MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 11:00 a. m./~~p.~~m., on February 22, 1978.

All members were present except: Senators Gaar and Gaines

The next meeting of the Committee will be held at 6:00 ~~x~~m./p. m., on February 22, 1978.

~~These minutes of the meeting held on~~ were ~~corrected~~ and approved.

Elaine F. Owsley
Chairman

The conferees appearing before the Committee were:

Lawrence C. Wilson - Kansas Commission on Civil Rights
Roger W. Lovett - Kansas Commission on Civil Rights
Constance L. Menninger - U.S. Commission on Civil Rights
Lee Kinch - Wichita Attorney
Professor David Ryan - Washburn Law School
Jack Swartz - Kansas Association of Commerce and Industry
William G. Haynes - Topeka Attorney
Steve Carter - Kansas Corporation Commission
Fred Rausch, Jr. - Kansas Association of School Boards
Joe Zima - Shawnee County Sheriffs Department
Frederick K. Starrett - Topeka Attorney

Staff present:
Art Griggs - Revisor of Statutes
Jerry Stephens - Legislative Research Department
Paul Purcell - Legislative Research Department

Senate Bill 852 - Commission of civil rights, procedure on appeal from orders of the commission. Lawrence C. Wilson, the chairman of the Commission on Civil Rights, spoke in support of the bill. He stated the present system provides for duplication of effort, and adds additional cost since another complete trial is required.

Roger Lovett spoke in support of the bill; a copy of his statement is attached hereto. Committee discussion with him followed.

Constance Menninger spoke in support of the bill; a copy of her statement is attached hereto. She stated the bill would raise the status of the Commission on Civil Rights.

Lee Kinch spoke in support of the bill and urged its passage.

Professor David Ryan testified in support of the bill. Committee discussion with him followed.

continued -

CONTINUATION SHEET

Minutes of the Senate Committee on Judiciary February 22, 19 78.

SB 852 continued -

Jack Swartz spoke in opposition to the bill, and introduced Bill Haynes, an attorney who spoke in opposition. He urged the committee to give serious consideration before changing present law. He also stated that the legislature should consider the passage of a uniform administrative procedures act. Committee discussion with him followed.

Fred Rausch spoke in opposition to the bill. He urged the committee, if it looked favorably on the bill, to delete section 2.

Joe Zima spoke in opposition to the bill. Committee discussion with him followed.

Senate Bill 912 - Kansas securities act, orders of commissioner. Steve Carter explained the bill, and urged its passage. He indicated that it had been introduced at the request of the Securities Commissioner. He stated that some concern had been expressed concerning section 3 on page 4 of the bill. He distributed copies of a proposed amendment to eliminate some of the problems that had been expressed with regard to this section. A copy of the proposed amendment is attached hereto. Committee discussion with him followed.

Senate Bill 841 - Divorce, modification of alimony payments. Mr. Fred Starrett spoke in support of the bill. He indicated it would remove a conflict in K.S.A. 60-1610. Committee discussion with him followed.

The chairman reminded the committee of the working session this afternoon upon adjournment of the Senate.

The meeting adjourned.

These minutes were read and approved by the committee on 4-24-78.

2-22-78

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Jack Swartz	Topeka	KACI
William L. Haynes	Topeka	Attorney
Fred W. Rausch, Jr.	"	Kansas Association of School Boards
Anthony D. Lyez	"	KCCR
Roger W Fows XP	"	"
Frank L. Ross	"	"
Melvin L Jenkins	K.C. Mo.	U.S. Comm. on Civil Right
Constance L Mennuger	Topeka	" "
Lee Knuckles	Wichita	Attorney
Joe Zima	Topeka	Shawnee County Sheriff's Dept
Bill Henry	"	Governor's Office
Prof. David Ryan	Topeka, Washburn Law School	
Lawrence C. Wilson	K.C.C.R. - Topeka	
Clark A. Nicholas	AGC of Ks	Topeka
Robert E. Edmonds	Topeka	Attorney
Marilyn Bradt	Lawrence	League of Women Voters

2-22-78

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
ARTHUR W. Solis	Lawrence, Ks	KU Law Student
FREDERICK K. STARRETT	TOPEKA	ATTY
Charles J. Damm	Topeka State Off. Bldg	SRS

2-22-78

FEBRUARY 22, 1978

STATEMENT OF MRS. CONSTANCE L. MENNINGER
CHAIRPERSON, KANSAS ADVISORY COMMITTEE
UNITED STATES COMMISSION ON CIVIL RIGHTS

GOOD MORNING. I AM CONSTANCE L. MENNINGER OF TOPEKA, CHAIRPERSON OF THE KANSAS ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS. APPEARING WITH ME IS MELVIN L. JENKINS, STAFF ATTORNEY FOR THE COMMISSION'S CENTRAL STATES REGIONAL OFFICE LOCATED IN KANSAS CITY.

