The Authority of Boards of County Commissioners in Kansas

Making the Case for Clarity

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THE AUTHORITY OF BOARDS OF COUNTY COMMISSIONERS IN KANSAS

MAKNG THE CASE FOR CHANGE

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The Authority of Boards of County Commissioners in Kansas
Making the Case for Change

Executive Summary

Who's in charge in the courthouse? Twenty-five years of legislative initiatives, state court rulings, including one from the Kansas Supreme Court, numerous opinions from the office of attorney general and innumerable courthouse conflicts have failed to clarify this basic governance question. The legislative authority of boards of county commissioners in Kansas remains imprecise and in dispute. Legal ambiguities surrounding the county commission's authority, compounded by political competition for power from other elected county officers, result in wasted public resources, destructive organizational conflict and diminished public trust in county governments.

Personnel Policies and County Commission Authority

Defining the Problem

In seemingly unequivocal language, state law grants county commissions authority to adopt personnel policies and pay plans for departments managed by sheriffs, clerks, treasurers and registers of deeds. However, ambiguous and conflicting interpretations from the courts and Kansas attorneys general have made this authority anything but crystal clear. A recent opinion issued by Attorney General Phill Kline seems to render moot this statutory authority. Kline declared that the county commissions' personnel policies apply to sheriffs' departments (and presumably other elected department directors) only if sheriffs agree to abide by them.

The interpretation means that elected department directors are bound by county personnel policies only if they voluntarily agree to comply with the policies. Consequently, they can selectively pick and choose the policies they like or ignore them altogether. Elected department directors who refuse to abide by county personnel policies are a *lawsuit waiting to happen*, and the commission will be named a party in such a lawsuit. Given the legal complexities of the modern workplace, the county commission can protect the public interest and the rights of county employees only if it has the authority to adopt and enforce personnel policies for all county departments.

Options for Change

Recommendation 1: The KCCA should seek legislation that gives clear and uncompromised authority to the board of county commissioners to adopt and enforce uniform personnel policies that shall apply to all county employees in all county departments.

Recommendation 2: The KCCA should provide for the development and written dissemination of model personnel policies and practices for Kansas county governments.

The Case for Change

- The county commission should have authority to enforce personnel policies and pay plans in order to mitigate liability, manage the county's risk and assure legally compliant employment practices in all county offices, including those managed by elected officials.

- The county commission should have the authority to enforce personnel policies and pay plans in order to eliminate the appearance or reality of favoritism, and assure that personnel actions in all departments, including those managed by elected directors, are based on considerations of merit.

- Granting the county commission enforcement authority over personnel policies and pay plans will allow elected department directors to retain discretion in personnel management, as long as their actions: 1) conform to their county's policies with respect to recruitment, hiring, dismissal, supervision and compensation of all county employees; and 2) are responsive to preventing discrimination, sexual harassment and violations of other employment laws.

The County Budget and County Commission Authority

Defining the Problem

Imprecise and competing state laws, combined with obtuse interpretations and impractical advice from courts and attorneys general, have compromised the county commission's budget authority. With elected department directors claiming an ill-defined authority to exceed spending limits for the benefit of their offices, the county commission is hampered in prioritizing county spending, setting tax levies and controlling allocation of scarce county resources. County commissions are left in an untenable position-- unable to fully control expenditures in five departments, but held legally and politically accountable for all county taxing and spending decisions.

The legislative powers of the county commission are fragmented in a way that harms the public interest. The inability of the Kansas Legislature to clarify the budget authority of county commissions pits elected county leaders in a budget tug-of-war, leaves citizens unable to assign spending accountability and renders the possibility of efficient county government an unattainable goal.

Options for Change

Recommendation 3: The KCCA should seek legislation that (a) requires elected department directors to request a budget amendment from the county commission under any circumstance in which they anticipate exceeding their total budget appropriation during the budget year; and (b) clarifies that the county commission has the authority to approve or disapprove increases in an
elected department director's budget.

Recommendation 4: The KCCA should educate boards of county commissioners that they have the authority to create a separate fund for budgets of departments managed by an elected official.

Recommendation 5: The KCCA should provide for development and written dissemination of model budget policies and practices for Kansas county governments.

Recommendation 6: The KCCA should explore opportunities to engage the expertise of retired city managers and county administrators to provide assistance to counties on how to improve budgeting policies and practices.

The Case for Change

- Without exclusive budget authority, the county commission is hindered in its mission to deliver effective and efficient services that best meet the community's needs while taking into consideration the availability of revenues to meet those needs.

- Citizens governed by counties deserve to have a single point of accountability for county spending decisions, and that point of accountability should be the board of county commissioners, the county's legislative body.

- Full public accountability requires that the power to make taxing decisions be coupled with the power to make spending decisions.

- The "necessary verses discretionary" test (developed by Attorney General Robert Stephan) is a subjective, unworkable standard for determining which county entity or official has spending authority.

The Authority of Boards of County Commissioners Options for Change

Who's in charge in the courthouse? Twenty-five years of legislative initiatives, state court rulings, including one from the Kansas Supreme Court, numerous opinions from the office of attorney general and innumerable courthouse conflicts have failed to clarify this basic governance question. The legislative authority of boards of county commissioners in Kansas remains imprecise and in dispute. Legal ambiguities surrounding the county commission's authority, compounded by political competition for power from other elected county officers,

result in wasted public resources, destructive organizational conflict and diminished trust in county governments.

