



TESTIMONY OF THE KANSAS ASSOCIATION OF COUNTIES  
TO THE HOUSE LOCAL GOVERNMENT COMMITTEE  
ON HB 2509

February 6, 2018

Madam Chair and Members of the Committee:

Thank you for the opportunity to offer testimony in support of HB 2509. HB 2509 places the Election Commissioner under the budget authority and the personnel and purchasing policies of the county. We believe the bill is a fair compromise to preserve the Secretary of State's appointment powers of Election Commissioners and the counties' right to exercise budget and personnel decisions for a position that is funded by county coffers and occupies a county office.

Election Commissioners are appointed in the four urban counties pursuant to K.S.A. 19-3419, which says:

In counties of this state having a population exceeding 130,000, there shall be an office of the commissioner of elections, which shall be administered by an election commissioner. The election commissioner shall be appointed by the secretary of state and shall hold the office for a term of four years. . . ."

Review of laws and news clippings dating back to the 1940s indicate that county election commissioners were created to replace city election commissioners.<sup>i</sup> Prior to 1945, elections were conducted in the unincorporated areas by county clerks, while city elections were administered by city election commissioners.<sup>ii</sup> Chapter 207 of the 1949 Session Laws lists K.S.A. 19-3419 as saying Election Commissioners are appointed by the Governor in counties with a population over 125,000. Amendments in 1953 and 1961 changed the population threshold to 90,000 and 130,000 respectively.<sup>iii</sup> The appointment of Election Commissioners moved from the Governor to the Secretary of State in 1969 when Kansas had a democratic Governor and republican Secretary of State.<sup>iv</sup> The new appointment process for the Secretary of State required Senate confirmation. In 1982, the Senate confirmation was eliminated and it became a straight-up appointment by the Secretary of State.<sup>v</sup>

Historically the Election Commissioner has occupied two realms; appointment by a state official yet service at the county level. In the other 101 counties, the County Clerk administers elections. The Election Commissioner—like the County Clerk—is funded by the budget created by the Board of County Commissioners.

Attorney General Opinion 2017-11, issued to Secretary of State Kris Kobach in August, 2017, interpreted the statutory language relating to the Election Commissioner's budget. References

to the word “shall” were interpreted as mandatory with an end result that the Board of County Commissioners must appropriate whatever funds are requested by the Election Commissioner.<sup>vi</sup> This reading of the law does not promote a reasonable result. The Board of County Commissioners must balance a budget based on its receipt of public monies and the needs of its citizens (just like the Kansas legislature). This task becomes difficult if one office has unilateral power in determining its budget. We know of no other position in government--or private industry, for that matter--where a person can submit his/her budget and declare that the budget shall be financed according to his/her terms. County Commissioners are elected officials and accountable to their constituents, yet they cannot control the outlay to the Election Commissioner according to AGO 2017-11. HB 2509 is our attempt to remedy the AGO and create reasonable policy where the Secretary of State retains his appointment authority, but the Board of County Commissioners retains its authority over the county budget and local policies.

We support the bill, and ask the committee to recommend it favorably. Thank you for your time and I would be happy to answer questions.

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<sup>i</sup> See attached news clipping from 1947 and Kansas Supreme Court case *State v. Schoepfel*, 160 Kan. 396 (1945).

<sup>ii</sup> See *Schoepfel* which explains the history of election commissioners.

<sup>iii</sup> See attached HB 197 (1953) and HB 145 (1961).

<sup>iv</sup> See attached Chapter 159, Section 1 of 1969 Session Laws, and news clipping from The Salina Journal, April 10, 1969.

<sup>v</sup> See attached Chapter 347, Section 13 of the 1982 Session Laws.

<sup>vi</sup> See attached AGO 2017-11.

## Senate Bill Would Eliminate City Election Officer

A Senate bill introduced last week providing for an election commissioner for each county appointed by the governor would do away with the city election commissioner, Frank Eresch, city attorney, reported Friday.

The bill (No. 112) was introduced by Senator A. J. Herrod of Kansas City and is now being considered by the Senate committee on elections.

**IF PASSED**, \* \* \* the bill would do away with the city election commissioner in Topeka and other cities in the state. The proposed legislation sets up a county election commission, who would serve four years at an annual salary of \$3,600.

The county clerk's office now carries out all election matters in the county, while the city election commission supervises elective matters within the city limits.

### PRIMARY BILL IS PASSED.

Kansas Senate Votes Part Return to Convention System.

(By The Star's Topeka Correspondent.)

