MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 10:00 a. m./p.m., on February 14, 1979.

All members were present except: Senator Parrish

The next meeting of the Committee will be held at 12:00 a.m./p. m., on February 14, 1979.

~~These minutes of the meeting held on ..... 19.. were considered, corrected and approved.~~

Elwaine F. Pomeroy
Chairman

The conferees appearing before the Committee were:

J. G. Shalinsky - Kansas Board of Pharmacy
Ken Klein - Kansas Bar Association
Charles Henson - Kansas Bar Association
Bob Davis - Kansas Board of Pharmacy
Lawrence C. Wilson - Kansas Commission on Civil Rights
Michael Bailey - Kansas Commission on Civil Rights
Roger W. Lovett - Kansas Commission on Civil Rights

Staff present:
Art Griggs - Revisor of Statutes
Jerry Stephens - Legislative Research Department
Wayne Morris - Legislative Research Department

Joe Shalinsky, of the Kansas Board of Pharmacy, testified with regard to the introduction of a committee bill to deal with rescheduling of certain drugs in order to make the Kansas statutes consistent with the federal law on the matter. Following committee discussion, Senator Berman moved that the committee introduce such a bill, and request that it be assigned directly to the Committee of the Whole; Senator Hess seconded the motion, and the motion carried.

Senate Bill No. 55 - Administrative procedures act; establishing uniform procedures for licensure actions. The chairman related the request that had been made for an attorney general's opinion; the opinion has not yet been drafted, but Mr. Bob Alderson will appear before the committee later to explain it.

Ken Klein spoke in favor of the bill and introduced Charles Henson. Mr. Henson reviewed the provisions of the bill and testified he strongly supports it. In response to a question from the chairman, Mr. Henson stated that he thought that the Kansas Bar Association would support amending the bill to make it applicable to all administrative agencies.

Bob Davis spoke in support of the bill, and stated that it would not change procedures presently followed by the Kansas Board of Pharmacy.

Mr. Wilson of the Civil Rights Commission testified that the

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commission supports the bill as it is, but could not support it if it were to apply to all administrative agencies.

Senate Bill No. 193 - Procedure on appeals from orders of the commission on civil rights. The author of the bill, Senator McCray, explained the bill and discussed proposed amendments to it; a copy of the proposed amendments is attached hereto. Committee discussion with him followed.

Larry Wilson testified that the commission supports the bill. A handout distributed by him is attached hereto.

Michael Bailey testified in support of the bill; copies of two handouts distributed by him are attached hereto. The chairman inquired as to the track record of the commission in cases that had been appealed; Mr. Bailey replied that Mr. Lovett would discuss that.

Roger Lovett, the general counsel for the commission, made an appearance to answer questions. In answer to the chairman's question, Mr. Lovett replied that there are 50 cases in courts at the present time; of the 10 cases that have been decided on trials de novo, only two were decided in favor of the commission. Committee discussion with him followed.

The chairman reminded the committee that there would be a working session at 12:00 today.

The meeting adjourned.

These minutes were read and approved by the committee on 4-25-79.

2-14-79

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Michael Bailey	535 Kansas Ave.	Kans Common Civil Rights
Lawrence C Woo	603 Topeka Ave	Kans. Com. Civil Rights
Charles Scott	503 Es ave	KCCR Hearing Examiner
Roger W Lovett	535 Kansas Ave	KCCR Chief Counsel
Frank L. Ross	535 Kansas	Asst. Director
Gary Jackson	535 Ks. Ave	KCCR
Billy McCray	Kans Senate	
Jerry Slaughter	Topeka	KS Med Society
Deborah P. Malsom	Topeka	
Richard E. Jones	Topeka	
Bob Alderson	"	Attorney Generals Office
Don Bills	"	AP
Paul Purcell	Topeka	Judicial Council
Kenneth M. Wilke	Topeka	Board of Agriculture
Ken Klein	"	Ks. Bar Assn.
Charles Henson	"	Ks. Bar Assn.
Theodore M. Dinges	"	Associated General Contractors
Jim Reardon	"	" " "
Marcia Poell	"	Ks Bar Assn
LARRY H. APLOOD.	"	KACP
David Hiebert	"	Kansas Legal Services
Doug Johnson	"	Ks Pharmacists Assoc
Bob Davies	Leav.	Ks Board Pharm Atty
J. G. SHALINSKY	K.C.	KS Bd of Pharmacy
Charles F. Hamm	SRS - State Hosp Bldg	Topeka