Background

Boards of county commissioners* in Kansas share similarities with other legislative bodies that govern general purpose governments in the U.S. County commissions have broad legislative powers to transact county business, approve local legislation and provide for taxation and control of expenditures through adoption of an annual budget. Under Kansas law, county commissions are also granted authority to adopt personnel policies and pay plans for all county employees.

The legislative powers of county commissions, however, are unique in that their authority is constrained by the presence of independently elected department directors who are responsible for the delivery of certain county services. Kansas law grants these individuals -- clerks, treasurers, registers of deeds, sheriffs and county attorneys -- considerable autonomy that shields them from the authority of the county commission.

Historically, the legal boundaries of the county commission's authority vis-à-vis the elected department directors have been unclear and the object of numerous courthouse clashes. Sometimes county officials have looked to the Kansas attorney general to resolve disagreements. Yet over the past 25 years, an estimated two dozen attorney general's opinions have often confused rather than clarified lines of authority. In a few instances, a disputant has resorted to legal action, as was the case in 2002 when the Lincoln County sheriff challenged the authority of the county commission to involve itself in personnel matters involving his department. Ultimately this case, *Neilander vs. the County Board of County Commissioners of Lincoln County,* made its way to the Kansas Supreme Court, which ruled in favor of the sheriff.

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* Hereafter boards of county commissioners will be referred to as the "county commission"

Almost 20 years earlier in 1983, the Kansas Legislature considered legislation in an attempt to more precisely define the county commission's authority and prevent conflicts with elected department directors. State Senator Joe Norvell sponsored SB 46 to *"clarify the powers of various elected county officials and hopefully promote more harmony in the courthouse."* [1]

An extended conflict over a personnel matter in Ellis County prompted the legislation and is illustrative of the nature of conflicts stemming from ambiguities about county commission authority. In 1978, the Ellis County Register of Deeds hired a woman to work in her office who, three months later, became her daughter-in-law. At the time, the county had no nepotism policy, although shortly thereafter, the county commission adopted such a policy; but this after-the-fact-rule did not change the daughter-in-law's employment status. In 1980, the register of deeds filed paperwork with the county clerk to increase her daughter-in-law's compensation by nearly 30 percent. Although the proposed pay increase did not exceed the total appropriation for the register of deed's office, the commission refused to authorize the increase. In court filings, the county commission claimed that approval of the raise would violate the county's collective bargaining agreement. The resulting stalemate prompted the register of deeds to file suit in 1981, with the court ultimately ruling that the county commission could not deny the pay raise nor interfere with the register of deed's performance of her duties.[2]

Senator Norvell's bill, intended to more precisely define the county commission's powers in relationship to elected department directors, eventually became law and did the following:

- declared that clerks, treasurers, sheriffs and registers of deeds have personnel authority in their offices, including the power to appoint, promote, demote and terminate all employees; however, that authority is not exclusive and is limited as follows:

  a) personnel actions must be subject to personnel policies and procedures adopted by the county commission for all county employees;

  b) compensation decisions must conform to pay plans adopted by the county commission for all county employees;

c) personnel actions must conform to collective bargaining agreements or civil service systems;

d) personnel actions must be in line with the budget approved by the county commission for their departments.

- required that elected department directors submit a budget for operation of their departments to the county commission for approval
- prohibited county commissions from using home rule to exempt the county from any of the above requirements; in other words, another exception to home rule authority was created.[3]

Norvell's bill earned nearly unanimous support from statewide associations representing clerks, treasurers and registers of deeds who correctly recognized the legislation more clearly defined their personnel authority. Associations representing sheriffs and county attorneys successfully requested their offices be added to the bill under the same provisions, although a later amendment removed county attorneys.

A number of county officials offered testimony in opposition to SB 46, largely because it added an exception to county home rule powers. Officials from Sedgwick, Montgomery, Saline, Douglas and Harvey testified in opposition to the bill. [4] There is no evidence in the legislative record that the Kansas Association of Counties offered testimony on the legislation.

Twenty years later, the Kansas Supreme Court decision in the Lincoln County case enlarged confusion over the county commission's authority:

> "*While personnel actions taken by sheriffs are 'subject to' personnel policies, payment plans, collective bargaining agreements, and budgets established by boards of county commissioners,* ***K.S.A. 19-805(d) does not give county commissioners the ability to supersede a sheriff's power to appoint, promote, demote, or dismiss his or her personnel****." (*emphasis added)[5]

Rather than resolve ambiguities over the county commission's jurisdiction, the court's decision has had the effect in some counties of creating heightened tensions among county commissions and elected department directors. An opinion issued last year by Attorney General Phill Kline has furthered obscured the county commission's authority with its conclusion that elected

department directors have discretion as to whether they will manage their departments under the county commission's personnel policies.

In some cases, county commissions find the practical application of these legal interpretations to be a source of new conflict and stalemate. What is a county commission to do, for example, if a sheriff's employee commits a violation, e.g., driving under the influence, that is grounds for suspension under its personnel policies, but the sheriff refuses to suspend the employee? In other cases, the ruling has emboldened elected department directors as they try to "push the envelope" by claiming the Lincoln County case has expanded their discretion over budget and personnel matters.

Continuing fragmentation and uncertainty associated with the county commission's legislative authority in budget and personnel decisions, and the resulting courthouse rancor and inefficiency it spawns, leave county government in Kansas ripe for reform.