TOPEKA, March 13.—The Kansas Senate yesterday made its biennial effort at nicking a bit out of the Kansas primary law. By a vote of 30 to 5 the Senate passed the Coleman bill to take away from the people the right of direct nomination of the minor state officers and turn that job over to political conventions.

Ever since the primary law was enacted in the special legislative session of 1908 almost every state Senate has undertaken to injure the primary project in some way.

Senator Rolla W. Coleman of Johnson County has led the fight in four recent sessions.

The House of Representatives, being more amenable to the votes of the people at home, has regularly turned thumbs down on the proposition.

656, 664, 62 P. 2d 875. Many other cases to be found but they would only further time and space will not permit their cita-

s case was liberal is beyond dispute. How-  
en we give full credence to all the testi-  
pellee, heretofore set forth in detail, which  
because the jury gave it such credence, we  
was sufficiently excessive, if actually exces-  
sion and prejudice on the part of the jury  
ng of a new trial. Obviously, under such  
; trial court in the exercise of its discre-  
ly reduce the verdict we are not disposed  
on the ground it was excessive.  
the judgment is affirmed.

No. 36,476

rel. A. B. MITCHELL, as Attorney General,  
ANDREW F. SCHOEPPPEL, as Governor, etc.,

(162 P. 2d 89)

SYLLABUS BY THE COURT

n—Validity. In an action in quo warranto a bill  
, as follows: "Section 1. That in counties of this  
1 in excess of one hundred thousand inhabitants  
valuation of less than \$150,000,000, there is hereby  
nissioner of elections, which shall be in charge of  
ssioner who shall be appointed by the governor  
bove restrictions caused the bill to be in violation  
the constitution.

o warranto. Opinion filed October 6, 1945. Judg-

general, Leon W. Lundblade, assistant attorney  
ounty attorney, and William K. Ward, assistant  
e briefs for the plaintiff.

ttorney general, and J. E. Schroeder, of Kansas  
the defendant.

was delivered by  
original action in quo warranto brought in  
the relation of the attorney general to de-

termine the validity of chapter 175 of the Laws of 1945. There is  
no dispute about the facts. The matter is presented on the plead-  
ings.

Prior to the 1945 session of the legislature the business of con-  
ducting elections in areas outside the limits of certain incorporated  
cities was under the supervision of officials designated by the county  
clerks of the various counties. The statutes provided for election  
commissioners in certain cities to be appointed by the governor of  
the state. Chapter 175 of the Laws of 1945 was senate bill 182.  
Its general purpose when introduced was to provide for the ap-  
pointment of a commissioner of elections by the governor in Wyan-  
dotte, Sedgwick and Shawnee counties who would have all the power  
and jurisdiction over elections in their respective counties thereto-  
fore exercised by county clerks, city election commissioners and  
township officers.

Section 1 of the chapter provided in part as follows:

"That in counties of this state having a population in excess of eighty  
thousand inhabitants, there is hereby created the office of commissioner of  
elections, which shall be in charge of a county election commissioner who  
shall be appointed by the governor."

As thus drawn, the bill passed the senate. Had it finally been en-  
acted with the above provisions it would have applied to Wyan-  
dotte, Sedgwick and Shawnee counties, where Kansas City, Wich-  
ita and Topeka are located. When the bill reached the house the  
foregoing section was amended so as to read:

"That in counties of this state having a population in excess of one hun-  
dred thousand inhabitants and having an assessed valuation of less than  
\$150,000,000, there is hereby created . . ."

The effect of this amendment was to restrict application of this bill  
to Wyandotte county.

About the time for the bill to become effective it appeared that  
there was a question as to its validity. Unless the bill was invalid  
it became the duty of the governor to appoint a county election  
commissioner on July 1, 1945. Since there was a question, the at-  
torney general brought a quo warranto action in which he set out  
the general provisions of the bill, alleged that the governor was  
about to make an appointment pursuant to it and pleaded several  
particulars in which the bill violated the state constitution. The  
prayer was that this court decide whether the bill violated the con-  
stitution and if we should hold that it did that we oust the gov-  
ernor from acting pursuant to it.

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CHAPTER 207

ELECTION COMMISSIONERS IN COUNTIES HAVING A POPULATION OF OVER 125,000; SALARIES; POWERS AND DUTIES

House Bill No. 333

AN Act relating to election commissioners in certain counties, amending sections 19-3419, 19-3420, 19-3421, 19-3427, 19-3428, 19-3430, 19-3431 and 19-3435 of the General Statutes Supplement of 1947, and repealing said original sections.

