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June 12, 1979

ATTORNEY GENERAL OPINION NO. 79-113

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District Attorney of Shawnee County
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Re: Counties and County Officers -- General Provisions --
Home Rule Powers

Synopsis: Shawnee County Resolution No. 79-53 as it purports to regulate the appointment powers of other duly elected county officials in some respects exceeds the legal

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power vested in the Board of County Commissioners, and in other respects the resolution is procedurally deficient to effect the intended result.

* * *

Dear County Officials:

You have collectively requested our opinion regarding the validity and effect of Shawnee County Resolution No. 79-53 which was passed by the Shawnee County Board of Commissioners on March 20, 1979. The resolution to which you have referred provides:

" RESOLUTION NO. 79-53

"WHEREAS, it is the policy of the Shawnee County Commission to insure maximum utilization of tax dollars and to provide the most efficient service to county taxpayers, the Shawnee County Board of Commissioners sitting in regular session this 20th day of March, 1979, hereby resolve the following:

"1. A county-wide moratorium on hiring of new and replacement permanent employees will be implemented immediately.

"2. Any new or replacement permanent employees may be hired only with the express authorization of the Commission. Such authorization will be granted only upon written request and justification by the official or department head requesting the new employee.

"3. Nothing contained herein shall operate to limit the absolute unbridled discretion of a duly elected official of this county to appoint, to any position created, authorized, or established by this resolution, any person of the personal choice of such official. Such choice of a person to fill any such authorized position shall not require the written permission of the Shawnee County Commission, but will be subject to all relevant laws, federal, state, and local, governing employment.

"4. Nothing contained herein shall operate to limit the mandate of any Kansas statute which, expressly requires

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the appointment of certain employees in any office held
by a duly elected official.

"IT IS BY THE COMMISSION SO RESOLVED.

"BOARD OF COUNTY COMMISSIONERS
SHAWNEE COUNTY, KANSAS

/S/ Larry D. Woodward
Larry D. Woodward, Chairman

"Absent"
Roland G. Hug, Member

ATTEST:
/S/ Winifred L. Kingman
Winifred L. Kingman, County Clerk"

/S/ Dennis R. Taylor
Dennis R. Taylor, Member

In order to adequately address the validity of the foregoing resolution,
it is necessary to first consider the statutory provisions which are
applicable to counties and county officials and to reach a determination
of the powers and duties of all elected officials at the county level.
The powers of the board of commissioners applicable to all counties
are set out in K.S.A. 19-212, the pertinent portions of which provide:

"The board of county commissioners of each county shall
have the power, at any meeting:

. . . .

"Second. To examine and settle all accounts of the receipts
and expenses of the county, and to examine and settle and allow
all accounts chargeable against the county; and when so settled,
they may issue county orders therefor, as provided by law.

. . . .

"Sixth. To represent the county and have care of the county
property, and the management of the business and concerns of
the county; in all cases where no other provision is made
by law.

. . . .

"Thirteenth. To perform such other duties as are or may be
prescribed by law."

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As is clear from the preceding statute, the financial operation of the county is vested in the board of county commissioners, and the fiscal responsibility for county affairs is placed upon the board. In order to effectively carry out these responsibilities, the Kansas Legislature in 1974 granted counties, via the board of county commissioners, the necessary power by way of "home rule" to carry out their powers and duties. (See L. 1974, ch. 110.) K.S.A. 1978 Supp. 19-101a provides:

"(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; second, counties shall have no power under this section to consolidate or alter county boundaries; third, counties shall have no power under this section to affect the courts located therein; fourth, counties shall be subject to acts of the legislature prescribing limits of indebtedness; fifth, in the exercise of powers of local legislation and administration authorized under provisions of this section, the home rule power conferred on cities to determine their local affairs and government shall not be superseded or impaired without the consent of the governing body of each city within a county which may be affected; sixth, counties shall have no power under this section to legislate on social welfare administered under state law enacted pursuant to or in conformity with public law No. 271-74th congress, or amendments thereof; seventh, counties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers; eighth, counties shall be subject to the limitations and prohibitions imposed under K.S.A. 1978 Supp. 12-187 to 12-195, inclusive, and amendments thereto, prescribing limitations upon the levy of retailers' sales taxes by counties; and ninth, counties shall have no power to exempt from or effect changes in statutes made nonuniform in application solely by reason of authorizing exceptions for counties having adopted a charter for county government.

