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ATTORNEY GENERAL OPINION NO. 2017- 11

The Honorable Kris W. Kobach
Kansas Secretary of State
120 S.W. 10th Ave.
Topeka, KS 66612

Re: Counties and County Officers—Election Commissioners—Powers, Authority and Duties; Budget

Synopsis: In counties with an election commissioner, the board of county commissioners is required to include in its budget the expenses necessary to pay salaries and operate the office of commissioner of elections, as certified by the election commissioner. Cited herein: K.S.A. 19-3419; 19-3419a; 19-3420; 19-3421; 19-3424; 19-3435; 19-3435a.

* * *

Dear Secretary Kobach:

As the chief election officer for the State of Kansas, you ask whether the following statutory language found in K.S.A. 19-3424 requires the board of county commissioners to fund the office of election commissioner in the amount certified by the election commissioner:

On or before July 15 of each year, the election commissioner shall certify to the board of county commissioners an itemized statement showing the amount necessary to pay the salary of the election commissioner, the deputy election commissioner and other employees in the office of the election commissioner and other expenses of said office during the next ensuing budget year and the county commissioners shall cause the same to be included in the county budget for such ensuing budget year.

By law, counties having a population exceeding 130,000 must establish an office of commissioner of elections, which is administered by an election commissioner.¹ The election commissioner is appointed by the secretary of state for a term of four years, and may be removed from office by the secretary of state for official misconduct.² The board of county commissioners sets the salary and car allowance of the election commissioner.³

The board of county commissioners is authorized to establish the budget for the county.⁴ The specific statutory language you reference provides that the county commissioners “shall” cause the election commissioner’s certified itemized statement of expenses to be included in the county budget for the upcoming budget year. At issue, then, is whether “shall” in this instance refers to a mandatory action, or whether the term is meant to be merely directory. In *State v. Raschke*,⁵ the Kansas Supreme Court outlined a four-factor test to determine whether the term “shall” should be construed as mandatory or directory in a particular statute. The Court recently reaffirmed that test in *Ambrosier v. Brownback* and summarized it as follows:⁶

We have previously recognized that the legislature’s use of the word “shall” can have different meanings in different provisions. Because the word’s meaning is not plain, statutory construction rather than statutory interpretation is necessary.

Our 2009 decision in *State v. Raschke* . . . extensively reviewed the relevant historical caselaw on the issue and distilled a four-factor test to be used to determine whether a “shall” in a statute should be understood as directory or mandatory. Courts should consider “(1) legislative context and history; (2) substantive effect on a party’s rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provisions, e.g., elections or notice on charges for driving under the influence.”⁷

We address each of the four *Raschke* factors below.

Legislative context and history

The office of election commissioner was created in 1947.⁸ The original act included the following provisions:

¹ K.S.A. 19-3419. In your letter, you state that there are presently four counties with an office of commissioner of elections.

² *Id.*

³ K.S.A. 19-3419a.

⁴ K.S.A. 2016 Supp. 19-101a(a); K.S.A. 19-212, *Second*.

⁵ 289 Kan. 911 (2009).

⁶ 304 Kan. 907 (2016).

⁷ *Ambrosier*, 304 Kan. at 912.

⁸ L. 1947, Ch. 203.

The election commissioner shall appoint one deputy, known as the chief deputy election commissioner . . . to be paid in the same manner as other county officer and employees, and in addition the election commissioner shall certify to the board of county commissioners the amount necessary for clerk hire and expense, which amount *may* be allowed by the board of county commissioners of said county.⁹

That the salaries and expense as in this act provided, shall be paid out of the general fund of the county, notwithstanding that the salaries and expenses as herein fixed were not included in the budgets heretofore made by the county.¹⁰

In 1949, the legislature amended certain statutes governing election commissioners. The 1949 act amended the first provision of the 1947 act quoted above by replacing “may” with “shall,”¹¹ which indicates legislative intent to take away the board of county commissioners’ discretion to fund the cost of clerk hire and expense as certified by the election commissioner. The 1949 act also repealed the second provision above that required a county to pay for expenses of the office of election commissioner even if those expenses were not included in the county budget.¹² Lastly, the 1949 act added to K.S.A. 19-3424 the paragraph you reference in your letter.¹³ That language has never been amended.