*Be it enacted by the Legislature of the State of Kansas:*

SECTION 1. Section 19-3419 of the General Statutes Supplement of 1947 is hereby amended to read as follows: Sec. 19-3419. In counties of this state having a population of over one hundred twenty-five thousand (125,000), there is hereby created the office of commissioner of elections, which shall be in charge of an election commissioner who shall be appointed by the governor and shall hold his office for a term of four years, and until a successor is appointed and qualified. The person so appointed may, for official misconduct, be removed by the governor. The governor shall appoint his successor for the same term of years; and in case of death, resignation or removal of the election commissioner, the appointment shall be for the unexpired term. Such election commissioner shall have been a qualified elector and resident of said county at least two years prior to his appointment, and shall before entering upon his duties, take and subscribe and cause to be filed in the office of the secretary of state an oath of office for the faithful discharge of his official duties, within ten days after receiving official notice of his appointment. Said election commissioner shall receive an annual salary of thirty-six hundred dollars, and such salary shall be paid monthly out of the county treasury in the same manner as the salary of other county officers.

SEC. 2. Section 19-3420 of the General Statutes Supplement of 1947 is hereby amended to read as follows: Sec. 19-3420. The election commissioner shall appoint one deputy, known as chief deputy election commissioner, who shall receive an annual salary of twenty-four hundred dollars to be paid in the same manner as other county officers 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 shall be allowed by the board of county commissioners of said county.

SEC. 3. Section 19-3424 of the General Statutes Supplement of 1947 is hereby amended to read as follows: Sec. 19-3424. The election commissioner, as a part of his official duties shall have and exercise the following powers and authority, to wit:

(a) He shall establish and fix the boundaries of wards and precincts within the county and in all cities located in said county for



HOUSE BILL No. 197

By Messrs. SHAW, LAING and TURNEY

AN ACT relating to election commissioners in certain counties, amending section 19-3419 of the General Statutes Supplement of 1951 and section 19-3421 of the General Statutes of 1949, and repealing said original sections.

Enacted by the Legislature of the State of Kansas:

SECTION 1. Section 19-3419 of the General Statutes Supplement of 1951 is hereby amended to read as follows: Sec. 19-3419. In counties of this state having a population of over ninety thousand (90,000), there is hereby created the office of commissioner of elections, which shall be in charge of an election commissioner who shall be appointed by the governor and shall hold his office for a term of four years, and until a successor is appointed and qualified. The person so appointed may, for official misconduct, be removed by the governor. The governor shall appoint his successor for the same term of years; and in case of death, resignation or removal of the election commissioner, the appointment shall be for the unexpired term. Such election commissioner shall have been a qualified elector and resident of said county at least two years prior to his appointment, and shall before entering upon his duties, take and subscribe and cause to be filed in the office of the secretary of state an oath of office for the faithful discharge of his official duties, within ten days after receiving official notice of his appointment. Said election commissioner shall receive an annual salary in counties with less



# HOUSE BILL No. 145

By Messrs. **SKOOG, HARDER, UNDERWOOD, GARDNER, CASTL and NESMITH**

AN ACT relating to fees and salaries in certain counties; amending sections 19-3419, 20-2504, 28-208, 28-209, 28-210, 28-211, 28-212, 28-213, 28-214, 28-215, 28-216, 28-217, 28-218, 28-219, 28-220, and 28-221 of the General Statutes Supplement of 1959, and repealing said original sections, and also repealing section 28-310b of the General Statutes Supplement of 1959.

*Be it enacted by the Legislature of the State of Kansas:*

SECTION 1. Section 19-3419 of the General Statutes Supplement of 1959 is hereby amended to read as follows: Sec. 19-3419.

2 In counties of this state having a population of over ninety  
3 one hundred thirty thousand (~~90,000~~) (130,000), there is hereby  
4 created the office of commissioner of election, which shall be  
5 in charge of an election commissioner who shall be appointed  
6 by the governor and shall hold his office for a term of four (4)  
7 years, and until a successor is appointed and qualified. The  
8 person so appointed may, for official misconduct, be removed  
9 by the governor. The governor shall appoint his successor for  
10 the same term of years; and in case of death, resignation or  
11 removal of the election commissioner, the appointment shall  
12 be for the unexpired term. Such election commissioner shall  
13 have been a qualified elector and a resident of said county at  
14 least two (2) years prior to his appointment, and shall before  
15 entering upon his duties, take and subscribe and cause to be  
16 filed in the office of the secretary of state an oath of office for  
17 the faithful discharge of his official duties, within ten (10)  
18 days after receiving official notice of his appointment. Said

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moneys derived from such levy shall be used exclusively for recreational purposes. ~~Before~~ Prior to August 1 of each year the park board shall prepare a budget and otherwise comply with the general budget law applying to the taxing subdivisions and municipalities of the state except as provided by this act: *Provided*, That the final budget shall not be adopted unless and until it has been approved by the board of county commissioners of Johnson county.