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GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Steve Ross	Kansas City	K. U. Med Ctr.
Max Moses	Topeka	KDOR

2-15-79

PROPOSED AMENDMENTS TO S. B. 193

by Senator McCray

TO: Senator Pomeroy, Chairperson, Senate Judiciary Committee

All Members of the Senate Judiciary Committee

Senator Billy McCray

FROM: Michael L. Bailey, Charles Scott, Roger Lovett and Gary Jackson, Kansas Commission on Civil Rights

DATE: February 14, 1979

As discussed in this mornings Committee Hearing on the "Trial De Novo" provision of the Kansas Act Against Discrimination, this is a clarification of the proposed amendment.

Senate Bill No. 193
by Senator McCray

The language shall remain the same to line 0054. It is proposed that the following be substituted for lines 0055 to line 0080.

The court shall hear the appeal on the administrative record. The 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 it aside, 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.

The following is proposed to be substituted for lines 0081-0104.

New Sec. 2. No new or additional evidence may be introduced on appeal, provided that, if it shall be shown to the satisfaction of the court that any party to the proceedings has additional material evidence which could not, by the exercise of due diligence, have been produced at the hearing before the Commission, or which was improperly excluded at the hearing and which evidence might materially effect the commission decision in the case, the District Court may remand the case to the Kansas Commission on Civil Rights for further disposition in accordance with the order of the court.

Lines 0105)
0106) remain the same.
0107)

LW:nh

2-14-79

MEMORANDUM

TO: All Commissioners

FROM: Michael Bailey, Charles Scott, Gary Jackson
Kansas Commission on Civil Rights

RE: Proposed Revisions in S.B. No. 193

DATE: February 9, 1979

The following might provide options in Senate Bill No. 193 that would enhance the possibility of passage and still eliminate the trial "de novo" provisions.

Line 0055 - The court shall hear the appeal on the administrative record. The appeal shall be heard and determined.

Strike lines 0059 to 0065 to authority.

Line 0082 - Introduced on appeal, provided that if it shall be shown to the satisfaction of the court that any party to the proceedings has additional material evidence which could not, by the exercise of due diligence, have been produced at the hearing before the Commission the District Court may remand the case to the Kansas Commission on Civil Rights for further disposition in accordance with the order of the court.

From line 0105 shall remain the same.

MLB:njh

2-14-79

MEMORANDUM

TO: Senate Judiciary Committee

FROM: Michael L. Bailey, Executive Director
Kansas Commission on Civil Rights

RE: Senate Bill 193 - Trial De Novo

DATE: February 14, 1979

The Kansas Commission on Civil Rights has for several years supported the repeal of the provision for "Trial De Novo" in the Kansas Act Against Discrimination. The Commission strongly supports the passage of Senate Bill 193 by Senator McCray in a form that would relieve the Commission from the burden of operating under a system that requires a duplication of proceedings and a repetitive due process mechanism. I feel there are several factors which make clear the fact that this process is both repetitive and unnecessary to provide due process as has been traditionally followed in the relationship between administrative agencies and the court system. In addition the "Trial De Novo" provision places an extremely harsh burden on the individuals (complainants) who are least able to bear that burden under the present system.

1. Administrative due process mechanisms are built into the Commission's present system. Before a complaint is filed with the Commission a determination is made on whether or not the Commission has jurisdiction over the matter. If it is determined that the Commission has jurisdiction the matter is assigned to an investigator who contacts all parties who may have knowledge of the allegations. Either party has the option to be represented by counsel at any stage in this process and is provided the opportunity to present any evidence in his or her defense that is available. The investigator then reviews and considers all information received and makes a recommendation regarding probable cause or no probable cause to credit the allegations. The material is then submitted to a Commission supervisor, who goes through the total review process and makes his or her judgment regarding evidence to indicate that probable cause has or has not occurred. After this review the material is submitted to an Investigating Commissioner who goes through the same process of considering and weighing the pros and cons of evidence before issuing a determination that probable cause to credit the allegations has or has not occurred.