Personnel Policies and County Commission Authority

Defining the Problem

For much of Kansas county history, county departments have operated as semi-autonomous units, delivering uniform, easy to administer, state-mandated services. The modern-day organizational slang "silo" is an apt metaphor for this history; individual county departments functioned as nearly separate organizations, with different pay scales and personnel practices. The decentralized county structure meant that department directors hired, supervised, disciplined and terminated with broad discretion and few limitations. The absence of countywide personnel policies often resulted in wide disparities in the compensation and treatment of county employees.

In clarifying county commission authority to adopt personnel policies and pay plans for all county employees in 1983, the Kansas Legislature recognized the new realities of public employment. Federal law and regulations, and landmark court decisions defined expansive new protections for public employees, and new liabilities for public employers who failed to provide

those protections. New legal mandates obligated public agencies including county governments, to insure fairness and the absence of discrimination in interviewing, selection, compensation, training, discipline, promotion, demotion and termination of personnel. Since the county commission is ultimately accountable for liabilities incurred by county employees or officers, the Legislature acted to protect the public interest by giving county commissions the power to adopt personnel standards and pay plans for all county offices.

K.S.A. 19-805(d) and parallel laws for clerks, treasurers and registers of deeds, grants to county commissions the authority to adopt personnel policies, and on its face seems plain spoken and unequivocal:

> *"Any personnel action taken by the sheriff … 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; (2) Any pay plan established by the board of county commissioners for all county employees other than elected officials."*[6]

Guidance from the courts and the Kansas Attorney General, however, have made this grant of authority anything but crystal clear to those on the front line of county government: A sample of these legal pronouncements:

> *"Any personnel decision a sheriff may make with regard to deputies and assistants, is subject to the limitations stated in the statute and, in particular, to personnel and pay policies applicable to all county employees."*[7]
> *"The BOCC is authorized to enact ……standards and directives governing the personnel policies of the county. Said policies* ***could*** *apply to both elected county officials and to county employees."*(emphasis added).[8]

> *"A county employee may be permitted to appeal his or her termination by the specified elected officials and may be reinstated by the board of county commissioners if such county policies and procedures exist…..The board may, in the end, prevent the elected official from dismissing an employee if such policies and procedures exist*." [9]

> *"While personnel actions taken by sheriffs are 'subject to' personnel policies, payment plans, collective bargaining agreements, and budgets, established by*

*boards of county commissioners, K.S.A. 19-805(d) does not give county commissioners the ability to **supersede** a sheriff's power to appoint, promote, demote, or dismiss his or her personnel.(Emphasis added)* [10]

A 2004 opinion issued by Attorney General Phill Kline seems to render moot the personnel authority of the county commission by declaring that a sheriff must agree that he or she will abide by the county commission's policies:

*"….the ultimate decision to hire, terminate, demote or otherwise discipline a specific sheriff's employee remains vested in the county sheriff and may not be overturned by a board of county commissioners, in reliance upon personnel policies or a negotiated memorandum of agreement**, unless such a procedure has not also been agreed to or signed by the county sheriff**."* (emphasis added) [11]

(Note: Whether this opinion applies to all elected department heads is unclear.)

Given these conflicting and confusing legal interpretations, it is not surprising that the *KAC County Commissioner's Deskbook* also offers equivocal advice:

"County offices and officers also have statutory authority to fulfill their duties of their office. They have the power to hire, fire and to supervise and evaluate the work product of their subordinates….The ultimate authority still lies with the board of county commissioners." [12]

In this climate of ambiguous jurisdiction, some elected department directors seek to exercise and defend certain personnel actions by wielding the court ruling or attorney general's opinion that best serves their interests -- and not necessarily the public interest.

The Lincoln County ruling and the recent Attorney General Kline opinion suggest that an elected officer could for example, make discriminatory hiring decisions, ignore employee sexual harassment or refuse to terminate an employee for drinking on the job -- actions contrary to county personnel policies -- and the county commission could do nothing to protect the county from inevitable legal liability. Such a situation occurred in Jackson County. Several months before a previous county sheriff was to leave office after choosing

not to run for reelection, the county commission learned that a sheriff's deputy was driving with a suspended license. County policy required that the employee be placed on suspension, but the sheriff refused to take the required disciplinary action. In response the county's insurance provider indicated that if the employee was not suspended, their firm might not be able to provide insurance coverage. The county commission's only option was to file a mandamus action in court, a process that could take several months. Fortunately, the newly elected sheriff indicated he would enforce the discipline policy upon taking office. In the interim, however, the sheriff's inaction posed a significant legal risk to the county.[13]

To be fair, the majority of elected department directors recognize their obligation to public service and exercise cooperation in abiding by the county's personnel policies. But cooperation with the county commission is not a statutory duty, and elected department directors may choose not to cooperate. Ambiguities in interpretations of state law empower these individuals and give them free reign to go their own way on personnel decisions.

The Lincoln County case and the Kline opinion have the effect of rendering toothless the state statute requiring all county offices to abide by uniform personnel policies. Kline's interpretation means that elected department directors are bound by county personnel policies only if they voluntarily agree to comply. Consequently, they can selectively pick and choose the policies they like or ignore them altogether. Present day employment law is far too complex and its interpretation cannot be left to individuals who lack specialized training. Elected department directors who refuse to abide by county personnel policies are a *lawsuit waiting to happen*, and without question, the county commission will be named a party in the eventual lawsuit.

Given the legal complexities of the modern workplace, the county commission can only protect the public interest if it has the authority to adopt and enforce uniform personnel policies for all county departments.

Options for Change

This section identifies actions that the KCCA may wish to consider in addressing problems created by imprecise county commission authority related to personnel matters.