The district, its board, and its officers shall also comply with article 11 of chapter 10 of the Kansas Statutes Annotated, known as the cash-basis law or any amendments thereto. All tax money ~~coming into the hands of~~ *collected by* the county treasurer for the Shawnee Mission park district shall be ~~by him paid over~~ to the treasurer of the park district and a notice of ~~any amount paid over by him to the treasurer of the park district such~~ *action*, showing the amount ~~and the, proper fund to which it shall be credited~~ *credit* and the date, shall be sent ~~by him~~ to the secretary of the park board.

*All claims against the board for money owed shall be presented and paid in the same manner as provided for in the uniform procedure for payment of claims act set out in K. S. A. 1968 Supp. 12-105a and 12-105b and any amendments thereto.*

Sec. 8. K. S. A. 19-2860, 19-2863, 19-2868, 19-2869, 19-2873 and 19-2877 and K. S. A. 1968 Supp. 19-2862 and 19-2876 are hereby repealed.

Sec. 9. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 15, 1969.

CHAPTER 159

Senate Bill No. 63

AN ACT concerning elections; appointment of election commissioners; amending K. S. A. 1968 Supp. 19-3419 and repealing the existing section.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. K. S. A. 1968 Supp. 19-3419 is hereby amended to read as follows: 19-3419. In counties of this state having a population of over one hundred thirty thousand (130,000), there is hereby created the office of commissioner of elections, which shall be in charge of an election commissioner who shall be appointed by the ~~governor~~ *secretary of state, subject to confirmation by the senate*, and shall hold his office for a term of four (4) years, and until a successor is appointed and qualified. The person so appointed may, for official misconduct, be removed by the ~~governor~~ *secretary of state, subject to confirmation by the senate*, shall appoint his successor for the same term of years; and in case of death, resignation or removal of the election



## VOTING OFFICIALS BILL PASSED

*H.R. 4/4/69*  
The House today passed and sent to Gov. Robert Docking a bill which would transfer authority for appointing election commissioners from the governor to the secretary of state.

The House vote on the bill, which followed strict party lines, was 77-37.

The measure would apply only to the four counties in Kansas which have election commissioners - Shawnee, Johnson, Wyandotte and Sedgwick. Elections in the state's other 101 counties are supervised by county election officers, usually the county clerk.

Democrats had attacked the bill as a strictly partisan GOP maneuver, while Republicans defended it as a piece of election reform legislation.

### Veto Seen

Docking has said he does not look with favor on the bill, and probably will veto it.

Democrats charged the

measure is designed to preserve the reappointments of Republican election commissioners in Sedgwick and Johnson counties.

The terms of Mrs. Virginia Lee Harrison of Wichita, the

Sedgwick County election commissioner, expires July 19 of this year which would mean she comes up for reappointment under a Democrat governor unless the appointing authority is changed.

The term of Willard Cook of Olathe, the Johnson County elections commissioner, expires

Aug. 31, 1970, thus jeopardizing his reappointment to the job.

### Secretary Republican

The present secretary of state is Mrs. Elwill Shanahan who is a Republican. The office traditionally has been won by GOP candidates and the election commissioner bill is viewed as an attempt to insure that ap-

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permanent record of all meetings and proceedings of the council at the office of the administrator.

Sec. 13. K.S.A. 19-3419 is hereby amended to read as follows: 19-3419. In counties of this state having a population of ~~over one hundred thirty thousand (130,000) exceeding 130,000~~, there is ~~hereby created the~~ shall be an office of commissioner of elections, which shall be ~~in charge of administered by~~ an election commissioner ~~who~~. The election commissioner shall be appointed by the secretary of state; ~~subject to confirmation by the senate~~; and shall hold his office for a term of four (4) years; and until a successor is appointed and qualified. ~~The person so appointed may, for official misconduct, be removed by~~ The secretary of state: ~~may remove the election commissioner for official misconduct~~. Upon occurrence of a vacancy in the office of county election commissioner, the secretary of state; ~~subject to confirmation by the senate~~; shall appoint his successor for the same term of years; and in case of death, resignation or removal of the election commissioner shall appoint a successor. If the vacancy occurs before the expiration of a term of office, the appointment shall be for the unexpired term. Such election commissioner shall have been a qualified elector and a resident of ~~said the~~ county at least two (2) years prior to his appointment; and shall. Within 10 days after receiving official notice of the appointment and before entering upon his duties; ~~take and the duties of the office, the election commissioner shall take~~, subscribe and cause to be filed in the office of the secretary of state an oath of office for the faithful discharge of his official duties; ~~within ten (10) days after receiving official notice of his appointment~~. Election commissioners holding office at the time this amendment takes effect shall hold their respective offices for the terms for which originally appointed unless sooner removed for official misconduct.