During the last five (5) fiscal years the Commission has averaged receiving approximately 600 cases per year. Investigation of the total number of complaints filed with the Commission throughout its history has resulted in a Probable Cause Finding in approximately 30% of the completed investigations.

After a probable cause finding has been made the Commission attempts to resolve the complaint through conference and conciliation. At this point the Respondent is informed of the factors that were involved in the determination of Probable Cause and there is nothing to prevent a Respondent from informing the Commission's representative of any additional information that may be in that entity's favor at this state.

If conciliation is not successful the case goes back for additional review by the Commission's legal staff. If the Commission's legal staff determines that the case has the legal merits to proceed to public hearing, the case is then brought before the total Commission to vote on the merits of proceeding or not proceeding to public hearing. Of the hundreds of cases processed by the Commission each year less than 5% are voted to proceed to hearing.

To this point there have been five (5) seperate reviews of the merits of the case to determine that a complaint should proceed to the public hearing stage. All parties have been given ample opportunity to present any evidence that may be in their favor. After a case has been voted to hearing there are two additional reviewing steps. At the public hearing both parties are represented by counsel and have the opportunity to present any and all evidence which would have a bearing on the outcome of the case. The hearing examiner reviews this material and makes a proposed recommendation to the total Commission. The Commission then reviews the entire transcript and issues a final order. After the final order any party who has been adversely affected has the opportunity to seek an additional review through rehearing before the matter even reaches the court systems. The total administrative mechanism has provided eight (8) seperate reviews of the merits of the case to this point. Given the situation and the fact that less than 30% of the cases before the Commission receive a finding of Probable Cause and less than 5% of the cases before the Commission reach the public hearing stage, it is apparent that any claims that the Commission is a "kangaroo" court or that due process is lacking in the system are totally unfounded.

2. Civil Rights laws have been established for the purpose of protecting individuals and groups who throughout the history of the United States have not, because of their race, sex, religion, etc. been afforded the same opportunities as the majoriy class.

Any delays in bringing a decision on whether or not an action has taken place because of a discriminatory act, by the nature of the social structure places more of a burden on an individual than on an employer or business. An individual who is unemployed or has no means of support suffers to a considerable degree more than an entity which can simply go about business while the processing continues.

The Commission is committed to conducting complete impartial investigations and providing due process to all persons involved. This mechanism would exist however without the necessity for "Trial De Novo" and the repetitive procedures involved in this mechanism. The Commission urges this Committee to repeal the "Trial De Novo" provisions in the Kansas Act Against Discrimination.

2-14-79

MEMORANDUM

TO: Members of the Senate Judiciary Committee

FROM: Michael L. Bailey, Executive Director
Kansas Commission on Civil Rights MLB

RE: Statement from Professor David L. Ryan - Washburn University concerning "Trial De Novo" and the Kansas Commission on Civil Rights

DATE: February 14, 1979

I have requested and received, from Professor Ryan, permission to present to the Senate Judiciary Committee his comments regarding the repeal of the "Trial De Novo" provision currently existing in the Kansas Act Against Discrimination. Professor Ryan's comments are contained in the memorandum and accompanying appendix dated February 23, 1977. It must be pointed out that Professor Ryan prepared the comments for last year's legislative session and to that extent, the language and references have not been updated. The basic points made regarding "Trial De Novo" remain the same. I urge your favorable consideration of the comments contained in this material.

MLB/mks
Enclosure

MEMORANDUM REGARDING LEGISLATION REMOVING
"TRIAL DE NOVO" FROM K.S.A. 44-1011

TO: Kansas Commission on Civil Rights

FROM: David L. Ryan

DATE: February 23, 1977

INTRODUCTION

Simply stated, this bill restores the scope of district court "review" of Kansas Civil Rights Commission orders to the status existing in the years prior to the Kansas Supreme Court decision in Stephens v Unified School District No. 500, 218 Kan. 220, December 1, 1975. (See attached Appendix: "Background Statement concerning history of judicial review of Kansas Commission on Civil Rights orders.")