I AM HERE TO PROVIDE THE SUPPORT OF THE KANSAS ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS ON BEHALF OF SENATE BILL 852. IN OUR OPINION THE BILL WILL BE HELPFUL TO THE CITIZENS OF KANSAS IN REMEDYING DISCRIMINATORY ACTS AND WILL RELEASE THE STATE'S COURT SYSTEM FROM A BURDEN IT NEED NOT AND SHOULD NOT CARRY.

THE BILL UNDER CONSIDERATION WILL RECOGNIZE THE RECORD DEVELOPED BY THE COMMISSION IN A HEARING AND THEREBY LIMIT THE DISTRICT COURT TO CONSIDERING WHETHER AS A MATTER OF LAW:

1) THE COMMISSION ACTED FRAUDENTLY, ARBITRARILY OR CAPRICIOUSLY;

2) THE ADMINISTRATIVE ORDER IS SUPPORTED BY EVIDENCE; AND

3) THE COMMISSION'S ACTION WAS WITHIN THE SCOPE OF ITS AUTHORITY.

CURRENTLY, COMMISSION DECISIONS CAN BE APPEALED TO A STATE DISTRICT COURT WHERE THEY ARE TREATED AS A TRIAL DE NOVO.

THE PROPOSED LEGISLATION WILL GIVE THE KANSAS COMMISSION ON CIVIL RIGHTS A STATUS SIMILAR TO THE KANSAS CORPORATION COMMISSION

IN THAT ITS ADMINISTRATIVE RULINGS WOULD BE ACCEPTED BY DISTRICT COURTS EXCEPT IN THE INSTANCES NOTED ABOVE.

IT IS MY BELIEF THAT THE RECORD OF THE KANSAS COMMISSION, AND THE GENERAL DEVELOPMENT OF THE ART OF CIVIL RIGHTS ENFORCEMENT, WARRANT RAISING THE COMMISSION'S ULTIMATE FINDINGS TO THE STATUS OF ADMINISTRATIVE LAW. IN THE DAYS OF THE MID-1960's WHEN CIVIL RIGHTS ENFORCEMENT BY STATE AGENCIES WAS IN ITS INFANCY, DIRECT OVERSIGHT BY THE COURTS MADE GOOD SENSE. IN THE LAST DOZEN YEARS HOWEVER, GREAT STRIDES HAVE BEEN MADE IN THE FIELD: BY USE OF MORE SOPHISTICATED INTAKE PROCESSES, AGENCY STAFF IS ABLE TO CONCENTRATE MORE INTENSELY ON SERIOUS COMPLAINTS AND DEVELOP APPROPRIATE DOCUMENTATION. CITIZEN COMMISSIONERS RECEIVE MORE THOROUGH TRAINING THAN BEFORE, AND HAVE THE BENEFIT OF STAFF PERSONS HAVING GREATER LEGAL EXPERIENCE. IN ADDITION, A BODY OF LAW HAS DEVELOPED WHICH GIVES CLEAR GUIDELINES LOCALLY AND NATIONWIDE. IN SHORT, THE AGENCY HAS GONE FROM BEING A GENERALIST IN THE FIELD TO A POINT WHERE IT IS NOW THE DEPOSITORY OF A SPECIAL EXPERTISE.

TO ONE WHO HAS WATCHED THE KANSAS COMMISSION GROW STRONG AND STABLE OVER THE PAST FIVE YEARS, IT SEEMS APPROPRIATE TO RECOGNIZE THIS REALITY AND THEREBY SAVE THE TAXPAYERS CONSIDERABLE COSTS FOR UNNECESSARY LEGAL EXPENSES.

