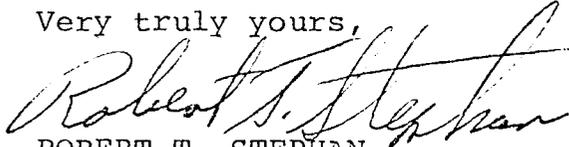
The provision of K.S.A. 1978 Supp. 19-262 allowing the Board to set charges and audit the contracting operator's books and records is permissive. The statute states that the Board "shall have the authority" and does not direct or demand the Board to exercise such authority. As these provisions are permissive, the Board is not required to set charges or audit the operator's books and records. Should the Board elect to exercise its authority to set the charges for the ambulance service, the previous discussion as to public inspection would apply. The charges, like the standards of operation, are to be set "by resolution" and would be open to public inspection under K.S.A. 1978 Supp. 45-201. The statute does not require that an audit be provided "by resolution," nor does it require or imply that a record of such be "kept and maintained."

Therefore, it is our opinion that the public right to inspection under K.S.A. 1978 Supp. 45-201 should not apply to any audit conducted under K.S.A. 1978 Supp. 19-262. While there should be no question as to the public's right to inspect the county's financial records (see K.S.A. 10-1117, 10-1118), so as to determine the moneys expended by the county to provide ambulance service, we can find no basis for extending that right to include inspection of the audit of a private company contracting with the county to provide such service.

K.S.A. 1978 Supp. 19-262 also provides that "[n]o operator with which the board of county commissioners has a contract. . . shall use the operation of ambulances as advertising or promotion for any other business venture of the operator." The question is raised as to whether the Board is prohibited from contracting with any ambulance operator promoting other business ventures. The statute prohibits operation as advertisement or promotion, and does not prevent an ambulance operator from conducting or promoting other business ventures by other methods. In this regard, it is our opinion that the use of the same names and telephone numbers does not rise to the status of a promotion or advertisement within the meaning of the statute.

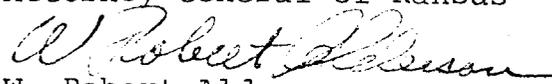
In summary, under K.S.A. 19-261, the Board of County Commissioners of Cherokee County has the authority to enter into contracts to provide ambulance service within the county. The Board may contract with either profit or nonprofit corporations, and may divide tax levy funds among the contracting firms as it deems necessary and proper. The Board also may set standards and charges for the conduct of such ambulance operations, but failure to do so does not invalidate contracts entered into for ambulance services for the county. Accordingly, the Board of County Commissioners' proposals to enter into various contracts for different amounts of compensation were within the Board's statutory authority. When properly executed, it is our judgment that such contracts would be valid.

Very truly yours,



ROBERT T. STEPHAN

Attorney General of Kansas



W. Robert Alderson

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First Deputy Attorney General