



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

April 11, 1983

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

ATTORNEY GENERAL OPINION NO. 83- 54

Stanley E. Antrim
Attorney at Law
P. O. Box 1278
101 West Fourth Street
Liberal, Kansas 67901

Re: Counties and County Officers--Hospitals--Pension
and Deferred Compensation Plans; Effect of
Participating in Public Employees Retirement
System

Synopsis: A county hospital organized and operated pursuant to K.S.A. 19-1801 et seq. may, at the discretion of the board of trustees, establish and fund pension and deferred compensation plans for its employees. If it desires, the board may affiliate with the Kansas Public Employees Retirement System (KPERS) by submitting an application for affiliation under K.S.A. 1982 Supp. 74-4910. Such an application must be approved by a two-thirds vote of the board of trustees, and is irrevocable once it is filed with KPERS. Cited herein: K.S.A. 19-1803, 19-1804, K.S.A. 1982 Supp. 74-4902, 74-4910.

*

*

*

Dear Mr. Antrim:

As Attorney for the Southwest Medical Center, Liberal, Kansas, you request the opinion of this office concerning the effect of K.S.A. 1982 Supp. 74-4910. That statute, which allows local

units of government to join the Kansas Public Employees Retirement System (KPERS), contains language which arguably makes any decision to participate irrevocable. You inquire whether this wording applies to an election to participate made by a county hospital such as Southwest Medical Center, or to merely decisions made by a city or township.

You inform us that Southwest Medical Center is a county hospital organized under the provisions of K.S.A. 19-1801 et seq. Operation of the hospital is supervised by a board of trustees appointed by the Seward County Commission (K.S.A. 19-1803). The powers and duties of the board are set out in K.S.A. 19-1804. At subsection (f) of that statute, the board is empowered to "establish and fund pension and deferred compensation plans for hospital employees," although it is not required to do so.

You further inform us that in 1974 the board determined to use its authority in this respect, and enacted a resolution whereby the hospital applied for membership in KPERS. This application, which was approved by the board of county commissioners, was accepted by KPERS, with the hospital making the required contributions since that time. Now, however, a question has arisen as to whether the board may now withdraw from the system, presumably to fund its own plan. Given the wording of K.S.A. 1982 Supp. 74-4910, you inquire whether such action is permitted.

K.S.A. 1982 Supp. 74-4910 is contained in the act which establishes KPERS, and, with some revisions, has existed in its present form since the creation of the system in 1961. The statute sets out the procedure by which an "eligible employer" may join the system. We note that eligible employers are defined by K.S.A. 1982 Supp. 74-4902 to include "the state of Kansas, and any county, city, township, special district or any instrumentality of any one or several of the aforementioned whose employees are covered by social security." Given this broad definition, there is no question but that the hospital is an eligible employer, and in fact no controversy exists on this point. Rather, the question which is presented concerns the effect of the hospital's election to join KPERS under the terms of K.S.A. 1982 Supp. 74-4910, and whether it may now reverse this action.

The pertinent portion of the statute is contained at subsection (a), which states:

"An eligible employer may join the system on January 1 of any year. Application for affiliation shall be in the form of a resolution approved by the governing or legislative body of the eligible employer or by

any other body or officer authorized by law or recognized by the board to approve the action. No city or township shall become a participating employer except by the adoption of a resolution therefor, which shall be published once in the official city or township newspaper or, if there is none, in a newspaper of general circulation in the city or county. No such resolution shall take effect until 60 days after its final publication. If within 60 days of its final publication a petition signed by electors equal in number to not less than 10% of the electors who voted at the last preceding regular election in the township, in the case of townships, the last regular city election in the city, in the case of cities is filed in the office of the clerk of such city, or township demanding that such resolution be submitted to a vote of the electors, the resolution shall not take effect until submitted to a referendum and approved by a majority of the electors voting thereon. A 2/3 vote of the members-elect of the governing body shall be necessary for the affiliation of any eligible employer other than a city or township. An application for affiliation with the system shall be filed with the board not later than 30 days prior to the date participation is to begin, except as such time limit may be extended by the board. Upon the filing of a certified copy of such resolutions with the board an election pursuant to this section shall be irrevocable, and the employer shall become a participating employer on January 1 of the year immediately following the filing of such election with the board." (Emphasis added.)

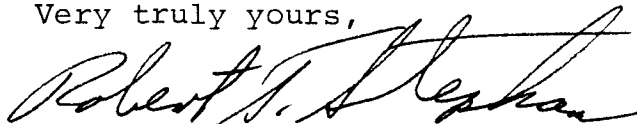
Given the numerous special provisions contained in the statute for cities and townships, can it be concluded that the last sentence of the subsection, which provides for the irrevocability of an election to join, also applies only to such units of government? In our opinion, such a result cannot be reached, given the plain language of the statute and the broad way in which eligible employer is defined earlier in the act. Irrevocability is contingent

Stanley E. Antrim
Page Four

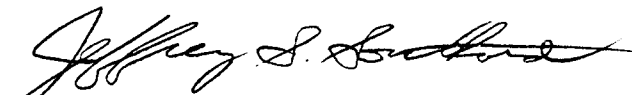
upon the filing of a "resolution" containing the application for affiliation, with nothing limiting the effect to only resolutions of cities or townships. As there is nothing ambiguous about the statute to require the use of other rules of statutory construction [Sutton v. State, 6 Kan.App.2d 831 (1981)], we conclude that submission of the resolution (and its acceptance by KPERS) had the effect of making the hospital's participation permanent. Other prior opinions of this office have reached the same result. VI Op. Atty. Gen. 495 (1969).

In conclusion, a county hospital organized and operated pursuant to K.S.A. 19-1801 et seq. may, at the discretion of the board of trustees, establish and fund pension and deferred compensation plans for its employees. If it desires, the board may affiliate with the Kansas Public Employees Retirement System (KPERS) by submitting an application for affiliation under K.S.A. 1982 Supp. 74-4910. Such an application must be approved by a two-thirds vote of the board of trustees, and is irrevocable once it is filed with KPERS.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:jm