ADMINISTRATIVE LAW HEARINGS ARE NOT UNKNOWN TO KANSAS AGENCIES, AS INDICATED BY THE AGENCIES I CITED PREVIOUSLY. USING THE FEDERAL ADMINISTRATIVE LAW PROCEDURE AS AN ANALOGUE, IT IS LIKELY THAT THE SAVINGS IN COST AND TIME WOULD BE MOST SIGNIFICANT. JUDGE HARVEY MCCORMICK OF THE BUREAU OF HEARINGS AND APPEALS FOR THE SOCIAL SECURITY

ADMINISTRATION NATIONALLY RECOGNIZED IN THE FIELD OF ADMINISTRATIVE LAW, ESTIMATES THAT A TRIAL ON THE ADMINISTRATIVE RECORD CAN BE HANDLED IN ABOUT ONE FIFTH OF THE TIME IT WOULD TAKE A TRIAL DE NOVO. SINCE IN THIS COUNTY WE HOLD JUSTICE DELAYED TO BE EQUIVALENT TO JUSTICE DENIED, I THINK THE SYSTEM OUGHT TO BE MODIFIED TO DELIVER SPEEDIER JUSTICE.

I WOULD LIKE TO STRESS THAT THE CURRENT ADMINISTRATIVE PROCESS ALLOWS FULL PROTECTION OF RESPONDENTS' RIGHTS, AND THIS WOULD NOT CHANGE UNDER SB 852. RESPONDENTS ARE NOTIFIED PROMPTLY THAT THEY HAVE BEEN CITED IN A DISCRIMINATION COMPLAINT. THEY ARE INTERVIEWED BY A FULL TIME PROFESSIONAL INVESTIGATOR. THE INVESTIGATOR'S REPORT IS REVIEWED BY A SENIOR ADMINISTRATOR BEFORE BEING SENT TO THE COMMISSIONER. IF THE COMMISSION DOES FIND PROBABLY CAUSE, A CONCILIATION EFFORT IS ATTEMPTED. ONLY IF ALL OF THESE STEPS PROVE INEFFECTIVE IS A FORMAL HEARING SCHEDULED.

THE TREND OF THE KANSAS COMMISSION ON CIVIL RIGHTS HAS BEEN TOWARD TAKING ALL OF THESE STEPS VERY SERIOUSLY. THE COMMISSION HAS WITHDRAWN WEAK CHANGES AND ADVISED COMPLAINANTS WHERE EVIDENCE IS SO WEAK THAT PROBABLE CAUSE CANNOT BE RECOMMENDED. THIS HAS OCCURRED, MUCH MORE FREQUENTLY IN RECENT YEARS, A SIGN OF INCREASED PROFESSIONALISM AND A LESS EMOTIONAL APPROACH TO THE REAL AND PERSISTING PROBLEM OF DISCRIMINATION.

UNFORTUNATELY, RESPONDENTS TOO OFTEN HAVE EXHIBITED A CAVALIER ATTITUDE TOWARD THE AGENCY'S INVESTIGATION AND REVIEW. FEELING THAT THEY CAN OBTAIN A MORE FAVORABLE HEARING FROM A FRIENDLY DISTRICT COURT, THEY HAVE HAD LITTLE INCENTIVE TO TAKE CONCILIATION SERIOUSLY.

THE RECORD HAS BEEN FAIRLY CLEAR ON THIS; AS VERY OFTEN THE COMMISSION'S RULINGS ARE OVERTURNED AT THE DISTRICT COURT LEVEL ONLY TO BE REINSTATED BY THE KANSAS SUPREME COURT.

IN SUMMARY, THE PASSAGE OF SENATE BILL 852 WILL RESULT IN SPEEDIER RESOLUTION OF DISCRIMINATION COMPLAINTS AT THE JUDICIAL LEVEL, WHICH WILL REDUCE THE BACKLOG OF CASES ON APPEAL AND WILL REDUCE THE COST OF SUCH CASES TO THE RESPONDENTS AND COMPLAINANTS.

THE KANSAS COMMISSION ON CIVIL RIGHTS HAS BEEN GIVEN VERY HIGH RATINGS BY THE PROFESSIONAL ASSOCIATION IN CIVIL RIGHTS, THE INTERNATIONAL ASSOCIATION OF OFFICIAL HUMAN RIGHTS AGENCIES. ITS PROFESSIONALISM AND THE SAVING THAT IT BRINGS BOTH IN TIME AND MONEY WILL BE ENHANCED BY PASSAGE OF SENATE BILL 852.

I URGE YOU TO PASS THE BILL FOR THESE REASONS.