Sec. 14. K.S.A. 22-3707 is hereby amended to read as follows: 22-3707. (a) The Kansas adult authority shall consist of five (5) members ~~to be appointed by the governor with the advice and consent of, subject to confirmation by the senate as provided in section 1~~. No more than three (3) members of ~~such the~~ authority shall be members of the same political party. To the extent feasible, members of the ~~Kansas adult~~ authority shall be chosen by the governor from among the following: Psychiatrists, psychologists, sociologists, persons licensed to practice medicine and surgery, and persons admitted to practice law before the supreme court of Kansas. The term of office of the members of the authority shall be four (4) years. ~~In case of~~ If a vacancy occurs in the membership of the authority ~~occurring~~ before the expiration of the term of office, a successor shall be appointed in ~~like the same manner as that~~ original appointments are made, for the



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

**DEREK SCHMIDT**  
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August 8, 2017

ATTORNEY GENERAL OPINION NO. 2017- 11

The Honorable Kris W. Kobach  
Kansas Secretary of State  
120 S.W. 10<sup>th</sup> 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.<sup>1</sup> 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.<sup>2</sup> The board of county commissioners sets the salary and car allowance of the election commissioner.<sup>3</sup>

The board of county commissioners is authorized to establish the budget for the county.<sup>4</sup> 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*,<sup>5</sup> 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:<sup>6</sup>

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.”<sup>7</sup>

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

#### *Legislative context and history*

The office of election commissioner was created in 1947.<sup>8</sup> The original act included the following provisions:

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

<sup>2</sup> *Id.*

<sup>3</sup> K.S.A. 19-3419a.

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

<sup>5</sup> 289 Kan. 911 (2009).

<sup>6</sup> 304 Kan. 907 (2016).

<sup>7</sup> *Ambrosier*, 304 Kan. at 912.

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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,”<sup>11</sup> 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.<sup>12</sup> Lastly, the 1949 act added to K.S.A. 19-3424 the paragraph you reference in your letter.<sup>13</sup> 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.

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

<sup>10</sup> L. 1947, Ch. 203, § 17.

<sup>11</sup> L. 1949, Ch. 203, § 2.

<sup>12</sup> L. 1949, Ch. 207, § 8.

<sup>13</sup> L. 1949, Ch. 207, § 3.

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

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.<sup>15</sup>

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*.<sup>16</sup>

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*.<sup>17</sup>

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. . . .<sup>18</sup>

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

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

<sup>15</sup> K.S.A. 19-3420 (emphasis added).

<sup>16</sup> K.S.A. 19-3421 (emphasis added).

<sup>17</sup> K.S.A. 19-3435 (emphasis added).

<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

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*,<sup>21</sup> 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.<sup>22</sup>

<sup>19</sup> *Ambrosier*, supra at 913-914.

<sup>20</sup> 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.

<sup>21</sup> 154 Kan. 751 (1942).

<sup>22</sup> *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.”<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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*

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<sup>23</sup> *Ambrosier*, supra at 914.

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

<sup>25</sup> See K.S.A. 2016 Supp. 79-2929a.

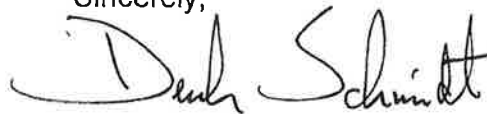
In *Raschke*, the court noted that two types of statutory provisions have been consistently held to be mandatory: provisions for notice of the time and place of an election, and provisions requiring police officers to provide oral and written notice to individuals suspected of driving under the influence before administering a breath test.<sup>26</sup> 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*

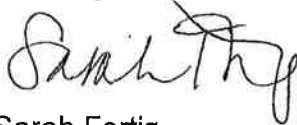
Applying the *Raschke* factors to the statutory language in question, only two factors support interpreting the statute as mandatory or directory; the other two factors are neutral or inapplicable. In this case, we think the legislative history and context of the provision in question outweighs the fact 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,



Derek Schmidt  
Attorney General



Sarah Fertig  
Assistant Attorney General

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<sup>26</sup> *Raschke*, supra at 918.