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April 26, 1985

ATTORNEY GENERAL OPINION NO. 85- 41

The Honorable Marvin A. Harder
Secretary of Administration
Room 263-E, State Capitol Building
Topeka, Kansas 66612

Re: Counties and County Officers -- County Counselor --
Duties; Social Security Benefits

Synopsis: A county counselor appointed by a board of county commissioners and whose responsibilities require some exercise of the sovereign authority of the county is a county officer. As such an officer, the county counselor is a county "employee" as defined in K.S.A. 40-2302(c), and the remuneration he receives for holding the office is "wages" as defined in K.S.A. 40-2302(a). Cited herein: K.S.A. 19-101; K.S.A. 1984 Supp. 19-101a; 19-247; K.S.A. 40-2301; 40-2302; K.S.A. 1984 Supp. 40-2305; K.S.A. 79-2101; 79-3419; 79-34,102.

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Dear Secretary Harder:

You have requested our opinion on various questions concerning the Reno County counselor. You inform us that the Reno County Commissioners have entered into an agreement with a local law firm for the purpose of obtaining the services of a member of the firm as Reno County counselor.

The agreement recites that the county commissioners have "established a position of County Counselor" and that they wish

to obtain the services of Joseph P. O'Sullivan "to serve as County Counselor for Reno County and to perform the duties specified" The agreement then provides:

"1. That Joseph P. O'Sullivan will serve as County Counselor for Reno County, and in this capacity will attend meetings of the County Commission when requested; give legal advice to said commissioners and other county officials; represent the county in civil suits and all other matters of civil law; prepare or review for legality county resolutions, contracts, agreements, and other written documents requiring legal review; and generally perform duties for Reno County as set out in K.S.A. 19-247."

K.S.A. 1984 Supp. 19-247, which the agreement incorporates, establishes the duties of a county counselor as follows:

"The county counselor shall: (a) When requested by the board of county commissioners or when necessary, attend the meetings of such board:

"(b) give advice upon all legal questions that arise and assist the board on all legal matters referred to the county counselor;

"(c) commence, prosecute or defend, as the case requires, all civil suits or actions in which the county is interested and represent the county generally in matters of civil law;

"(d) draw all contracts and other papers required by the board of county commissioners and furnish to the board, when requested by it, opinions in writing upon legal matters pending before the board;

"(e) if applicable, perform the duties provided by K.S.A. 19-716 and amendments thereto; and

"(f) perform all the duties in civil matters that have previously been required by law of the county attorney of the county. (Emphasis added.)

Compensation for the services of county counselor is provided in the form of a monthly retainer with provisions for prorating the fee if fewer than 18 hours of legal services are provided in a month. In addition, services requiring more than 18 hours per calendar month are to be paid at an hourly rate on a case by case basis. The agreement also provides that the county counselor shall not be considered an employee of Reno County nor be entitled to any rights or privileges associated with county employment "including insurance or retirement benefits and compensation or indemnity for injury or sickness arising out of the performance of legal services for the county."

You raise several questions concerning this arrangement, the most important of which is whether the Reno County counselor is a county officer covered by the agreement between the county and your office pursuant to K.S.A. 40-2301 et seq. This agreement provides coverage for county employees under the Old Age and Survivors Insurance program contained in the social security act. You also ask whether the county's agreement with Mr. O'Sullivan's law firm is "valid."

As you are aware, K.S.A. 40-2301 declares the policy of this state to be as follows:

"In order to extend to certain employees of the state and its political subdivisions and to the dependents and survivors of such employees, the basic protection accorded to others by the old-age and survivors insurance system embodied in the social security act, it is hereby declared to be the policy of the legislature, subject to the limitations of this act, that such steps be taken as to provide such protection to employees of the state and its political subdivisions on as broad a basis as is permitted under the social security act."

Since 1951, Reno County has participated in an agreement with your agency to extend the benefits of Old Age and Survivors Insurance to county employees. K.S.A. 40-2302(a) defines "wages" as all remuneration for employment or service of the state or a political subdivision of the state. K.S.A. 40-2302(c) defines the term "employee" to include an officer of the state or a political subdivision of the state. In our opinion, the Reno county counselor is such an officer and therefore, is an "employee" for the purposes of K.S.A. 40-2301 et seq.