2-22-78

TRIAL DE NOVO - K.S.A. 44-1011

KANSAS ACT AGAINST DISCRIMINATION

KANSAS COMMISSION ON CIVIL RIGHTS

The term trial de novo means to try over again or to hear a case "anew". This language was amended to the Kansas Act Against Discrimination at K.S.A. 44-1011 in 1965 (L. 1965 Ch. 323, 7) and refers to the scope of review of commission orders by the district courts. It means a trial where the issues of both fact and law would be determined anew. The Kansas Supreme Court has rendered two decisions on the issue of trial de novo as provided for in the Act; Jenkins v. Newman Memorial County Hospital, 212 Kan. 92, 510 P.2d 132 (1973) and Clarence Stephens v. U.S.D. No. 500, 218 Kan. 220, 546 P.2d 197 (1975).

The Supreme Court originally ruled in the Jenkins case:

> "...if called upon to construe K.S.A. 44-1011 we would hold that judicial review of an order of the Commission under that section would be of the same limited nature as that afforded other administrative agencies. That is to say, it would be limited to determining whether, as a matter of law, (1) the Commission acted fraudulently, arbitrarily or capriciously, (2) its order is supported by substantial competent evidence, and (3) its order is within the scope of its authority." (Kansas State Board of Healing Arts v. Foote, 200 Kan. 447, 436 P.2d 828).

However, when called upon in Stephens to actually rule, the court reversed its previous stand and said:

> "The Court therefore holds that the provision of K.S.A. 44-1011 requiring a trial de novo does not violate the separation of powers doctrine of the constitution, and is to be applied as written. A trial under that section will, however, be limited to those issues fairly raised in an application for rehearing before the commission. ...[T]he court is not convinced that its dicta as to the scope of judicial review of a commission's order found in... (Jenkins) ... were wrong."

While there is limiting language in the above citation, it is clear that it takes no special ability to raise every issue encompassed in a public hearing in an application for rehearing, thus assuring to the appealing party an unlimited trial de novo of the entire case.

Although in Stephens the court pays lip-service to the proposition that:

> "...(A) party appearing before an administrative body cannot produce his evidence piecemeal. He cannot produce part of his evidence before an administrative agency and then produce the balance on judicial review.",

it states later in the same opinion:

> "The statutory provisions authorizing the court to receive additional evidence and to 'modify' the commission's order are both consistent with a true trial de novo. The statutory statement that "The review shall be heard on the record (of hearing before the commission) without requirement of printing" we take to be a mechanical direction with a view to economy and not a nullification of the previously granted authority to take additional evidence."

It thus appears that under the Stephens decision, matters originally tried before and decided by the commission must be completely retried at a later date before a court if the commission's decision is appealed. Experience proved that under even the restricted scope of review announced in Jenkins almost all adverse commission decisions were appealed to the district court. Under the expanded scope as announced in Stephens the desire for review appears to be even greater, as the opportunity for reversal is greater. In the past the court was obliged to consider the commission's decision, and the basic issue was whether or not the commission might reasonably have come to the conclusion which it made, not whether the court agreed with that decision. In the future, the courts will make their own decisions without regard to the commission's previous decision.

The question of the extent of jury involvement in appeals was not settled by the Supreme Court, but the possibility is both strong and extensive.

The net result of the recent Stephens decision is that the commission is now faced with the necessity of two complete trials; one before the commission or its hearing examiner and a second before the district court. When one considers the crowded court dockets, it becomes evident that at least a year would probably intervene between these two separate full trials. The amount of time elapsing between the two trials would require that trial preparation be duplicated. As a consequence of de novo review those seeking resolution of a discrimination complaint face additional delays, the courts are burdened with additional trials, and the added trial work seriously overburdens the commission's legal staff.

In some judicial districts, most notably right here in Shawnee County, the courts have refused to accept even those portions of the commission's findings not appealed from or to consider the transcript of testimony presented by the witnesses before the commission on public hearing, and have demanded that all witnesses again be assembled and testify anew before the court. In cases where juries are impaneled, counsel are placed under strict orders of the court to refrain in any way from allowing the jury to know that the matter before them is an appeal, or how it had originally been decided. This second and unnecessary marshalling of the witnesses and the evidence is a burden of no small proportions on all involved.

Senate Bill No. 852 amends the current provisions of K.S.A. 44-1011 which provide for judicial appeals of Commission orders by trial de novo with or without a jury in accordance with the provisions of K.S.A. 60-238, at which the court may, in its discretion, permit any party or the Commission to submit additional evidence on any issue.