Recommendation 1: The Kansas County Commissioners Association should seek legislation that gives clear and uncompromised authority to the board of county commissioners to adopt and enforce uniform personnel policies that shall apply to all county employees in all county departments.

Current law gives county commissions the authority to adopt uniform personnel policies for all county offices, including those headed by an elected department director, but makes no provision for policy enforcement when the elected official refuses to be bound by county policy. Under legislation granting enforcement authority to the county commission, elected department directors could retain the discretion to appoint, promote, demote, discipline and dismiss employees in their departments, but only within the parameters established by county personnel policies. The county commission's authority over personnel policies must not be conditional on the consent of an elected department director; such a condition undermines the county commission's ability to promote fairness in decisions involving county employees and protect the county from legal liability.

Recommendation 2: The Kansas County Commissioners Association should provide for the development and written dissemination of model personnel policies and practices for Kansas county governments.

Every county government should have up-to-date personnel policies in place, but some do not. Counties with a county administrator or a human resource manager are more likely to have formal policies that reflect current law than those counties without professional management. In counties without specialized expertise, the county commission may have standards, but they may not reflect changes in federal or state law, or emerging employment case law. In the 2002 Lincoln County case, the futility of the county commission's retroactive adoption of a policy to address an individual personnel problem was underscored by the court's ruling against the county.

If county commissions intend to exercise unfettered authority to adopt and enforce personnel policies for the benefit of the county and its employees, they must do so in a wise and responsible manner. Personnel policies adopted by the county commission must accurately reflect current employment law, and must be regularly reviewed and revised in response to changing legal standards.

A sizeable number of smaller counties do not have access to, nor could they afford the specialized expertise to develop and update personnel policies. The KCCA could provide a valuable service to Kansas counties by developing and regularly updating model personnel policies to be used or modified as appropriate by individual counties. A first step in this direction could be consultation with the Kansas County Human Resource Managers Association to seek information as to the scope of the project and the resources that might be required to implement it.

The Case for Change

This section identifies key points that support the position that county commissions need the authority to enforce personnel policies in all county departments.

1. The county commission should have authority to enforce personnel policies and pay plans in order to mitigate liability, manage the county's risk and assure legally compliant employment practices in all county offices, including those managed by elected officials.

The county commission holds ultimate legal and financial accountability for managerial decisions related to employees, including those actions taken by elected department directors. While an elected director who tolerates sexual harassment *may* eventually be voted out of office, the county commission will ultimately be held accountable when an aggrieved employee files legal action or when the court awards a judgment against the county. In these circumstances, the county commission will be required to find the resources to defend the lawsuit and pay the judgment. The county's liability exposure is potentially in the millions of dollars in the case of a serious employment violation. In the Jackson County example cited earlier, one can easily imagine a sizeable judgment if the

sheriff's deputy with the suspended driver's license had been involved in a car accident while on duty.

Insurance companies are quick to recognize circumstances in which the inability to enforce personnel policies may constitute unacceptable risk as far as insurance coverage is concerned. In the Lincoln County case, the sheriff's refusal to take action against a deputy accused of using excessive force prompted the county's insurance carrier to threaten discontinuation of coverage. [14] The same concern was voiced by an insurance provider in the Jackson County case cited earlier.[15]

2. The county commission should have the authority to enforce personnel policies and pay plans in order to eliminate the appearance or reality of favoritism, and assure that personnel actions in all departments, including those managed by elected directors, are based on considerations of merit.

Northing is more corrosive in an organization than the perception that employees in similar situations are treated differently in matters of compensation, non-monetary benefits, training, discipline, etc. Allowing each elected department director to make his or her own personnel policies places the county at risk for a dysfunctional and inefficient workplace. Employees who work under an appointed department director may see their counterparts under elected directors get more favorable treatment with respect to actions considered a violation of policy in their department. The resulting employee resentment diminishes productivity, fuels courthouse squabbles and increases the risk of costly grievances. If county organizations are to have truly merit-based policies, as do city, state and federal units of governments, then county commissions must have the ability to enforce personnel policies in all departments.

3. Granting the county commission enforcement authority over personnel policies and pay plans will allow elected department directors to retain discretion in personnel management, as long as their actions: 1) conform to their county's policies with respect to recruitment, hiring, dismissal, supervision and compensation of all county employees; and 2) are responsive to preventing discrimination, sexual harassment and violations of other employment laws.

The 1983 record of legislative committee hearings on SB 46 demonstrates the Kansas Legislature recognized that elected department directors need the ability to exercise managerial discretion within their departments. Organizations representing clerks, treasurers and registers

of deeds testified during committee hearings that discretion over personnel decisions was important to them. The Legislature acceded to their request with explicit language granting this discretion.

However, in the same bill which ultimately became law, the legislature qualified the authority of elected department directors in personnel matters as follows:

> *"Any personnel action taken by the 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"*[16]

This same restraint is declared in parallel statutes for the county clerk, register of deeds, and treasurer. Although county attorneys were covered by this provision in an earlier draft of the bill, they were not included in the bill that became law.**

What seems clear from looking at legislative intent and the language of K.S.A. 19-805 (and its parallel counterparts) is that the Legislature recognized that elected directors need leeway over personnel matters in their offices, but their managerial discretion must be exercised within the parameters of personnel policies adopted by the county commission.

In a perfect world where all county officials conform their actions to the interests of the county as a whole, the county commission would not need authority to enforce personnel policies. But in those instances of a "stand off dispute" where the actions or inactions of an elected department director are contrary to county personnel policies, the county commission should prevail. Public interest is best served by enforcement of personnel policies whose provisions are informed by employment law and construed to promote fairness among all county employees.

