



STATE OF KANSAS

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January 14, 1983

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ATTORNEY GENERAL OPINION NO. 83- 3

William D. Rustin
County Counselor
Sedgwick County Courthouse
Suite 315
Wichita, Kansas 67203-3790

Re: Insurance--Fireman's Relief Fund--Penalties for
Non-Payment; Ability of Fire District to Pay Counsel

Synopsis: K.S.A. 40-1703 requires each insurance company providing fire protection coverage to pay an annual tax to the commissioner of insurance of 2% of the premiums collected for such coverage, with the taxes then paid over to the firemen's relief association of the city, township, county or fire district from which the premiums were collected. In the event of a failure by an insurance company to pay the required amount, K.S.A. 40-1705 allows these governmental entities to recover a civil penalty of \$300 for each violation, with the penalty going to the use and benefit of the firemen's relief association. As the employment and compensation of legal counsel is necessarily implied by the statute authorizing suit, a fire district may use a portion of the penalties so recovered to pay its attorney, although the tax money itself may not be so spent. Cited herein: K.S.A. 40-1702, 40-1703, 40-1705, 40-1706, 40-1707.

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Dear Mr. Rustin:

As Sedgwick County Counselor, you request our opinion on a question concerning Fire District No. 1, of which the Sedgwick County Commission is the governing board. Specifically, you

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inquire whether the fire district may use a portion of any civil penalty collected under K.S.A. 40-1705 to pay attorney's fees due and owing to their counsel for his efforts on the district's behalf. As no express language exists in the statutes which either allows or prohibits this, any conclusion reached must be based on principles of statutory interpretation.

The statutes in question are contained within the Firemen's Relief Fund Act, K.S.A. 40-1701 et seq. This act is intended to provide for the establishment and funding of firemen's relief associations within the fire departments of Kansas counties, cities and townships, as well as specially-created fire districts like District No. 1 in Sedgwick County. The associations provide a variety of services and benefits for injured or disabled firemen, as well as for the families of those who die as a result of service-related causes (K.S.A. 40-1707). Funding is provided by a tax upon insurance companies who issue fire and lightning insurance policies for the area served by the individual fire department. This tax, set at 2% of the premiums collected for such coverage, is paid to the commissioner of insurance (K.S.A. 40-1703), and then distributed to the local associations. K.S.A. 40-1706.

The statute which prompted your request, K.S.A. 40-1705, concerns the failure of an insurance company to pay the tax or perform other acts required by the statutes. Therein, it is stated:

"Every such insurance company who shall neglect to keep such books of account as aforesaid, or shall fail or neglect to report or pay over any of the money due on premiums received as provided in this article at the times and in the manner specified in this article, or shall be found upon examination to have made a false return of business done by them, shall for each offense forfeit three hundred dollars (\$300) for the use and benefit of such firemen's relief association of such city, township, county or fire district, to be recovered in a civil action in the name of the city, township, county or fire district." (Emphasis added.)

You inquire whether the fire district may, on the authority of this section, enter into contingent fee arrangements with its attorney whereby he or she would be compensated from the \$300 civil penalty. This would occur when the attorney was successful

in prosecuting an insurance company which either failed to pay the requisite tax or paid funds due the district to another entity.

Admittedly, the express wording of the statute itself does not envisage such a situation. However, in our opinion this silence is by no means dispositive of the question. In addition to powers specifically given them by statute, governmental units possess those limited, implied powers which are necessary to effectively exercise the former. See, e.g., Tilton v. Riley County, 194 Kan. 250 (1965), State ex rel. v. City of Topeka, 176 Kan. 240 (1954). Cases which have found certain powers to be necessary, and therefore incidental to other powers specifically authorized, have generally done so only where the purpose of the statute could not be fulfilled without such power. State, ex rel. v. Davis, 114 Kan. 270 (1923), Edwards County Commissioners v. Simmons, 159 Kan. 41 (1944). In the latter case, the authority of the county commissioners to contract for attorneys' services to intervene in a receivership action was challenged. The court stated:

"The statute provides that a board of county commissioners may direct that suit be brought against the delinquent utility corporation, that a receiver may be appointed, that such proceedings may be taken as are necessary to collect the delinquent taxes, and that the board may intervene in any suit brought by other parties (79-2101a). It would be a wholly unreasonable construction to hold that the board might do all of that but might not employ attorneys for the purpose. The statute plainly contemplates that the board may employ such reasonable means as are necessary to effect the statutory purpose. How else would the board have intervened in the receivership action in Reno county except by the employment of attorneys?" Id. at 52, 53.

Accordingly, in that K.S.A. 40-1705 authorizes a district to initiate a lawsuit when an insurance company fails to perform certain acts, the power to employ and pay an attorney must of necessity be inferred. Further, the method of payment (i.e. hourly or on a contingent basis) is a matter within the discretion of the district.

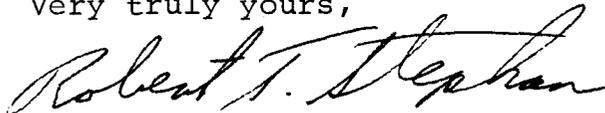
It is additionally our opinion that a fire district may use all or a portion of the civil penalty received under K.S.A. 40-1705 to pay its counsel. Unlike the money received from the 2% tax, the use of which is strictly delineated by K.S.A. 40-1706 and

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40-1707, the civil penalty recovered under the former statute can be spent "for the use and benefit" of the relief association of the district. In that the initiation of a lawsuit to require deposit of the necessary funds is clearly of benefit to the relief fund, the ability to use the civil penalties recovered thereunder for attorneys' fees would, by facilitating such suits, also benefit the district's relief association.

In conclusion, K.S.A. 40-1703 requires each insurance company providing fire protection coverage to pay an annual tax to the commissioner of insurance of 2% of the premiums collected for such coverage, with the taxes then paid over to the firemen's relief association of the city, township, county or fire district from which the premiums were collected. In the event of a failure by an insurance company to pay the required amount, K.S.A. 40-1705 allows these governmental entities to recover a civil penalty of \$300 for each violation, with the penalty going to the use and benefit of the firemen's relief association. As the employment and compensation of legal counsel is necessarily implied by the statute authorizing suit, a fire district may use a portion of the penalties so recovered to pay its attorney, although the tax money itself may not be so spent.

Very truly yours,



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Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

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