Senate Bill No. 852 provides "...THE COURT SHALL HEAR THE APPEAL ON THE ADMINISTRATIVE RECORD SUBJECT TO THE PROVISIONS OF SECTION 2. ON APPEAL THE DISTRICT COURT SHALL NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION BUT SHALL BE RESTRICTED TO CONSIDERING WHETHER, AS A MATTER OF LAW: (1) THE COMMISSION ACTED FRAUDULENTLY, ARBITRARILY OR CAPRICIOUSLY: (2) THE ADMINISTRATIVE ORDER IS SUPPORTED BY EVIDENCE: AND (3) THE COMMISSION'S ACTION WAS WITHIN THE SCOPE OF ITS AUTHORITY."

Section 2 provides that when additional evidence should be heard, it be heard and considered by the Commission rather than by the court.

The Commission supports the amendment as provided for in Senate Bill No. 852 which would be of benefit in clarifying the several ambiguities in a judicial review of the administrative procedure.

It should be pointed out that due process does not require the de novo review. The public hearing process as it is now set out in the Act contains all the safeguards inherent in due process.

A thorough reading of the Stephens case discloses that at no time does the court indicate that trial de novo is required for any other reason than to satisfy the terms of K.S.A. 44-1011. In fact, in discussion of the limitation of issues open to the courts, the Supreme Court says:

> "The district courts are expressly created by the constitution of the State of Kansas and are given only such jurisdiction as may be provided by the Legislature."

Thus the striking of de novo from the act by the enactment of Senate Bill No. 852 would be a constitutionally proper exercise of the legislative function which would speed the administration of justice and curtail the unnecessary expenditure of public funds.

Moreover, experience has shown us that in almost every case of a public hearing resulting in commission findings that unlawful discrimination did exist, the decision has been appealed to the district court, while almost no cases that result in a finding of no discrimination are so appealed. This is of course to be expected, for employers, landlords and operators of places of public accommodations, in general, have greater financial ability to go through another complete court proceeding than do those who are out of work or tenants. The Kansas Legislature has in its wisdom seen fit to create a special body, the Kansas Commission on Civil Rights, with powers to investigate allegations of unlawful discrimination, hold public hearings which include all the safeguards of due process,

and, when such discrimination is found to exist, to issue orders which will set matters aright. The net result of the present form of K.S.A. 44-1011, as interpreted by the Supreme Court of Kansas and as that interpretation is applied by many courts, is to render the public hearings of the commission a nullity.

The Kansas Commission on Civil Rights was created for the express purpose of eliminating and preventing discrimination, and it was granted the powers necessary so to do. Subsequent amendments and judicial interpretations have deprived the Commission of its most powerful tool, meaningful public hearings and commission orders. Senate Bill No. 852 will restore vitality to this important function of the Kansas Commission on Civil Rights.

APPENDIX

BACKGROUND STATEMENT ON PROPOSED BILL
CONCERNING JUDICIAL REVIEW OF COMMISSION
ORDERS AMENDING K.S.A. 44-1011

A look at the history of this paragraph in K.S.A. 44-1011 will provide perspective on the commission's recommended amendment.

The Kansas Act Against Discrimination was amended in 1961 to make it an enforceable law prohibiting discriminatory employment practices because of race, religion, color, national origin or ancestry. It provided for an enforcement process of complaint, investigation, conciliation, public hearing and judicial review which continues to the present time. Section 44-1011 in the paragraphs concerning judicial review originally read:

> "The attorney general, county attorney or any person aggrieved by an order made by the commission may obtain judicial review thereof in the said court by filing with the clerk of said court within thirty (30) days from the date of service of the order, a written appeal praying that such order be modified or set aside. The appeal shall certify that notice in writing of the appeal, with a copy of the appeal, has been given to all parties who appeared before the commission at their last known address, and to the commission by service at the office of the commission at Topeka. The evidence presented to the commission, together with its findings and the order issued thereon, shall be certified by the commission to said district court as its return. No order of the commission shall be superseded or stayed during the proceeding on the appeal unless the district court shall so direct.
>
> No objection that has not been urged before the commission shall be considered by the court unless failure or neglect to urge such objection shall be excused because of extraordinary circumstances.
>
> The court shall hear the appeal with or without a jury and the court may, in its discretion, permit any party or the commission to submit additional evidence on any issue. Said appeal shall be heard and determined by the court as expeditiously as possible. After hearing, the court may affirm the adjudication. If the adjudication by the commission is not affirmed, the court may set aside or modify it, in whole or in part, or may remand the proceedings to the commission for further disposition in accordance with the order of the court.