** *The KCCA will need to determine whether it wants to seek authority to adopt and enforce its personnel policies for employees in the county attorney's office.*

The County Budget and County Commission Authority

Defining the Problem

Who is in charge of county spending? The answer, like so many others in county government, is neither simple nor definitive. Here too, the legislative authority of the county commission is compromised and fragmented. Throughout much of Kansas' history, this flaw had few serious consequences. But in the 21st century with expansive new demands thrust upon county governments from every direction, overburdened taxpayers cannot afford the excesses of disjointed county government.

In much of Kansas county history, the county commission had few choices to make about county spending. County services were mandated by the state, and the costs to manage largely routine ministerial functions varied only minimally from year to year.

Today, the dynamic profile of county government only remotely resembles that of 50 years ago. Counties of every size across Kansas have taken on major new service obligations and become full service governments. In many cases, counties have had additional service responsibilities forced upon them by state and federal governments, absent the grant of funds to pay for them. With state-granted home rule authority in 1974, counties also have taken on more services obligations in response to community needs.

The financial impact of the growth in county responsibilities is difficult to overstate. Providing a vast array of services during a time when national, state and local economies struggle, and when federal and state governments curtail funding, but not mandates, has created serious financial stress on all counties, especially those with declining populations and stagnant tax bases. Counties -- as the service providers of last resort -- are financially challenged as never before. In this climate, county leaders need the full capacity to make wise and responsible spending choices for their communities.

County commissioners are the only county leaders with responsibility to consider all obligations of county government and the needs of the entire community when making spending decisions. But the county commission lacks the capacity to make effective budget and taxing choices because it cannot fully control county expenditures. Budget decisions

may also be made *defacto* by elected department directors, independent from budget decisions made by their county commissions. The implied budget authority of elected department directors positions them as "…powerful political figures who can frustrate the ability of ….county legislative bodies to make their governments high performing." [17]

Certain Kansas statutes seem to make clear that the county commission has exclusive budget authority. K.S.A. 19-229 reads in part:

"The boards of county commissioners…..shall have exclusive control of all expenditures accruing…… or any other county expenditures."

Interpreting this law in 1987, the attorney general asserted: "County commissioner statutes clearly vest the authority and responsibility for control of county expenditures in the board of county commissioners." [18] In 1999, the attorney general reiterated that state law clearly vests responsibility for the financial operation of the county in the county commission and that fiscal responsibility for county affairs is assigned to the commission. [19]

The 1983 legislative revisions in the county commission's authority also make clear that expenditures of elected department directors must be approved by the county commission through budget adoption: "The sheriff shall submit a budget for the financing of the operation of the sheriff's office to the board of county commissioners for their approval." Another section states that personnel actions taken by the sheriff are subject to: "…the budget for the financing of the sheriff's office as approved by the board of county commissioners."[20] Parallel statutes impose the same obligations on clerks, treasurers and registers of deeds.[21]

Still another state law gives to the county commission authority to reduce an approved budget of the sheriff and alter spending authority given to the sheriff by the budget, as long as state law for amending a budget is followed. [22] A 1987 attorney general's opinion identifies additional budget authority for the county commission, stating that the commission can develop a line-item budget for an elected department director and require funds be spent accordingly. [23]

Despite this seemingly unequivocal statutory language, the authority of the county commission to exercise "exclusive control" of expenditures collides with elected department directors who operate under separate statutory authority. Elected department directors believe that under their separate authority, if the county commission does not, in their opinion, budget funds for the effective operation of their offices, they may make such expenditures. Several court cases and a series of attorney general opinions lend support to their position.

A 1990 district court decision, *Watson, Treasurer v. Board of Trego County Commissioners,* ruled the county commission cannot arbitrarily reduce the treasurer's budget if such action prevents the treasurer from carrying out the duties of the office. The Trego Board of County Commissioners, in a conflict over the treasurer's payment of overtime, had reduced the treasurer's budget by $8,800. In its judgment against the county, the court also noted the county had neither personnel policies nor a pay plan to justify its actions. [24]

Over many years, Kansas attorneys general have tried to reconcile the general budget authority of county commissions with the specific statutory authority of the five elected county department directors. Attorney General Robert Stephan developed the concept that the *nature of the spending* was the critical factor in determining whether the county commission had authority. His conclusion is based on a law that directs the county commission to allow reasonable sums for staff in order to carry out "…the business of the several offices of the county." [25] Is the spending by an elected official, Stephan asks, necessary to carry out the duties of the office or merely discretionary?

Stephan reasoned that if the expenditure is necessary, then the elected department director "….need not obtain prior approval from the board of county commissioners." [26] But if the expenditure is discretionary, he counsels, then the county commission may deny the spending or require prior approval. Attorney General Carla Stovall concurred in a 1999 decision, making the added distinction that the elected department director cannot exceed his or her total budget unless the "…additional expenditure is required by law or approved by the

board of county commissioners" [27] Both opinions agree that elected department directors have authority to make spending decisions as long as they do not exceed their total budget.

Stephan conceded there were no statutory guidelines to determine which expenditures are necessary and which are discretionary. Moreover, his opinion leaves only the courts to be final arbiter of whether an expenditure is necessary or discretionary. Anticipating this problem, Stephan proposed the concept of "shared discretion", meaning that in a public spending dispute, the county commission and the elected department director, in the spirit of good government, should work together to resolve the impasse. [28] Stephan's optimistic view of human nature is perhaps laudable, but his solution to spending disagreements is naïve in the context of the often contentious competition for power that occurs among some county officials.

