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STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 92- 158

Joe O'Sullivan  
Reno County Counselor  
315 W. First Street  
P.O. Box 2066  
Hutchinson, Kansas 67504-2066

Re: Counties and County Officers -- County Attorney --  
Budget; Limitation of Personnel Action

Counties and County Officers -- County  
Commissioners; Powers and Duties -- Control Over  
Expenditures

Synopsis: The county attorney is not bound by the county's personnel policies and procedures, the county pay plan, or any applicable collective bargaining agreement as they apply to personnel actions. Furthermore, the county commissioners have authority to set the county attorney's budget. However, once they have set the budget, the county attorney can spend this money as he or she sees fit as long as it is within the amount allotted either generally or through a line item budget by the board of county commissioners. Cited herein: K.S.A. 19-212; 19-229; 19-701; 19-706.

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Dear Mr. O'Sullivan:

As Reno county counselor, you have requested our opinion concerning the authority of the Reno board of county

commissioners over the Reno county attorney in matters of personnel policies and procedures, pay plans, collective bargaining agreements and budget limitations. Specifically, you ask the nature and extent to which personnel actions taken by the Reno county attorney are subject to the following:

1. Personnel policies and procedures established by the board of county commissioners for all county employees other than elected officials;
2. Any pay plan established by the board of county commissioners for all county employees other than elected officials;
3. Any applicable collective bargaining agreement for civil service systems;
4. The budget for the financing of the operation of the county attorney's office as approved by the board of county commissioners.

During the 1983 legislative session, Senate Bill No. 46 was introduced. This bill contained the following new provision:

"Any personnel action taken by the [county clerk, county register of deeds, county treasurer, county sheriff] under this section shall be subject to the following: (1) Personnel policies and procedures established by the board of county commissioners for all county employees other than elected officials; (3) any applicable collective bargaining agreements or civil service system; and (4) the budget for the financing of the operation of the clerk's office as approved by the board of county commissioners."

"This bill was meant to clarify the powers of various elected county officials and to promote more harmony in the court house. It specifically deals with the powers of county commissioners, county clerks, county treasurers and county registers of deeds." Minutes, Senate Committee on Governmental Organization, February 10, 1983.

The bill was later amended to include coverage of county attorneys, however the house committee deleted this section

(Minutes, House Committee on Local Government, March 24, 1983) and thereafter both houses passed Senate Bill No. 46 without the amendment to cover county attorneys.

Although the legislative history does not specify why K.S.A. 19-701, the statute dealing with the powers of county attorneys, was not amended, there are several considerations. First and foremost is that under the model rules of professional conduct (MRPC) adopted by the Supreme Court of Kansas, an attorney with subordinate lawyer and non-lawyer assistant employees is ultimately responsible for the ethical conduct of those employees. MRPC 5.2 and 5.3. Therefore, the county attorney and not the board of county commissioners must have the control over personnel and personnel procedures necessary to ensure conformance with the ethical rules. The second consideration is that within the legal profession there are certain specific qualifications for paralegals and legal assistants. In hiring, the county attorney should determine which prospective employees meet those qualifications.

Therefore, based on the legislative history of the provision we opine that a county attorney is not subject to dealing with the county's personnel policies and procedures when taking personnel action within his or her own office.

Your next question deals with whether the county attorney is subject to the pay plan established by the county commissioners for his or her employees. Once again legislative history would indicate that the county attorney can estimate a different pay scale within his or her office without prior board approval. However, we do believe that the county attorney would need to stay within the budget set out by the board of county commissioners. See also Attorney General Opinions No. 87-37 and 84-30.

You ask whether the county attorney is bound by the collective bargaining agreements for civil service systems. The legislature has specifically omitted this from the powers and duties section of the county attorneys' statutes and therefore, the county attorney is not bound by the collective bargaining agreements for civil service systems.

Your final question is whether the county attorney is subject to the budget for the operation of the county attorney's office as approved by the board of county commissioners.

The board of county commissioners have been given the authority and responsibility over the county funds as set out in the following statute:

"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 therefore, as provided by law." K.S.A. 19-212.

Furthermore, K.S.A. 19-229 states:

"The boards of county commissioners of the several counties of this state shall have exclusive control of all expenditures accruing, either in the publication of the delinquent tax lists, treasurer's notices, county printing, or any other county expenditures."

In Attorney General Opinion No. 87-37 we opined that:

"A review of these statutes, along with a Kansas Supreme Court decision and several previous opinions of this office, leads one to conclude that little remains outside the scope of the county commissioner's power regarding financial matters of the county. See Attorney General Opinion NO. 82-85 and Hackler v. Board of County Commissioners, 189 Kan. 697, 698 (1962)."

Therefore, it is the opinion of this office that the county commission has the authority to set the county attorney's budget, however, once the budget is set the county attorney has the authority to hire or fire as he or she sees fit as long as such a measure does not go beyond the budget allotted.

It should be noted that pursuant to K.S.A. 19-706b the board of county commissioners in a county having a population of not more than 100,000 appear to retain the authority to pass a resolution providing for the funds that are needed to meet the "actual and necessary expenses" incurred when hiring a deputy or assistant. However, this may only be applicable when the county attorney does not have sufficient funding for such a position in his or her own budget.

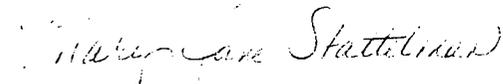
"The fundamental rule is purpose and intent of legislature governs construction of statute when that intent can be ascertained from the statute.' Stauffer Communications v. Mitchell, 246 Kan. 492 (1990). When a statute is plain and unambiguous the court must give effect to the intent of the legislature as expressed, rather than determine what the law should or should not be. Randall v. Seeman, 228 Kan. 395, 613 P.2d 1376 (1980)."

Based on the legislature's exclusion of the county attorney in the provision dealing with personnel matters, we opine that the county attorney is not bound by the county's personnel policies and procedures, the county pay plan, or any applicable collective bargaining agreement as they apply to personnel actions. Furthermore, the county commissioners have authority to set the county attorney's budget. However, once the budget is set, the county attorney can spend this money as he or she sees fit as long as it is within the amount allotted either generally or a line item budget by the board of county commissioners.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Mary Jane Stattelmann  
Assistant Attorney General

RTS:JLM:MJS:bas