> The commission's copy of the testimony shall be available at all reasonable times to all parties for examination without cost, and for the purpose of judicial review of the order. The review shall be heard on the record without requirement of printing.
>
> The commission shall be deemed a party to the review of any order by the court.
>
> The jurisdiction of the district court of the proper county as aforesaid shall be exclusive and its final order or decree shall be subject to review by the supreme court as in other cases upon appeal within thirty (30) days of the filing of such decision."

In the session of 1965 the legislature struck out the second of the paragraphs quoted above and inserted in the next paragraph after "The court shall hear the appeal," the words, "by trial de novo" and, after "with or without a jury," the words "in accordance with the provisions of K.S.A. 60-238" (which is part of the Code of Civil Procedure pertaining to the right of trial by jury). The words, "by trial de novo," were among amendments recommended to the House of Representatives by the Committee on State Affairs and adopted by the House. The Senate Committee on Federal and State Affairs added the words, "in accordance with the provisions of K.S.A. 60-238," and the bill, as amended, was passed by the Senate. Both houses adopted a conference committee report which included these changes:

> In 1967 the commission recommended that the provision for trial de novo be stricken.
>
> In 1969 the commission again recommended that the provision for trial de novo and the provision for a jury trial be stricken and the first printing of the bill (H.B. 1466) had the entire paragraph containing these words printed in strikeout type. The House Committee on Federal and State Affairs restored the paragraph when, in the course of the legislative session the Kansas Supreme Court ruled in Rydd v. State Board of Health, "In the light of the constitutional inhibition prescribed by the separation of powers doctrine...the legislature may not impose upon the judiciary the function of a trial de novo of action of an administrative agency in the sense of authorizing the court to substitute its judgment for that of the administrative agency in matters other than law or essentially judicial matters." In its 1969 Annual Report the commission stated its continuing concerns (1) about the appropriateness of a jury trial, (2) about the permission to raise issues additional to those raised before the commission and whether the Rydd case which involved a question or licensing would apply to a question of discrimination.

The Senate did not act on H.B. 1466 until the 1970 session when it was approved without amending the trial de novo paragraph.

In 1971, the commission again proposed that the de novo provision be stricken but neither in 1971 or 1972 did the legislature give any encouragement to this proposal.

The Kansas Supreme Court on January 27, 1968 in Kansas State Board of Healing Arts v. Foote declared: "Recent cases dealing with the scope of judicial review of administrative actions include (six citations)."

"Rules firmly emerging from this line of authority may be summarized thus: A district court may not, on appeal, substitute its judgment for that of an administrative tribunal, but is restricted to considering whether, as a matter of law, the tribunal acted fraudulently, arbitrarily or capriciously, whether the administrative order is substantially supported by evidence, and whether the tribunal's action was within the scope of its authority."

On May 12, 1973 in Jenkins v. The Newman Memorial County Hospital which concerned the validity of the rehearing requirement in K.S.A. 44-1011, after reviewing the Foote case where the statute did not include the de novo or jury trial provision, and several cases, including Rydd, where the statute did include de novo and jury trial provisions, the Kansas Supreme Court declared, "An examination of these cases clearly indicates the functions of the Kansas Civil Rights Commission are within the same general administrative agency category as the other agencies mentioned. The scope of judicial review provision of K.S.A. 1972 Supp. 44-1011 will not be construed to impose upon the judiciary the function of a trial de novo in the true legal sense in reviewing orders of an administrative agency. (Rydd v. State Board of Health, supra.) The legislature may not impose such power or duty upon the judiciary by reason of the separation of powers doctrine inherent in the constitution of the State of Kansas. If we were called upon to determine the scope of judicial review on appeals from orders of the Kansas Commission on Civil Rights it would be no broader than that set forth in Foote."

Following this 1973 decision which appeared to lay to rest commission apprehensions about the trial de novo provisions which had been expressed before legislative committees, the commission ceased to seek an amendment to the law. Confidence in the effect of the Jenkins decision was strengthened as several District Courts adopted the rule set forth to govern their reviews of commission orders.

However, the Wyandotte County District Court did conduct a trial de novo in the matter of Stephens v. Unified School District No. 500 which was appealed to the Supreme Court by the commission on the basis, in part, that the scope of review should be limited.