The Kansas Supreme Court ruling in the Lincoln County case also failed to bring clarity to county commission budget authority. While stating that personnel actions of the sheriff are 'subject to' budgets adopted by the county commission, the court goes on to say that Kansas law, "…does not give county commissioners the ability to **supersede** a sheriff's power to appoint, promote, demote, or dismiss his or her personnel."[29] The meaning of this statement is certainly in the eye of the beholder. For a sheriff intent on manipulating the budget process, this ruling gives justification to hire and compensate deputies without regard for budget consequences, as long as they assert such spending is necessary to carry out their duties or protect public safety.

Such rulings have had the effect of empowering some elected department directors to challenge spending limits imposed by the budget. In Haskell County for example, the sheriff has a long history of exceeding his budget before the end of the fiscal year and habitually expects the county commission to cover his overspending. He often waves in front of commissioners what he claims are legal opinions that justify his case for more spending.

This problem was especially pronounced in 2004 when early in the year, Haskell County's assessed valuation proved to be below estimates on which the budget was based. The county commission was forced to make modest budget cuts, including the budget for the sheriff. According to commissioners, however, despite reductions to his budget, the sheriff continued to purchase non-essential equipment. By September of that year, the sheriff had exceeded his total budget appropriation and was unable to meet payroll. In this circumstance, the county commission felt it had no choice -- legally or politically -- except to cover payroll obligations with other county funds. In 2005, the county commission approved a three percent increase in the sheriff's budget, but once again commissioners' report that the sheriff's current rate of spending makes it likely he will again exceed his total appropriation before the end of the fiscal year. [30]

In short, imprecise and competing state laws, combined with obtuse interpretations from courts and attorneys general, have compromised the county commission's budgetary authority. With elected department directors claiming an ill-defined authority to exceed spending limits for the benefit of their offices, the county commission is hampered in prioritizing county spending, setting tax levies and controlling allocation of scarce county resources. County commissions are left in an untenable position-- unable to fully control the expenditures of five county departments, but held legally and politically accountable to their communities for all county taxing and spending decisions.

Who is in charge of county spending? The answer is no one. The inability of the Legislature to clearly answer this question pits elected county leaders in a budget tug-of-war, leaves citizens unable to assign spending accountability and renders the possibility of efficient county government an unattainable goal.

Options for Change

This section identifies actions that the KCCA may wish to consider in addressing problems created by the uncertainty of the county commission's budget authority.

Recommendation 3: The KCCA should seek legislation that (a) requires elected department directors to request a budget amendment from the county commission under any circumstance in which they anticipate exceeding their total budget appropriation during the budget year; and (b) clarifies that the county commission has the authority to approve or disapprove increases in an elected department director's budget.

In any circumstance in which an elected department director foresees that he or she is likely to exceed the total department appropriation in the current fiscal year, that director should be required to request approval for a budget amendment from the county commission. A budget amendment should be required in all such circumstances, irrespective of the type of county fund in which the elected department's budget is placed. Presently a county may budget several departments in its general fund.

In the situation where an elected department's directors' budget is included in a county's general fund the request for a department budget change should still be required. In this circumstance the legal process of amending the budget would not be required unless total general fund expenditures would exceed the original general fund budget. However, the request by an elected department head would allow the commission to determine if the department's requested budget increase is in fact appropriate and if approved would require a budget amendment for the general fund via the legal process. Such a request would allow the commission to properly allocate resources and control departmental expenditures.

The legislation should clearly prohibit elected department directors from spending any funds or entering into any contract that commits funds, unless the county commission has approved a budget amendment. The process for a budget amendment is spelled out in state law and parallels the process for adoption of the annual budget. Under current law, when considering a budget amendment, the county commission is required to publish, give notice and provide a public hearing on the proposed change in spending. In addition, the county commission must identify revenues other than property taxes to pay for the proposed spending increase. [31]

Requiring a formal budget amendment for over-budget spending by elected department directors will strengthen county commission legislative authority and provide

greater accountability for spending decisions. The process will allow full disclosure of the facts necessitating the spending increase. A department director will have to make the case for the spending request, just as in the annual budget process, and explain why he or she was not able to manage within the budget's spending limits.

If circumstances developed that could not be predicted and were beyond the control of the elected department director, for example, a major crime, computer failure, etc., the director should have no difficulty defending the request and securing county commission approval. If on the other hand, the elected director engaged in undisciplined spending and failed to properly manage budgeted funds, the commission will have opportunity to review the request in a formal public hearing and vote. The budget amendment also will allow the county commission to exercise greater scrutiny over the offending department for the remainder of the fiscal year. Finally, requiring an amendment before a department can exceed its total budget will offer greater "sunshine" on budget decisions and enable citizens to judge for themselves the need for additional spending.

There may be rare instances in which a budget amendment process may hamper the public interest. For example, a murder case toward the end of the fiscal year may require significant overtime wages for deputies investigating the case. The legislation could make special provision in circumstances where public safety emergencies cause department spending to exceed the budget. For example, it could be possible to allow the county commission, with proper notice, to convene in a phone conference call meeting to approve an emergency budget amendment. [32]

Recommendation 4: The Kansas County Commissioners Association should educate county board of county commissioners that they have the authority to create a separate fund for budgets of departments managed by an elected official.