While there is no express statutory authorization for a county to hire a county counselor, previous Attorney General Opinions have concluded that a board of county commissioners may appoint a county counselor in the exercise of the home rule power provided by K.S.A. 19-101 and K.S.A. 1984 Supp. 19-101a. See Attorney General Opinions Nos. 78-127; 77-31. A board of county commissioners may then prescribe the duties of a county counselor, either by reference to K.S.A. 1984 Supp. 19-247 or independently of that statute.

As noted above, the agreement entered into by the Reno County commissioners defines the county counselor's responsibilities by incorporating K.S.A. 1984 Supp. 19-247. That statute defines the duties of the counselor to include performance of all the duties in civil matters that previously have been required by law of the county attorney. Some of these responsibilities involve the exercise of authority which, in our opinion, makes the county counselor a county officer.

In Opinion No. 83-133, the Attorney General noted that one of the attributes of public office is the right to exercise some definite portion of the sovereign power. Sowers v. Wells, 150 Kan. 630 (1939). In distinguishing an office from mere employment, it has been said:

"Although an office is an employment, it does not follow that every employment is an office. An individual may be employed under a contract, express or implied, to do an act or perform a service without becoming an officer. But where the duties are continuing ones which are defined by government-prescribed rule and not by contract, and the government-appointed individual performs these duties without any contract defining them, if the duties continue even though the person performing them changes it is difficult to distinguish such employment from an office, or the person performing the duties from an officer." (Emphasis added.)
3 McQuillin, Municipal Corporations, §12.30.

Attorney General Opinion No. 83-133 was concerned with an attempt by a city to authorize "independent contractors" to exercise some of the sovereign power of the city. The opinion concluded that such an attempt was contrary to public policy and void. The individuals in question, however, were found to be de facto officers because they exercised some of the sovereign authority under an apparently legitimate appointment. As such

officers, they were also city employes for the purposes of social security contributions. The Reno County agreement pertaining to the services of a county counselor does not purport to establish an "independent contractor" relationship. Instead the commissioners have appointed an attorney to fill the recently established position of county counselor. The counselor is required to perform duties for the county as prescribed by state law. K.S.A. 1984 Supp. 19-247. Thus, the county counselor is performing duties defined by government prescribed rule. His responsibilities are not specifically defined by the contract and presumably the duties of office will continue regardless of who performs them. In establishing and filling the county counselor position, in our opinion, the county commissioners have established a county office.

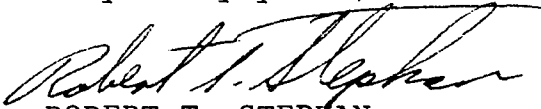
Much of the county counselor's role as legal advisor to the county does not involve the exercise of sovereign authority. However, a county counselor is required by law to perform various acts necessary to and inherent in the county's power of taxation. For example, K.S.A. 79-2801 requires the county attorney or county counselor, as ordered by the county commissioners, to institute civil actions to enforce liens for delinquent taxes on unredeemed real estate in the county. The statute further provides that:


"Any member of the board of county commissioners, county attorney or county counselor who fails to perform the duties required by this section shall forfeit the office held by such officer." (Emphasis added.)

According to the agreement in question, the Reno County counselor performs all duties in civil matters which are required of the county attorney. K.S.A. 79-2101 makes it the duty of the county attorney to begin proceedings which are necessary to collect a judgment for delinquent personal property taxes. A county attorney (or, as here, a county counselor) is also required to pursue all civil proceedings necessary for the recovery of tax, penalties and interest due under the Liquified Motor Fuel Tax. K.S.A. 79-34,102. Similar responsibilities regarding enforcement of the Motor Vehicle Fuel Tax belong to the county attorney. See K.S.A. 79-3419. In performing such functions, the county counselor exercises a portion of the sovereign power of taxation and thus acts as an officer of the county. As such an officer, the counselor is also a county employee pursuant to K.S.A. 40-2302(c). The remuneration the counselor receives for holding the office is therefore "wages" as defined in K.S.A. 40-2302(a). Presumably, the agreement between Reno County and

the State of Kansas regarding social security benefits is applicable to all county employees. (K.S.A. 1984 Supp. 40-2305). Therefore, in our opinion, the county counselor's position is covered by the agreement between the county and the state regardless of the provision in the local agreement between the county and the counselor, which provides that the counselor is not entitled to any other benefits of county employment.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Mary F. Carson
Assistant Attorney General