On December 1, 1975, the Kansas Supreme Court disapproved the paragraph quoted above from Jenkins v. Newman Memorial County Hospital and declared, "The court therefore holds that the provision of K.S.A. 44-1011 requiring a trial de novo does not violate the separation of powers doctrine of the constitution and is to be applied as written. A trial under that section will, however, be limited to those issues fairly raised in an application for rehearing before the commission." (Stephens v. Unified School District)

The proposed bill thus is one in a long line of efforts to accord the same judicial review standards to the hearing orders of the K.C.C.R. as are accorded to the orders of other administrative agencies.

As is readily apparent, the commission proposes to insert in the act the language of the Foote and Rydd cases which supported the refusal of the legislature to eliminate the de novo provision in 1969 since they seemed to limit the scope of review in ways acceptable to all. Since the court, after endorsing this view in 1973, has reversed its stand and opened the door to greatly expanded litigation at great cost to the State and its citizens the commission is asking the legislature to restore the scope of review of commission orders to the status held in the years prior to December 1, 1975.

1978 Senate Bill 912
New Section 3

Current Provision

[Similar to the registered broker-dealer summary suspension proceedings under K.S.A. 17-1254(h) and the registered securities summary suspension proceedings under K.S.A. 17-1260(b).]

New Sec. 3. (a) Whenever it appears to the commissioner that any person has engaged, or is engaging, or is about to engage in any act or practice constituting a violation of any provision of this act or any rule or order hereunder, the commissioner may summarily order that person to cease and desist from such act or practice pending final determination of any proceeding under this section.

(b) Upon the entry of any order under subsection (a) of this section, the commissioner shall promptly notify each person specified in subsection (a) that it has been entered and of the reasons therefor and that within fifteen (15) days after the receipt of a written request from any person specified in subsection (a) the matter will be set down for hearing. If no hearing is requested and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to each person specified in subsection (a), may by written findings of fact and conclusions of law, vacate, modify, or affirm the order. No order under this section, except an order issued pursuant to subsection (a), may be entered without appropriate prior notice, opportunity for hearing, and written findings of fact and conclusions of law.

(c) The commissioner may vacate or modify an order under this section if he or she finds that the conditions which prompted its entry have changed and that it is in the public interest to do so.

Suggested Alternative Provision

[Similar to the cease and desist powers granted the Securities Commissioner under the Kansas Uniform Land Sales Practices Act (K.S.A. 58-3312) and the regulations thereunder (K.A.R. 81-30-1).]

New Sec. 3. (a) If the commissioner determines after notice of and opporutnity for hearing that any person has engaged, or is engaging, or is about to engage in any act or practice constituting a violation of any provision of this act or any rule or order hereunder, the commissioner may by order require that person to cease and desist from the unlawful act or practice and to take such affirmative action as in the judgment of the commissioner will carry out the purposes of this act.

(b) If the commissioner makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under subsection (a) of this section, the commissioner may issue a temporary cease and desist order. Prior to issuing a temporary cease and desist order, the commissioner whenever possible by telephone or otherwise shall give notice to the proposal to issue a temporary cease and desist order to the person. Upon the entry of a temporary cease and desist order, the commissioner shall in writing promptly notify the person subject to the order that it has been entered and of the reasons therefor and that within fifteen (15) days after the receipt of a written request from that person the matter will be set down for hearing to determine whether the order becomes permanent and final. If no hearing is requested and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to the person subject to the order, shall by written findings of fact and conclustions of law, vacate, modify, or make permanent the order.

(c) No order under this section, except an order issued pursuant to subsection (b), may be entered without prior notice of and opportunity for hearing. The commissioner may vacate or modify an order under this section if he or she finds that the conditions which prompted its entry have changed and that it is in the public interest to do so.

907 | 852
Fiscal Note | Bill No.
1978 Session
February 17, 1978

The Honorable Elwaine F. Pomeroy, Chairperson
Committee on Judiciary
Senate Chamber
Third Floor, Statehouse

Dear Senator Pomeroy:

SUBJECT: Fiscal Note for Senate Bill No. 852 by Committee on Judiciary

In accordance with K.S.A. 75-3715a, the following fiscal note concerning Senate Bill No. 852 is respectfully submitted to your committee.

Enactment of this legislation would amend K.S.A. 44-1011 relating to judicial review of certain orders issued by the Commission on Civil Rights. The main provisions would delete the requirement that judicial review be on the basis of trial de novo and provide that the district court in reviewing an order of the Commission shall determine as a matter of law whether: (1) the Commission acted fraudulently, arbitrarily, or capriciously in issuing the order; (2) the administrative order of the Commission is substantially supported by evidence; and (3) the Commission's action was within the scope of its authority.