Collectively, the 1949 amendments resulted in *two* statutory provisions requiring the election commissioner to certify to the board of county commissioners the amount necessary to pay for certain expenses: K.S.A. 19-3420, concerning “the amount necessary for clerk hire and expense,” and K.S.A. 19-3424, concerning “the amount necessary to pay the salary of the election commissioner, the deputy election commissioner and other employees in the office of the election commissioner and other expenses of said office.”

The 1949 amendments also resulted in two statutory provisions requiring the board of county commissioners to fund such expenses as certified by the election commissioner: K.S.A. 19-3420 states that the amount certified for clerk hire and expense “shall be allowed by the board of county commissioners,” and K.S.A. 19-3424 states that board “shall cause” the amount certified for other expenses to be included in the county budget. Taken together, the 1949 amendments appear to have been designed to require the county to budget for—and fully fund—the expenses of the office of election commissioner as certified by the election commissioner.

⁹ L. 1947, Ch. 203, § 2 (emphasis added). This statute was codified at K.S.A. 19-3420.

¹⁰ L. 1947, Ch. 203, § 17.

¹¹ L. 1949, Ch. 203, § 2.

¹² L. 1949, Ch. 207, § 8.

¹³ L. 1949, Ch. 207, § 3.

We also look to other statutes governing the expenses of the office of election commissioner for context:¹⁴

The board of county commissioners *shall also authorize* the statutory mileage allowance provided for in K.S.A. 75-3203 for the assistants of the election commissioner, to provide and maintain means of travel within their county.¹⁵

The election commissioner shall maintain his office in suitable and convenient quarters in the courthouse or in some other place, *to be provided by the board of county commissioners*.¹⁶

That the salaries and expenses of the office of the election commissioner as in this act provided, the cost of printing and distributing the ballots and all other expenses connected with county-wide elections whether primary, general or special elections, in counties having an election commissioner, *shall be paid by the county*.¹⁷

The board of county commissioners in any county having an election commissioner, is hereby authorized to make a tax levy in each year, in such amount as may be necessary in order to provide the necessary fund for the payment of the salaries and expenses of the office of the election commissioner and of election expenses as provided for in K.S.A. 19-3435. . . . Said tax levy shall be in addition to all other tax levies authorized or limited by law and shall not be subject to nor within the aggregate tax levy limit. . . .¹⁸

The above statutes make clear that the duty to pay for the expenses of the office of election commissioner falls on the county. The legislature has even authorized the county to levy a special tax if necessary to pay for those expenses.

In *Ambrosier*, the Court compared two statutes containing time limits for the governor's action on the appointment of district court judges in the event of a vacancy: K.S.A. 2015 Supp. 20-2911(a) and K.S.A. 2015 Supp. 25-312a. The Court determined that compliance with K.S.A. 2015 Supp. 20-2911(a) is mandatory, while K.S.A. 2015 Supp. 25-312a is merely directory. In the case of elected judges, K.S.A. 2015 Supp. 25-312a states that the governor "shall" appoint a person to fill the remainder of an unexpired term within 90 days following receipt of notice of the vacancy by the clerk of the Supreme Court. In the case of judges appointed through a nonpartisan nominating commission process, K.S.A. 2015 Supp. 20-2911(a) states that "it shall be the duty of

¹⁴ "Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together." *Clafin v. Walsh*, 212 Kan. 1, 8 (1973).

¹⁵ K.S.A. 19-3420 (emphasis added).

¹⁶ K.S.A. 19-3421 (emphasis added).

¹⁷ K.S.A. 19-3435 (emphasis added).

¹⁸ K.S.A. 19-3435a.

the governor to make an appointment within 60 days” after nominations are submitted to the governor, and if the governor fails to do so, the chief justice of the Kansas Supreme Court shall make the appointment. As part of its determination that the legislative context of K.S.A. 2015 Supp. 25-312a suggests that “shall” was meant to be directory, the Court stated:

The legislature’s creation of the backup plan for gubernatorial appointments in the nonpartisan nominating commission districts demonstrates that it knows how to make sure it has such a plan if it is considered necessary. The fact that it did not put a backup in place for partisan election districts is persuasive evidence that it did not believe one to be necessary for interim appointments such as the one before us today.¹⁹

Applying a similar analysis to the statutes governing the office of election commissioner, the legislature has created a backup plan in the form of a special tax levy to ensure that the expenses of the office are fully paid by the county, even if anticipated revenues are insufficient to cover them. The special tax levy “shall be in addition to all other tax levies authorized or limited by law and shall not be subject to nor within the aggregate tax levy limit. . . .” This suggests that the legislature believed it was necessary to ensure that the office of election commissioner has the funds required to perform its statutory functions, even if the county is cutting its budget elsewhere.²⁰

Based upon the foregoing, we think the legislative history and context of the statutes governing the office of election commissioner lean in favor of construing the provision you ask about as mandatory rather than directory.