"(b) Counties shall apply the powers of local legislation granted in subsection (a) of this section by resolution of the board of county commissioners. If no statutory authority exists for such local legislation other than that set forth

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in subsection (a) of this section and the local legislation proposed under the authority of such subsection is not contrary to any act of the legislature, such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper. If the legislation proposed by the board under authority of subsection (a) of this section is contrary to an act of the legislature which is applicable to the particular county but not uniformly applicable to all counties, such legislation shall become effective by passage of a charger resolution in the manner provided in K.S.A. 19-101b."

Having considered the powers and duties of the boards of county commissioners, it is necessary to consider both whether Resolution No. 79-53 is a legal exercise of the Board's power and whether it complies with the requisite procedure for exercising that power. As will be detailed in the following discussion, it is our opinion that Resolution No. 79-53 in some respects exceeds the legal power vested in the Board of County Commissioners, and in other respects it is procedurally deficient. In reaching this conclusion we give consideration to the substance as well as form of the above resolution.

Whereas section 3 of the resolution purports to leave in tact the "unbridled discretion of a duly elected official of this county to appoint" any person to an "authorized" position; the clear and unequivocal language of section 2 impermissibly infringes on the appointment power of elected officials. The statutory authority for elected officials to appoint subordinate employees will, by necessity, be considered individually.

The appointment powers of the Sheriff of Shawnee County are governed partially by K.S.A. 28-706 which states, in part:

"The sheriff may appoint deputy sheriffs one (1) of whom shall be designated undersheriff. The sheriff shall appoint jailers, with the approval of the board of county commissioners and one jury clerk. The sheriff may appoint a woman not related to the sheriff, as matron of the county jail. Such matron shall be a member of the sheriff's force; shall have all the authority now delegated to a deputy sheriff and shall be subject to removal for cause. The sheriff shall with the approval of the board of county commissioners also appoint a cook who is to prepare the meals for the prisoners in the county jail. The county commissioners shall pay all the expenses for feeding the prisoners in the county jail.

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No contract shall ever be made with the sheriff or other persons for feeding the prisoners."

It should be noted that, while the foregoing statute expressly requires approval of the board of commissioners for the appointment of jailers and a cook, it does not mandate board approval for the appointment of deputies or a matron. The clear implication is that the sheriff may appoint deputies at his or her pleasure without the prior approval of the board of county commissioners. It is our opinion that the sheriff's appointment discretion is governed only by budgetary restraints, and that if the sheriff makes appointments which will not exceed the previously approved budget, pursuant to K.S.A. 79-2927, he or she need not obtain the board's prior approval. It should be noted that this opinion does not consider collateral appointment limitations such as civil service regulations, qualifications of various appointees as law enforcement officers, etc., which may effectively limit the sheriff's discretion in other respects. Those considerations aside, we believe that section 2 of Resolution 79-53 is contrary to K.S.A. 28-706 and, consequently, is an exercise of power beyond the statutory powers set out in K.S.A. 19-212 and K.S.A. 1978 Supp. 19-101a as applied.

Although we have concluded that Resolution No. 79-53 impermissibly infringes upon the existing statutory appointment power of the sheriff regarding deputy sheriffs, we also would note the collateral question of whether such action may be permissible by way of charter resolution in accordance with K.S.A. 19-101b. Since K.S.A. 28-706 is not an act of the legislature which applies uniformly to all counties, it might be argued that the procedural deficiency resulting from the use of a general resolution could be cured by way of a charter resolution. However, we find that argument without merit. Having reviewed the statutes prescribing powers and duties of sheriffs, we find that K.S.A. 19-805 and 28-706 are the only statutes providing for the appointment of deputies. As such they are statutes in pari materia. Clark v. Murray, 141 Kan. 533, 537 (1935). The fact that they were enacted at different times does not alter such conclusion. Flowers, Administratrix v. Marshall, Administrator, 208 Kan. 900, 904, 905 (1972). To consider these statutes as being in pari materia is extremely pertinent to determining whether a county may exempt itself therefrom by using its home rule powers.

While there is a body of case law developing regarding home rule power of cities (Kan. Const. Art. 12, §5), there is a complete absence of precedential court decisions pertaining to the county home rule statutes. Thus, to the extent there is an identity or substantial similarity between provisions of these respective grants of home rule powers, we think it appropriate to apply decisional law construing cities' home rule powers.

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In this instance, the holdings of Claflin v. Walsh, 212 Kan. 1 (1973), are relevant.

Claflin concerns the determination of whether legislative enactments apply uniformly to all cities. The Court found that the key to such determination is legislative intent, which is to be ascertained by application of rules of statutory construction where such intent is not expressly stated. Id. at 8. Principal among these is the rule that statutes in pari materia be construed together to determine legislative intent, with the following statement from Claflin having relevance:

"In addition, to be in pari pateria statutes need not have been enacted at the same time. Statutes relating to the same subject, although enacted at different times are in pari materia and should be construed together.

.....
"These rules of construction require us to consider all statutes relating to the same subject together in determining legislative intent. We should follow these rules in determining whether the legislature intended to have a statute applied 'uniformly to all cities.' " Id. at 8.

Applying these rules to your inquiry and construing the provisions of K.S.A. 19-805 and 28-706 together, it is apparent that these statutes evince a uniform legislative policy regarding the appointment of sheriffs' deputies. Even though 28-706 itself has limited application, its provisions regarding appointment of deputies are consonant with those of 19-805 and, in our judgment, do not alter the latter's uniform applicability to counties. Although it is clear that the board may utilize "home rule" powers by charter resolution to alter acts of the legislature which apply to that particular county, it is our opinion that such a resolution cannot abrogate the powers granted in Kansas legislation which apply uniformly, i.e., the appointment powers of Kansas sheriffs.

The foregoing conclusion applies only to the sheriff's appointment of deputies, and should not be construed as applying to clerical employees and office assistants which will be discussed in a separate portion of this opinion. With regard to the appointment of jailers and a cook, it is our opinion that Resolution No. 79-53 exhibits a proper exercise of the Board's statutory authority and for that reason the Sheriff is bound by the dictates of the resolution in making such appointments. With respect to the appointment of a matron, we believe that a charter resolution would be required and that Resolution No. 79-53 is deficient for that purpose.

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The appointment powers of a district attorney are established in K.S.A. 22a-106 which provides, in part:

"Within the limits of appropriations therefor, the district attorney shall appoint such assistant district attorneys, deputy district attorneys and other stenographic, investigative and clerical hire as may be necessary to carry out the functions of the district attorney's office in such judicial district, and he shall determine the annual compensation of each assistant district attorney and other persons appointed pursuant to this subsection. The county commissioners shall determine and allow such reasonable sums from funds of the county for compensation of assistants, deputies and other stenographic, investigative and clerical hire and for other expenses of such office as may be necessary to carry out the function of such office." (Emphasis supplied.)

This statutory provision explicitly gives appointment discretion to the elected official, with the sole limitation being that the district attorney not exceed the funds appropriated. In light of the explicit language of K.S.A. 22a-106, it is our opinion that Resolution 79-53 is contrary to an act of the legislature, and for that reason it is invalid with regard to the District Attorney. Additionally, it is our opinion that the powers of the district attorney may not be altered by way of charter resolution, in that the appointment powers of the district attorney are not "county business" within the contemplation of K.S.A. 1978 Supp. 19-101a. K.S.A. 22a-101 provides, in part:

"Said district attorney is hereby declared to be an executive officer of the judicial district in which he is elected, with said office constituting a separate entity within said district for administrative purposes, and in no event shall said district attorney be deemed an officer of any county."

It is our opinion that the foregoing statute exempts the operation of the office of the district attorney from alteration by charter resolution. In any event, since Resolution No. 79-53 is a general resolution, it is invalid as enacted with regard to the office of the district attorney.

The appointment powers of the county clerk, county treasurer and register of deeds are set out in K.S.A. 19-302, 19-503 and 19-1202, respectively. Each of these statutes provides that the particular official may appoint a deputy (and additional deputies in the case of the county clerk), and to the extent that Resolution 79-53 conflicts with this statutory power

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it is invalid. It is our opinion that the appointment discretion of these officials, just as that of the sheriff and district attorney, is limited only by established budget appropriations. Since K.S.A. 19-302, 19-503 and 19-1202 apply uniformly to all counties, the specific appointment powers of these officials would not be subject to alteration by charter resolution.

Employment of clerk hire and office assistants by county officers is governed by K.S.A. 19-235 which provides:

"That whenever the county commissioners of any county in the state of Kansas shall allow any sum of money to any county officer for clerk hire or for an assistant in his office, the said sum so allowed shall be available for the payment of any such clerk hire or assistance, upon itemized and verified vouchers presented by the clerk or assistant employed in such office, and such voucher shall be approved by the county officer in whose office such clerical work or assistance is performed. All payments made on account of such voucher shall be made directly to the clerk or assistant performing such services, and in no case shall any part of the moneys so allowed by the county commissioners be paid to the county officer in whose office such work or assistance is performed." (Emphasis supplied.)

In our opinion the critical language of the foregoing statute is that which we emphasized. From that language it is apparent that the county commissioners have discretion regarding the sum of money which may be allowed to any officer for clerk hire or assistants; however, there is no language which indicates that the county commission is empowered to directly control the number of clerical personnel or office assistants. Rather, it is our impression that once the county commissioners have allowed a sum of money to the county officer for the purpose of employing clerical employees, the determination of how many employees should be hired is within the discretion of the county officer. To the extent that Resolution No. 79-53 alters the foregoing interpretation, it is our opinion that the resolution exceeds the authority vested by law in the board of county commissioners.

Throughout the preceding discussion, we have repeatedly indicated that elected county officials may exercise statutory power to appoint employees, as long as they do not exceed the amounts appropriated for that purpose in the budget adopted by the board of county commissioners. This conclusion is based upon our interpretation of the statutes applicable to the county budgetary process set out in K.S.A. 79-2925 through 79-2963, and amendments thereto, commonly referred to as the Budget Law. The requirement that counties accomplish an itemized budget is set out in K.S.A. 79-2927 which, in part, provides:

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"The governing body of each taxing subdivision or municipality shall meet not later than the first day of August of each year, and shall respectively make in writing on forms furnished by the director of accounts and reports a budget properly itemized and classified by funds and showing all amounts of money to be raised by taxation and from all other sources for the ensuing budget year."

The subsequent budgetary process is more fully set out in K.S.A. 1978 Supp. 79-2929 which states, in part:

"Prior to the filing of the adopted budget with the county clerk, the governing body of each taxing subdivision or municipality shall meet for the purpose of answering and hearing objections of taxpayers relating to the proposed budget and for the purpose of considering amendments to such proposed budget. Said governing body shall give at least ten (10) days' notice of time and place of said meeting by publication in a weekly or daily newspaper of the county having a general circulation therein, which notice, except as otherwise hereinafter provided, shall set out all essential items in the budget excepting such groupings as may be designated by the director of accounts and reports on a special publication form prescribed by the director of accounts and reports and furnished with the regular budget form."