The Commission on Civil Rights anticipates that Senate Bill No. 852 would reduce the amount of legal preparation necessary when the Commission's orders are appealed to the district courts. However, it would seem that any impact on the Commission's legal preparation would depend upon the type and nature of the cases appealed. Therefore, the Division of the Budget cannot place a dollar estimate on this bill.

James W. Bibb
Director of the Budget

JWB:DLW:jkt

2-22-78

Sec. 2. K.S.A. 1977 Supp. 38-805 is hereby amended to read as follows: 38-805. (a) The record in the district court for proceedings pursuant to the Kansas juvenile code shall consist of the petition, process and the service thereof, orders and writs, and such documents shall be recorded and kept by the court, separate from other records of the court.

~~(b) The official records of the district court for proceedings pursuant to the Kansas juvenile code shall be open to inspection only by consent of the judge of the district court, or upon order of a judge of the court of appeals, or upon order of the supreme court.~~

~~(c)~~ *(b)* All *records, files or other* information *maintained,* obtained ~~and records~~ *or* prepared by any *officer or* employee of the district court ~~for~~ *in connection with* proceedings under the Kansas juvenile code shall be privileged and shall not be disclosed, directly or indirectly, to anyone ~~other than the judge of the district court or others entitled under this act to receive such information, unless and until otherwise ordered by such judge~~ *except:*

(1) A judge of the district court and members of the staff of the court designated by a judge of the district court;

(2) parties to the proceeding and their counsel;

(3) a public or private agency or institution providing supervision or having custody of the child under court order;

(4) to any other person when authorized by a judge of the district court, subject to any conditions imposed by the judge; or

(5) a court in which such person is convicted of a criminal offense for the purpose of a presentence report or other dispositional proceeding, officials of penal institutions and other penal facilities to which such person is committed or a parole board considering such person's parole or discharge or exercising supervision over such person.

Sec. 11. K.S.A. 1977 Supp. 38-815a is hereby amended to read as follows: 38-815a. (a) Neither the fingerprints nor a photograph shall be taken of any child less than eighteen (18) years of age, taken into custody for any purposes, without the consent of the judge of the district court having jurisdiction. When the judge permits the fingerprinting of any such child, the prints shall be taken as a civilian and not as a criminal record.

(b) *Except as provided in subsection (c),* all records *of law enforcement officers or agencies, municipal courts and other governmental entities* in this state concerning a public offense committed or alleged to have been committed by a child less than eighteen (18) years of age, shall be kept separate from criminal or other records, and shall not be ~~open to inspection, except by order of the district court.~~ *disclosed to anyone, except:*

(1) The judge, and members of the court staff designated by the judge, of a district court having the child before it in any proceeding;

(2) the parties to the proceeding and their counsel;

(3) the officers of public institutions or agencies to whom the child is committed;

(4) law enforcement officers of other jurisdictions when necessary for the discharge of their official duties; or

(5) to any other person, when ordered by a judge of a district court in this state, under such conditions as the judge may prescribe.

(c) Subsections (b) and (d) shall not apply to records and files:

(1) Made in conjunction with prosecutions pursuant to the code of criminal procedure;

(2) concerning an offense for which a district court has directed prosecution pursuant to K.S.A. 1977 Supp. 38-808;

(3) concerning a traffic offense described in subsection (e) of K.S.A. 1977 Supp. 38-802, as amended, which was committed or alleged to have been committed by a child fourteen (14) years of age or more; or

(4) specified in K.S.A. 1977 Supp. 38-805, as amended.

(d) It shall be the duty of any ~~peace~~ *law enforcement* officer, judge or other ~~similar~~ *public* officer, making or causing to be made any ~~such~~ record *or file concerning an offense committed or alleged to have been committed by a person less than eighteen (18) years of age,* to ~~at once~~ *promptly* report to the judge of the district court of the district of such officer or judge the fact that such record *or file* has been made and the substance thereof together with all of the information in the possession of the officer or judge pertaining to the making of such record *or file.*

~~(e) When a record has been made by or at the instance of any peace officer, judge or other similar officer, concerning a public offense committed or alleged to have been committed by a child less than eighteen (18) years of age, the judge of the district court of the district in which such record is made shall have the power to order such record expunged. If the person to whom such order is directed shall refuse or fail to do so within a reasonable time after receiving such order, such person may be adjudged in contempt of court and punished accordingly.~~

~~(d)~~ *(e)* This section shall be ~~construed as~~ supplemental to and a part of the Kansas juvenile code.