The recommendation is contrary to the budgeting trend in recent years to reduce the number of special funds and finance operations from the county general fund. This authority may be useful, however, as a last resort when other efforts to reign in excess spending have failed. A county in Western Kansas may be such an example. Over the past

twelve years, the sheriff in this county has exceeded his annual budget appropriation by early fall, usually as the result of overtime wages. The county commission has increased appropriations, developed line-item budgeting, moved jail expenditures to a different budget, offered to add new deputy positions to reduce overtime and created a special equipment reserve for vehicle purchases. Despite all of these efforts, and to the considerable frustration of the county commission, the annual overspending by the sheriff continues.

The authority to create a separate fund and separate levy for departments managed by an elected official may be used only rarely, but could be used as a last ditch tool when other efforts to control spending have failed. Under state law, once the budget for a fund has been exhausted, spending must end. Any county official who incurs a fund indebtedness is subject to removal from office. [33] In instances where an elected department director depletes the fund, the county commission has the option to approve a budget amendment (funded with non-property tax revenues) or seek approval to issue no-fund warrants.

Establishment of a separate fund for a department managed by an elected official may be possible through exercise of county home rule authority.[34] However, explicit state authority to take such action could strengthen the commission's hand in circumstances where there is a serious clash among county officials.

Recommendation 5: The Kansas County Commissioners Association should provide for the development and dissemination of model budget policies and practices for Kansas county governments.

Counties with county administrators or financial managers appear to have fewer problems with spending excesses of elected department directors. This suggests at least some budget conflicts could be reduced or eliminated with budget policies that provide for improved financial management, including more accurate planning, forecasting and spending data during budget development. Best practices can be employed to impose greater spending discipline on county departments, including those managed by an elected director. Some county commissions, for example, do not use line-item budgeting as a way to manage

the sheriff's spending and may not understand they have this authority. On the other hand, Sedgwick County is an example of a county that has successfully used its home rule authority to enforce spending controls, including a purchasing policy, on all county departments. [35]

The Kansas Leadership Academy for County Commissioners provides excellent training in financial management and budget practices, but too few commissioners take advantage of the opportunity. Effective budgeting may also be hindered by resistance from a county official who prepares the budget. In still other cases, if the county outsources budget preparation to an accounting firm, the accountant may not be fully aware of legal options for improving budget practices.

Publication of a user-friendly guide to budgeting, along with model budget policies, would be of great value in strengthening the county commission's budget authority, especially in counties without access to professional management. A first step in this direction could be consultation with the Kansas County Administrators Association to seek information as to the scope of the project and resources that might be required to complete it.

Recommendation 6: The Kansas County Commissioners Association should explore opportunities to engage the expertise of retired city managers and county administrators to provide assistance to counties on how to improve budgeting policies and practices.

Presently, the Kansas Association of City and County Management (KACM) sponsors a Range Rider program that deploys retired local government professional managers to municipalities to provide short-term management assistance. The KCCA should initiate discussions with KACM as to how similar technical assistance on budget development and oversight could be made available to counties that lack the resources to hire full-time professional managers.

The Case for Change

This section identifies key points in support of the position that the county commission requires enhanced budget authority to control county spending and provide for greater spending accountability.

1. Without exclusive budget authority, the county commission is hindered in its mission to deliver effective and efficient services that best meet the community's needs while also taking into consideration the availability of revenues to meet those needs.

The function of the legislative body in the budget process is to: 1) receive requests for spending from citizens, community groups, and elected and appointed department directors; 2) balance and weigh competing demands and interests against community priorities; 3) make authoritative choices about what resources are to be used for what public purposes; 4) determine the taxation necessary to fund the budget; and 5) formally adopt the budget.

In county government the budget decision process is distorted in favor of departments

managed by elected directors. These county departments can make spending decisions outside the approved budget; therefore, the legislative body cannot fully weigh resource demands, determine proper trade-offs, and make spending and taxing decisions for the community and county government as a whole. The power of elected department directors to make autonomous budget decisions thwarts county commission efforts to deploy limited funds to their highest and best use. A less efficient and effective county government results.

Executive departments should not have final authority for their own spending decisions. No other form of U.S. government allows executive agencies that are funded with general tax dollars to make independent spending decisions outside of approved budgets. In state government for example, the elected secretary of state, treasurer and attorney general may spend only within the budget appropriation approved by the Legislature. Clerks, treasurers and police chiefs in city government must align their spending within the appropriation made by the city council. Granting the county commission exclusive budget authority is an important step toward improving efficiency and effectiveness in Kansas county governments.

2. Citizens governed by counties deserve to have a single point of accountability for county spending decisions, and that point of accountability should be the board of county commissioners, the county's legislative body.

Citizens should not be expected to sort through competing claims and accusations exchanged among county elected officials as to who is at fault for overspending, underfunding, ineffective budgeting, poor planning, etc. Spreading budget authority among executive and legislative officials does not provide for appropriate accountability. The single point of accountability for budget decisions in other American governments is the legislative body. The same should be true for county governments.

3. Full public accountability requires that the power to make taxing decisions be coupled with the power to make spending decisions.

Arguably the most important function of a legislative body is to determine taxing and spending levels for public purposes. A legislative body is constitutionally empowered to authoritatively levy taxes and fees, and decide through adoption of a budget, for what purposes revenues are to be spent and in what amounts.

In county government the linkage between taxing and spending authority is flawed. Only the county commission -- not elected department directors -- has the power in county government to levy taxes. But the county commission as noted earlier, does not have clear authority when it comes to spending decisions in the five offices managed by elected department directors.

