

**Testimony of Steve Leben
in Opposition to Senate Bill 58**

**House Judiciary Committee
January 28, 2016**

Chairman Barker and Members of the Committee:

Thank you for the opportunity to present my views regarding Senate Bill 58, a bill that would restrict venue for most Kansas administrative appeals to Shawnee County—preventing Kansas citizens and business owners in the other 104 Kansas counties from appealing an adverse agency decision in their home county.

SB 58 is quite short, and the Attorney General’s office (which has proposed it) suggests that it simply “make[s] the review process simple and uniform.”¹ But this bill makes a significant change that will affect many of your constituents. For the Attorney General’s office, the bill would mean handling all administrative appeals in a court just a few blocks away. But citizens and business owners in Abilene or Coldwater or Hutchinson or Ulysses would have to travel much farther for an administrative appeal—349 miles farther away for someone from Ulysses.

At this point, two questions come to mind. First, who will this affect? Second, is there a good reason to add this additional inconvenience and expense to citizens and business owners who are appealing an agency’s decision against them?

Who Will Be Affected?

The short answer is we don’t know. Appeal under the Kansas Judicial Review Act (KJRA) is the default for almost all agency appeals. There are so many different agencies and agency decisions that I can’t tell you all of the people in your districts who might be affected.

¹ Testimony of Assistant Attorney General M.J. Willoughby, Senate Judiciary Committee, Jan. 29, 2015, at 4 (hereinafter “Willoughby Testimony.”)

SB 58 specifically exempts only six types of appeals,² so all other appeals of state agency decisions would have to be made in Shawnee County. Any time a state agency grants or denies a benefit or a license, or takes some other action that directly affects a citizen or business, someone might want to appeal the decision. The possibilities are as broad as the activities of our state government.

Let me give you one example from my law-practice days. I represented the owner of a small business; he and some of his employees were licensed pesticide applicators—licensed through the then-Board of Agriculture. The Board brought an administrative action to revoke his license. We were able to resolve his situation through the administrative-agency hearing, but if we hadn't, he might have wanted to appeal. The fate of a small business would hang in the balance—and a licensed pesticide applicator might run a business in any part of Kansas.

There were 488 administrative appeals filed in district courts statewide in FY 2014; 76 of those were filed in Shawnee County.³ We don't know how many of those were KJRA appeals—some of them were driver's-license appeals, for example, and those would not be affected by SB 58. But quite a few citizens and business owners would be affected each year. We simply can't identify with much specificity the types of agency decision that they have appealed.

Is There Good Reason to Do This?

Let's look at the benefits suggested by the Attorney General's office, which requested this bill.⁴ In testimony supporting the bill, Assistant Attorney General M.J. Willoughby offers two overall justifications. First, she said that it would decrease costs to the Attorney General's office in defending these actions. Second, and more important, she said that "the real problem is that KJRA actions are specialized, involve special procedures and a limited scope

² The exceptions are as provided by K.S.A. 8-259 (driver's-license revocations), K.S.A. 31-144 (school-district appeals of fire-marshal orders), K.S.A. 44-556 (workers' compensation), K.S.A. 59-29a01 (sexually-violent-predator committals), K.S.A. 72-5430a (prohibited practices in teacher negotiations), and K.S.A. 74-2426 (appeals from the Board of Tax Appeals).

³ Fiscal Note to SB 58 (stating information provided by the Office of Judicial Administration).

⁴ The bill was proposed by the Attorney General's office, and the reasons for it discussed here are those found in the testimony presented by M.J. Willoughby to the Senate Judiciary Committee in January 2015. See Willoughby Testimony, *supra* note 1.

of review,”⁵ thus making them different from the civil cases district judges normally see. She suggests that judges outside Shawnee County “see these kinds of actions rarely” and have a “tendency . . . to apply the usual procedure under Chapter 60, not Chapter 77,” resulting in “confusion and delay, the possibility of additional burdens and expenses, . . . as well as possible misapplication of the law.”⁶ These problems would be avoided—and presumably uniform procedural and substantive rulings would be made—if all of the appeals were assigned to Shawnee County.

I do not share her understanding of the abilities of Kansas judges outside Shawnee County. It’s true that some of them handle fewer KJRA cases than Shawnee County judges. But if a judge hasn’t had an administrative appeal before, it’s easy to point out to them that the case is brought under the KJRA, which is Chapter 77, rather than the Code of Civil Procedure, which is Chapter 60. Once the judge turns to the KJRA, Chapter 77, most of the procedural questions one might have are directly answered in the statute itself.

Ms. Willoughby says that “it is important to state agencies to have uniform interpretations of state regulations and state laws.”⁷ That’s true, but the place where uniformity is maintained in judicial rulings is the Kansas Supreme Court. Even in the Shawnee County District Court, more than one judge is assigned to civil matters, including administrative appeals. Different judges may rule differently on both procedural and substantive matters.