Substantive versus procedural effect on a party’s rights

In *City of Hutchinson v. Ryan*,²¹ the Kansas Supreme Court described the differences between a statute affecting a party’s rights and a statute merely affecting procedure:

[I]t 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 time within which an official act it to be done and is intended to secure order, system and dispatch of the public business, the provision is directory.²²

¹⁹ *Ambrosier*, supra at 913-914.

²⁰ Generally, the board of county commissioners has the authority to set the annual county budget. In 2016 this power was curtailed by the enactment of K.S.A. 2016 Supp. 79-2925c, commonly known as the tax lid law, which generally requires the governing body of a city or county to hold an election before approving a budget that is greater than the prior year’s budget by more than the average changes in the consumer price index during the preceding five years. Whether the special tax levy authorized by K.S.A. 19-3435a is subject to the county tax lid law is outside the scope of this opinion.

²¹ 154 Kan. 751 (1942).

²² *Id.* at Syl. ¶ 1.

Or, as summarized by the *Ambrosier* court, the issue is whether the statutory provision “is meant to confer a specific legal right on any one party.”²³ It does not appear that the provision you ask about is intended to preserve or confer any rights, but rather is intended to secure the orderly dispatch of the county budgeting process. Therefore, this factor leans towards viewing the provision as directory rather than mandatory.

Consequences for noncompliance

The Kansas Supreme Court provides the following guidance to assess the consequences of noncompliance with a statute:

[W]hen a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition; and a statute is regarded as directory where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results. On the other hand, a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory, and when a fair interpretation of a statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain other powers can be exercised, the statute must be regarded as mandatory.²⁴

Following this guidance, it could be argued that if the board of county commissioners fails to include in its budget the full amount of expenses certified by the election commissioner, other mechanisms exist to pay those expenses. For example, a county could later amend its budget to increase its general fund spending authority.²⁵ However, it also could be argued that the full funding of the expenses of the office of election commissioner is an example of “some antecedent and prerequisite conditions [that] must exist prior to the exercise of power or must be performed before certain other powers can be exercised,” in that the office of election commissioner cannot exercise its powers without an appropriation to cover its expenses. We therefore think that this *Raschke* factor is neutral with respect to the provision in question.

Subject matter of the statutory provisions

²³ *Ambrosier*, supra at 914.

²⁴ *Wilcox v. Billings*, 200 Kan. 654, 657-58 (1968).

²⁵ See K.S.A. 2016 Supp. 79-2929a.

In *Raschke*, the court noted that two types of statutory provisions have been consistently held to be mandatory: provisions for notice of the time and place of an election, and provisions requiring police officers to provide oral and written notice to individuals suspected of driving under the influence before administering a breath test.²⁶ The subject matter in both of those provisions involved notice to the public. Here, the subject matter in K.S.A. 19-3424 does not address notice to the public, so this factor does not apply.

Conclusion

Applying the *Raschke* factors to the statutory language in question, only two factors support interpreting the statute as mandatory or directory; the other two factors are neutral or inapplicable. In this case, we think the legislative history and context of the provision in question outweighs the fact that the provision does not appear to be intended to preserve or confer any rights. We therefore opine that the statutory provision you ask about is intended to be mandatory, not directory.

This is not to suggest that the board of county commissioners has no control over the expenses of the office of election commissioner. The board of county commissioners has the authority to negotiate the election commissioner's office space, and to set the election commissioner's salary and car allowance. However, absent a change in statute, the board of county commissioners lacks the authority to exercise discretion in funding the other salaries and expenses of the office of election commissioner. In conclusion, we opine that the board of county commissioners is required to include in its budget the expenses necessary to pay salaries and operate the office of election commissioner, as certified by the election commissioner.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Sarah Fertig

Sarah Fertig
Assistant Attorney General

DS:AA:SF:sb

²⁶ *Raschke*, supra at 918.