



STATE OF KANSAS

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April 23, 1979

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ATTORNEY GENERAL OPINION NO. 79- 67

Stanley E. Antrim
Attorney for Southwest Medical Center
Light, Yoxall, Antrim & Richardson
P. O. Box 1278
Liberal, Kansas 67901

Re: Counties and County Officers--Hospitals--Appointment
of Administrator

Synopsis: A hospital created pursuant to K.S.A. 1978 Supp.
19-1801 et seq. may contract for managerial
services for the operation of a county hospital
wherein an employee of the services provider is
appointed as administrator of the hospital.

* * *

Dear Mr. Antrim:

You inquire on behalf of your client, Southwest Medical Center, a county hospital located in Seward County, Kansas, established pursuant to K.S.A. 19-1801 et seq., regarding a proposed contract between Southwest Medical Center and Wesley Medical Center of Wichita, Kansas. Your opinion request is forwarded to this office by counsel for Wesley Medical Center.

Specifically, you inquire if Southwest Medical Center, hereinafter referred to as "hospital," may legally enter into a contract for professional managerial services with Wesley Medical Center, hereinafter referred to as "Wesley," wherein Wesley agrees to provide "the full time services of a qualified hospital administrator recruited, examined and employed by WESLEY." See Section 2, Article D, Paragraph 2 of the agreement.

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You are concerned that the authority of the board of trustees of the hospital to hire an administrator pursuant to K.S.A. 1978 Supp. 19-1804(f), would not include authority to enter into such a contract. Subsection (f) of the statute states in pertinent part, that the "board shall have the power to appoint a suitable administrator and any other necessary assistants and personnel, shall fix the compensation or wages of all personnel, and shall have the power to remove all such personnel."

By the express terms of Section 2, Article D., Paragraph 2 of the agreement, "WESLEY shall furnish to HOSPITAL, subject to approval of its Board of Trustees, the full-time services of a qualified hospital administrator recruited, examined and employed by WESLEY. The Hospital Administrator may be replaced at any time by WESLEY at WESLEY's discretion or upon the written request of HOSPITAL given to WESLEY."

The hospital retains the power to appoint by virtue of its power to approve the employment of any individual who is to serve as the administrator. Likewise, the hospital retains its statutory authority to remove the administrator by virtue of its power to "replace" said administrator. In addition, by its terms the agreement requires the approval of the board of trustees of the hospital as to the "compensation or wages" of the administrator employed by Wesley.

In reference to all employees or personnel, other than the administrator, the contract reserves to the hospital all authority granted by statute to the hospital regarding appointment, removal, and compensation or wages. See Section 2, Article D., Paragraph 1 of the agreement.

In sum, the only interests conveyed to Wesley under the terms of the agreement are the right of Wesley to replace the administrator and the requirement of written notice to Wesley when the hospital desires that the administrator be replaced.

The contract as a whole is an agreement to provide recruiting and professional management services. We find nothing in the statute which would preclude the hospital from entering into a contract for such services. For example, certainly, the hospital would be free to contract for tree removal services rather than employing staff for such purpose.

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Likewise, contracts for janitorial or maintenance services would be a recognized and responsible means of performing essential hospital operations.

In fact, in reference to the recruitment services to be provided by the agreement, the statute specifically authorizes the expenditure of funds for such purpose. K.S.A. 1978 Supp. 19-1804(f). Thus, were it not for the fact that the administrator is to be employed by Wesley and not by the hospital, the question herein presented would not arise.

It cannot be precisely stated that the hospital is appointing either an "individual" or a corporation as the administrator. The agreement declares that Wesley is the agent of the hospital (See Section 1, Paragraph 1 of the agreement.) and that the administrator is its employee. But, the administrator is approved or dismissed by the hospital in its discretion and his salary is approved by the hospital. He is, thus, a sub-agent responsible to two principals. Nothing in the statute prohibits such relations.

In addition, the hospital is given considerable discretion in order to achieve the purpose of this act, namely, the creation and maintenance of a county hospital.

"(f) The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, . . . The board shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital funds, . . . The board shall be charged with the business-like supervision, care and custody of all hospital property . . . Said board shall, in general, carry out the spirit and true intent of this act in establishing and maintaining a county public hospital with equal rights to all and special privileges to none"

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We cannot conclude that the use of the term "shall" in K.S.A. 1978 Supp. 19-1804(f) regarding the appointing, removing and fixing of compensation or wages by the hospital board of trustees is intended to preclude the contractual arrangements you propose. This statutory provision is, in our judgment, directory rather than mandatory. The Kansas Supreme Court said in Wycoff v. Board of County Commissioners, 189 Kan. 548, 556 (1962),

"Generally speaking, statutory provisions directing the mode of proceeding by public officers and intended to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties cannot be injuriously affected, are not regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. See discussion on mandatory and directory legislation in Board of Education v. Barrett, 101 Kan. 568, 570, 167 Pac. 1068; City of Hutchinson v. Ryan, 154 Kan. 751, 121 P. 2d 179, and School District v. Clark County Comm'rs, 155 Kan. 636, 638, 639, P. 2d 418."

Also, see Curless v. Board of Commissioners, 197 Kan. 580, 586 (1966) wherein the court said,

". . . The use of the word 'shall' in various statutes has been considered in arriving at a proper construction of a statute, and the use of the word 'shall' does not prevent a statute from being construed as requiring a discretionary act. (Bock v. Stack, 132 Kan. 533, 296 Pac. 357; Rockwell v. Junction City, 92 Kan. 513, 141 Pac. 299.)"

Probably the best discussion of this problem is contained in Wilcox v. Billings, 200 Kan. 654, 657 (1968), wherein the court reasoned,

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"No absolute test exists by which it may be determined whether a statute is directory or mandatory. Each case must stand largely on its own facts, to be determined on an interpretation of the particular language used. Certain rules and aids to construction have been stated. The primary rule is to ascertain legislative intent as revealed by an examination of the whole act. 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 [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 regarded as directory, unless followed by words of absolute prohibition; and a statute is regarded as directory where no substantial rights depend on it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results"

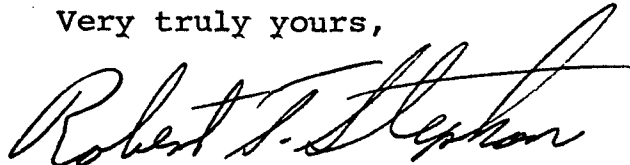
In addition, the language of the statute itself suggests the discretion granted to the Board regarding appointment of a hospital administrator. K.S.A. 1978 Supp. 19-1804(f) states that the "board shall have the power to appoint," but it does not require such appointment. It would, indeed, be a strained interpretation to conclude that a statute which does not require the appointment of an administrator mandates that the functions to be performed by such administrator cannot be performed in some other fashion.

Therefore, in view of the broad discretion granted to the hospital board of trustees for the economic and business-like operation of the county hospital, and the lack of a specific prohibition against the contractual arrangement you

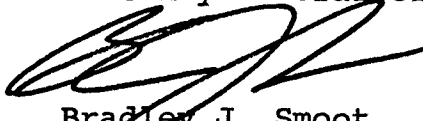
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propose, it is our opinion that the Southwest Medical Center Board of Trustees may enter into the agreement with Wesley Medical Center for the services provided therein.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk