



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 81-287

Jeanine Lockwood
Bourbon County Clerk
Bourbon County Courthouse
Fort Scott, Kansas 66701

Re: Counties and County Officers -- County Commissioners -- Control of County Clerk's Office

Synopsis: The deputy county clerk is not required by law to remain in the clerk's office at all times when the clerk is absent and may attend meetings with the clerk.

The board of county commissioners has the authority to set office hours for the offices of elected county officials; however, the board may not set the working hours of the elected officials. Cited herein: K.S.A. 1980 Supp. 19-101a, K.S.A. 19-212, 19-302, 19-2601, K.S.A. 1980 Supp. 25-101, K.S.A. 25-702, K.S.A. 1980 Supp. 25-4301, K.S.A. 28-824, 60-1205, 75-714.

* * *

Dear Ms. Lockwood:

You have asked several questions regarding the authority of the board of county commissioners to exercise control over you as county clerk and your office. Specifically, you have asked:

- "1. Whether the county clerk and her deputy may attend meetings together or whether the deputy must remain in the clerk's office to perform the clerk's duties when the clerk is away.

- "2. Whether the board of county commissioners have total control of the budget, and whether the powers they have regarding the budget permits the board to hire or fire elected officials and their office personnel.
- "3. Whether the board of county commissioners may determine what time elected officials are to report to work."

We understand that the meetings you wish to attend are those held by various groups for county clerks which provide training and information relevant to their official duties and for which a fee is charged.

To determine whether the deputy clerk is required to remain in the office while the clerk is away attending a meeting, we first look to the statute which pertains to the deputy county clerk. K.S.A. 19-302 states in pertinent part:

"Every such clerk shall appoint a deputy . . . and such deputy, in case of the absence or disability of such clerk, or in case of a vacancy in his office, shall perform all the duties of such clerk during such absence, or until such vacancy shall be filled."

While the statute states that the deputy "shall" perform all duties during the absence of the clerk, in those few Kansas Supreme Court cases which discuss the duties of the deputy clerk, the court has interpreted the statute as permitting the deputy clerk to perform the clerk's duties. There is no indication from the court that the deputy clerk is required to perform the clerk's duties in all cases of absence, disability or vacancy. See, Amrine and Russell v. K.P.R.R. Co., 7 Kan. 179 (1871); Missouri River, Fort Scott & Gulf Railroad Co. v. Morris, 7 Kan. 136 (1871); Whitford v. Lynch, 10 Kan. 180 (1872). As the Kansas Supreme Court stated in Paul v. City of Manhattan, 212 Kan. 381 (1973),

"'Shall' is frequently read to mean 'may' where the context requires . . . As we said in City of Hutchinson v. Ryan, 154 Kan. 751 'In determining whether statutory provisions are 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.' (Syl. ¶1)" (Citations omitted.) Id. at 385.

In our opinion, K.S.A. 19-302 merely provides an orderly procedure by which public business may continue to be conducted in the event the county clerk is unable to do so by virtue of the county clerk's absence. There is no indication that any party's rights will be affected by the deputy's failure to be in the office whenever the clerk is absent, since assistants may perform ministerial acts which the clerk has delegated to them. 63 Am.Jur.2d Public Officers and Employees §483 (1972). Thus, in our opinion, "shall perform" in K.S.A. 19-302 must be interpreted as directory only, and therefore, would not prevent the deputy from attending a meeting with the county clerk, assuming the clerk's office has other personnel available who will keep the office open as required by K.S.A. 1980 Supp. 12-2601.

Next, you ask whether the board of county commissioners may hire and fire elected officials and their office personnel. Elected officials are not "hired" or appointed by the board of county commissioners; they are selected for their offices by the voters of the county in a general election held pursuant to K.S.A. 1980 Supp. 25-101 et seq. Likewise, elected officials can not be "fired" by the board of county commissioners, but may be removed from office by ouster proceedings brought by the attorney general or the county attorney (K.S.A. 60-1205), or by recall election (K.S.A. 1980 Supp. 25-4301 et seq.).

Personnel in the county clerk's office are selected in a different manner. K.S.A. 19-302 provides in pertinent part:

"Every such clerk shall appoint a deputy, in writing, under his hand, and shall file such appointment in his office . . . Every such clerk may appoint other deputies"

The appointment power regarding deputy county clerks is vested solely in the county clerk. Consent or approval of the board of county commissioners is not required. Simply stated, the board of county commissioners is without authority to hire or fire deputy county clerks. With regard to other office

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personnel in the county clerk's office, we find no statute which specifically grants authority to either the county clerk or the board of county commissioners to hire such personnel. It appears that, in the absence of a uniformly applicable statute to the contrary, the board could establish hiring and firing procedures for the non-deputy personnel in the clerk's office pursuant to its home rule power to determine matters of local administration. K.S.A. 1980 Supp. 19-101a.

Although K.S.A. 28-824 requires the board of county commissioners in counties having a population of 100,000 or less to "allow such reasonable sums for salaries and compensation of assistants, deputies, clerks and stenographers as may be necessary to properly expedite the business of the several offices of the county," it does not specify who is to determine what is "necessary." However, when 28-824 is read in conjunction with K.S.A. 79-2927, which requires the board of county commissioners as the governing body of the county to set the county's annual budget, and also read in conjunction with the power granted to the board of county commissioners in K.S.A. 19-212 Second "[t]o examine and settle all accounts . . . of the county," the determination of how much money will be spent on clerks, assistants, deputies and stenographers to expedite the county's business plainly lies within the power of the board, not the county clerk. Therefore, the county clerk has the power to determine which persons are to serve as deputies, but the board retains the power to fund only the number of positions it deems to be necessary to conduct the county's business. We are compelled to note, however, that unresolved staffing conflicts between the board and the other county officers may be periodically settled by the courts on a case by case basis, as the question of what staffing is "necessary" for a particular county is a question of fact.

Finally, you ask whether the board of county commissioners may determine what time elected officials are to report to work. K.S.A. 1980 Supp. 19-2601 provides:

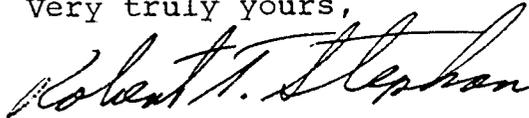
"Every county officer shall keep his or her office at the seat of justice of such county, and in the office provided by the county, if any such has been provided; and if there be none established, then at such place as shall be fixed by special provisions of law; or if there be no such provisions, then at such place as the board of county commissioners shall direct, and they shall keep the same

open during such days and hours as shall be fixed by the board of county commissioners; and all books and papers required to be in their offices shall be open for the examination of any person; and if any of said officers shall neglect to comply with the provisions of this section, such officer shall forfeit, for each day he or she so neglects, the sum of five dollars (\$5)." (Emphasis added.)

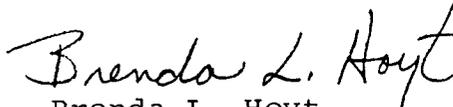
By virtue of this statute, the board has the authority to set office hours for all county offices, including the clerk's office. The Kansas Supreme Court affirmed this authority in Whitmer v. House, 198 Kan. 629 (1967). The statute refers to the hours an office is to be open and the duty of the county officer to keep his or her office open in compliance with same. In our opinion, the county clerk has a duty to keep her office open during the established hours with sufficient deputies or other assistants present to conduct the county's business. However, the board may not extend its power to set office hours to require an elected public official to report to work at a particular time.

In summary, it is our opinion that the deputy county clerk is not required by law to remain in the clerk's office at all times when the clerk is absent and may attend meetings with the clerk. In addition, while the board of county commissioners has the authority to set office hours for the offices of elected county officials, the board may not set the working hours of the elected officials.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Brenda L. Hoyt
Assistant Attorney General