Ms. Willoughby also suggests that assigning all of these cases to Shawnee County will allow its judges “to continue to develop expertise in this specialized area of law.”⁸ But Kansas administrative appeals are no more complicated than many other types of cases that come through our courts. District courts throughout the state hear water-law cases, oil-and-gas-law cases, medical-malpractice cases, and many others that are quite complex. We have not assigned any of those cases to a single county or judge.

With regard to the current statute, Ms. Willoughby also suggests that there is some ambiguity in the current language, which allows a case to be heard wherever an agency order “is entered or is effective.” In the example I gave of

⁵ Willoughby Testimony, *supra* note 1, at 2.

⁶ Willoughby Testimony, *supra* note 1, at 3-4.

⁷ Willoughby Testimony, *supra* note 1, at 4.

⁸ Willoughby Testimony, *supra* note 1, at 4.

the pesticide-business owner, the order revoking his license would be effective where he works, that is, his home county, and he could sue either there or where the order was entered (Topeka). Two published Kansas Court of Appeals decisions already have held that the “or is effective” language allows venue in the county where the party resides or operates an affected business.⁹ If there is some ambiguity, though, the ambiguity could surely be fixed by even more specific language rather than by eliminating venue in 104 of the 105 counties.

Let me close by addressing the claim of financial savings. The Attorney General’s office has not provided any information about the mileage costs or other expenses that it incurs in handling these cases, but we know that the bill would increase costs for Kansas citizens and business owners not located in Shawnee County. We have no way to compare those amounts. In addition, an unknown number of cases would essentially be transferred from courts around the state to Shawnee County. Depending on the number, as well as other caseload factors affecting Shawnee County, this could increase the need for another judge in that court, which is a significant potential financial impact. That would not be necessary if most of those cases remain dispersed throughout the state. (The potential that this change would cause a need for another judge in Shawnee County is real; the attached chart shows that Shawnee County judges presently have the highest caseload in the state among districts that have no magistrate judges.)

I have great respect for Attorney General Derek Schmidt and the very capable attorneys and staff who work in his office. This specific proposal, however, would benefit that office’s attorneys to the detriment of Kansas citizens and business owners in 104 of the 105 counties in Kansas. The 1986 Kansas Legislature added the option of appealing an order where it “is effective” to the venue statute for good reason—to meet the needs of citizens throughout the entire state.

The views I have expressed here are solely my own; I am not here representing the Kansas Judicial Branch or anyone else.

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⁹ See *Karns v. Kansas Bd. of Agriculture*, 22 Kan. App. 2d 739, 923 P.2d 78 (1996) (providing that judicial review of Board of Agriculture order was properly in county where affected crop duster operated); *Mildfelt v. Kansas*, 11 Kan. App. 2d 617, 731 P.2d 884 (1987) (providing that venue was proper in county of residence of person denied food stamps and medical assistance).

For your background information, I have substantial expertise in the area of Kansas administrative law and procedure. I have written two articles¹⁰ and have given many continuing-legal-education programs for attorneys focused specifically on administrative law. I am also a past president (1992–1993) of the Administrative Law Section of the Kansas Bar Association. While in law practice from 1982 through 1993, I practiced in front of state and federal agencies, including the Kansas Department of Health and Environment, the Kansas State Board of Agriculture, the United States Environmental Protection Agency, and the United States Consumer Product Safety Commission. I handled many administrative-agency appeals while a district judge in Johnson County from September 1993 until June 2007, and I have also handled many such appeals as a member of the Kansas Court of Appeals from June 2007 to the present. I have served as a member of the Administrative Law Advisory Committee to the Kansas Judicial Council from 2006 to the present, and I have testified on behalf of the Judicial Council in support of amendments it proposed to the Kansas Administrative Procedure Act and the Kansas Judicial Review Act in 2009, 2010, and 2011. I also serve as an Adjunct Professor at the University of Kansas School of Law; since 2007, I have regularly taught a three-credit-hour course called Legislation and Statutory Interpretation.

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¹⁰ Steve Leben, *Challenging and Defending Agency Actions in Kansas*, J. KAN. B. ASS'N, June/July 1995, at 22; Steve A. Leben, *Survey of Kansas Law: Administrative Law*, 37 KAN. L. REV. 679 (1989).

**KANSAS AVERAGE CASELOAD PER JUDGE COMPARISONS
DISTRICTS WITH DISTRICT JUDGES ONLY
JULY 1, 2014 -- JUNE 30, 2015**

	Number of Judges	Total Caseload		Total Less Traffic		Civil and Criminal		Chapter 60, Felony, Domestic Relations	
		per judge	rank	per judge	rank	per judge	rank	per judge	rank
District 3	15	2,422	1	1,842	1	1,698	1	384	3
District 18	28	2,179	2	1,445	2	1,264	2	572	1
District 7	6	1,876	3	1,050	4	893	4	364	4
District 19	3	1,754	4	1,197	3	1,032	3	333	6
District 1	6	1,388	5	1,021	5	842	5	393	2
District 29	16	1,272	6	843	6	727	6	346	5
Total Caseload	74	1,926		1,319		1,162		444	
Statewide Caseload	246	1,595		926		778		461	