These two legislative functions -- taxing and spending -- must be fully assigned to a single authority if true public accountability for county decision making is to be achieved. Elected department directors without the power to tax should not be making spending decisions independent from the approved budget. Spending decisions must also consider taxpayers' willingness to pay taxes. Only the county commission with its taxing authority is positioned to make spending decisions in this critical context. The county commission can be held accountable for taxing decisions only if it also has the power to fully control spending decisions through the budget process.

4. The ‘necessary verses discretionary’ test is a subjective and unworkable standard for determining which county entity or official has spending authority.

This standard was first offered by Attorney General Robert Stephan in the 1980s as a way to resolve what he identified as competing statutory authority in budget decisions involving departments managed by an elected director. No definitions of ‘necessary’ and ‘discretionary’ are found in statutes, nor did Stephan offer any. Any legislative effort to define the specific expenditures that are necessary and those that are discretionary would not likely end disputes among county officials. Department directors are natural advocates for their department and its services, and can be expected to seek resources to enhance the department capabilities by any reasonable means possible. What department head would ever want to communicate to citizens that his or her proposed spending was unnecessary?

Presently, the only authoritative arbiter to resolve such spending disputes is district court. Do we really want the court to step into such disputes, as it did in Trego County in 1990, and determine whether an $8,800 overtime payment by the county treasurer was necessary spending? Undoubtedly in the instance, the court costs and attorneys fees exceeded the amount of disputed funds. The county commission routinely makes judgments about what is necessary spending with respect to county departments headed by an appointed director and is capable of making the same determinations for departments managed by an elected director.

The county commission should not try to control the spending of elected department directors once they have given approval to the department’s budget. But in instances where the director’s spending will exceed the total budget appropriation, approval by the legislative body should be required. The county commission is the proper decision maker to determine what constitutes “necessary” spending, and in doing so, must balance the claims from the five departments managed by elected directors alongside the ‘necessary’ spending claims from departments managed by appointed directors. If the county commission errs in its judgment and rejects a spending request that negatively impacts a county service, then commissioners will be accountable for that decision at the next election.

ENDNOTES

[1] Minutes from Senate Commission on Governmental Organization, February 24, 1983.

[2] Minutes from Senate Commission on Governmental Organization, February 24, 1983.

[3] K.S.A. 19-805; K.S.A. 19-302; K.S.A.19-503; K.S.A. 19-1202.

[4] Minutes from Senate Commission on Governmental Organization, February 24, 1983.

[5] Kansas Supreme Court Case, Board of County Commissioners of the County of Lincoln, Kansas v Neilander, 275 Kan..267 (2003)

[6] K.S.A. 19-805(d). See parallel statutes for Clerks, K.S.A. 19-302(d); Treasurers, K.S.A. 19-503(d) and Register of Deeds, K.S.A. 19-1202(d)

[7] Attorney General Opinion 84-30

[8] Attorney General Opinion 87-37

[9] Attorney General Opinion 93-64

[10] Kansas Supreme Court Case, Board of County Commissioners of the County of Lincoln, Kansas v Neilander, 275 Kan..267 (2003).

[11] Attorney General Opinion 2004-13

[12] Kansas County Commissioner's Deskbook, published by Kansas Association of Counties, 2003, chapter 20, p. 13.

[13] Interview with Commissioner Brad Hamilton, Jackson County.

[14] Presentation by Wendell Cowan, Attorney for Lincoln County, to KCCA Annual Conference, May 8, 2003.

[15] Interview with Commissioner Brad Hamilton, Jackson County.

[16] K.S.A. 19-805(d) (1)

[17] *Governing the American County in the 21st Century,* by Donald Menzel, "Spectrum", Summer, 1996, p. 49.

[18] Attorney General Opinion, 87-14

[19] Attorney General Opinion, 99-29

[20] K.S.A. 19-805(c) (d)

[21] Clerks, K.S.A. 19-302(c)(d); Treasurers, K.S.A. 19-503 (c)(d) and Register of Deeds, K.S.A. 19-1202 (c) (d)

[22] K.S.A 79-2929a.

[23] Attorney General Opinion 87-14

[24] *Kansas Local Government Law*, Second Edition, by Mike Heim. League of Kansas Municipalities, 2001, p. 1-17.

[25] K.S.A. 28-824

[26] Attorney General Opinion 94-115.
[27] Attorney General Opinion 99-29.

[28] Attorney General Opinion 94-115.

[29] Kansas Supreme Court Case, Board of County Commissioners of the County of Lincoln, Kansas v Neilander, 275 Kan..267 (2003).

[30] Interview with Commissioner Raymond Brown, Haskell County

[31] K.S.A. 79-2929a

[32] Interview with Phil Winter, former Lyon County Counselor

[33] K.S.A. 79-2936

[34] Interview with Phil Winter, former Lyon County Counselor

[35] Interview with Rich Euson, Sedgwick County Counselor

The following Commissioners have agreed to serve on the KCCA Legislative Initiative Committee:

Jim Minnix, Scott County
Stan Skaer, Greenwood County
Clyde Graeber, Leavenworth County
Dudley Feuerborn, Anderson County
Delmar Kaiser, Gove County
Dick Works, Allen County
Jerry Carson, Labette County

Marice Kane, Shawnee County
Dave Unruh, Sedgwick County
Gene Merry, Coffey County
Brad Hamilton, Jackson County
Larry Hall, Linn County
Gary Baker, Stevens County