The effect of the approved budget is considered in K.S.A. 79-2934 which provides:

"The budget as approved and filed with the county clerk for each year shall constitute and shall hereafter be declared to be an appropriation for each fund, and the appropriation thus made shall not be used for any other purpose. No money in any fund shall be used to pay for any indebtedness created in excess of the total amount of the adopted budget of expenditures for such fund, and any balance remaining in such fund at the end of the current budget year shall be carried forward to the credit of said fund for the ensuing budget year. The clerk or secretary of each taxing subdivision or municipality shall open and keep an account of each fund, showing the total amount appropriated for each fund, and shall charge such appropriation with the amount of any indebtedness created at the time such indebtedness is

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incurred: Provided, That if any of such indebtedness is reimbursed during the current budget year and such reimbursement is in excess of the amount which was shown as reimbursed expense in the budget of revenues for the current budget year the charge so made shall be reduced by the amount of the reimbursement.

"No part of any fund shall be diverted to any other fund, whether before or after the distribution of taxes by the county treasurer, except as provided by law." (Emphasis supplied.)

It is our opinion that the foregoing statutory scheme mandates the board's formulation, publication and filing of an explicit budget for the ensuing year. As indicated in K.S.A. 79-2934 the budget as approved constitutes an appropriation for each fund, and it is our understanding that each fund sets out allocations within the fund for particular purposes. Although our research fails to reveal any specific statutory provision or decisional law which expressly requires that all county officials are entitled to the full use of their allocation, it is our opinion that such a conclusion must be implied from a review of all applicable statutes. (Such an express mandate is contained in K.S.A. 1978 Supp. 22a-106 regarding district attorneys.) In a practical sense, the proposed budget is accomplished following input from the various elected officials regarding their fiscal requirements for the proper administration of their respective offices. The proposed budget is the final result of proposals, negotiations and compromise between the Board and the elected officials, and the final step in the process is a public hearing provided for in K.S.A. 1978 Supp. 79-2929, wherein taxpayers of the county may voice objections and challenge the propriety of the budget. It is only after these official and unofficial steps have been followed that the final budget is filed. In light of this extensive and lengthy process, it is our opinion that both the taxpayers and the elected officials may rely on the final document as a statement by the Board of the moneys which will be used in carrying on the business of the county. To find otherwise would be to render virtually meaningless the authority which is vested in the elected officials to carry out their statutory duties and obligations.

We express no opinion regarding the power of the Board to indirectly exert control over the number of employee appointments by way of fiscal restraint during the budgetary process negotiations; however, in our opinion the passage and implementation of Resolution 79-53 exceeds the permissible exercise of budgetary power and usurps the statutory powers granted duly elected county officials. Therein lies the deficiency of the resolution and the rationale for the substance of this opinion.

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In conclusion, it is our opinion that the power of appointment which is statutorily vested in duly elected county officials carries with it an authority for office management which may not be directly abridged by a general resolution couched in the language of fiscal restraint, however well intentioned. The power of the board of county commissioners regarding the financial matters of the county is extensive; however, that power may not be exercised so as to impinge upon the statutory authority of other elected county officials.

This opinion has required an extensive and interpretive view of the county-level power structure in its entirety and, specifically, a review of the relationship between the board of county commissioners and other elected county officials. As indicated we are faced with interpreting the relationship between the fiscal power of the board and the power and authority of the elected officials to conduct the activities of their respective offices. It is our opinion that the balancing factor between these two powers is the statutory budget process. It is during this process that all of the involved parties, including the taxpayers, have the opportunity to participate and effect a final, published document which reflects the intended financial commitment for the ensuing year. Once the budgetary process is complete and the budget is officially approved, the elected officials must be free to carry on the duties of their office in their sound discretion. As long as these officials operate within the confines of the approved appropriations, it is our opinion that neither the Kansas statutes nor decisional law permits an infringement upon their functions. In our judgment nothing less would assure their autonomy as duly elected officials clothed with the public trust and confidence by which they attained their office.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


James E. Flory
Assistant Attorney General

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