Prior to the Stephens opinion, the K.C.C.R. orders were subject to the same scope of review as existed with other agencies in the state, generally known as the "substantial evidence" scope of review. Jenkins v Newman Memorial County Hospital, 212 Kan. 92 (1973). The court held in Jenkins "judicial review of an order of the Commission under that section (K.S.A. 44-1011) 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." In Stephens, the court concluded that the separation of power doctrine does not require the "de novo" district court review requirement to be so restrictively read as in Jenkins. Significantly, the court does not call the "de novo" review wise legislation in Stephens. The court does call the "substantial evidence" limited review wise in Jenkins, and indeed, reaffirms its general view that limited scope review is a wise and appropriate standard and reaffirms its for other agencies even in the Stephens opinion. In short, the Stephens opinion simply finds the legislature could constitutionally impose the onerous and burdensome review it has done by virtue of the "de novo" review provision.

The evils, injury and injustice resulting from the imposition of true "de novo" appeal are readily apparent. "De novo" review is neither wise nor just. It is manifestly unfair, prejudicial to the complainant, and exceedingly costly to the state. It is fiscally irresponsible and judicially indefensible. The reasons for this, include the following:

1. Litigation and Relitigation.

With all the other agencies in the state we have but one "trial" of the subject matter, and that is the trial before the agency. Even with the one other state agency for which there is a quasi "de novo" review, the adjudicatory trial is by statute and by common law limited to the evidentiary hearing before the agency. This is not true with the Civil Rights Commission. The de novo law here has no such limitation, as interpreted by the Supreme Court and the Stephens opinion. The Stephens opinion holds: "The statutory statement that the 'review should be heard on the record (of hearing before the Commission) without requirement of printing' we take to be a mechanical direction with the view to economy and not a nullification of the previously granted authority to take additional evidence (in district court)." Consequently, under the Stephens decision, matters originally tried before and decided by the Commission must be completely retried at a later date before the court. This is unlike the Workman's Compensation Commission "de novo" where the retrial and refinding of fact by the district court is limited to the record and transcript on appeal. That is not the case with the Civil Rights Commission. Consequently we have what is historically viewed as a relative absurdity, two complete "trials" on the Civil Rights complaint. There is no effectiveness to the entire extensive litigation which has been occasioned before the agency. A true "de novo" district court review obviates any validity of the Commission procedure.

Thus, while other prospective litigants in the state need only take their case before either the agency, or the court in the first instance and have it "tried" once, the Civil Rights litigant must file before the agency, effect a full due process hearing at which the Civil Rights complainant's full case must be proven, and then, assuming the Commission finds a violation, the entire matter is relitigated with full due process trial at the district court level. We have now singled out in Kansas that the Civil Rights complainant must engage in two such complete trials, unlike the due process required of any other kind of case in this state. Obviously, the State of Kansas has discriminated clearly and solely against the prospective Civil Rights litigant by imposing a two "trial" requirement he must sustain in order to obtain an effective determination of his claim. The sad fact is that the person most likely to be aggrieved with the matter appropriate for the Kansas Commission on Civil Rights is the person least likely to be able to endure the expense and inconvenience of such a two trial requirement.

2. Delay.

The above two trial requirements effects considerable delay. Even under the system existing prior to the Stephens case, when only one adjudicatory trial was required, and that was before the Commission, there was still considerable delay in effecting a full due process hearing before the Commission coupled with the standard limited appeal to district court, often accompanied by the subsequent standard appeal to the supreme court. What we have after the Stephens opinion, is an additional approximate year delay added when we change the nature of the limited review in district court from that of the substantial evidence on the record, to a setting on the regular court's trial docket with full discovery pre-trial and jury trial matters which are attendant thereto to the time line involved in a Civil Rights matter. In other words, we have simply added significant delay to a Civil Rights resolution.

3. Repetitive Due Process.

The current two trial requirement with de novo review, results in repetitive due process. The Commission currently affords, under its published rules, an extensive due process proceeding where the facts are adduced and the decision obtains. What the Stephens decision effects, is simply a second extensive due process adjudicatory determination, totally repetitive of the first. Repetitious due process does not create a more just due process. Instead, repetitious due process reduces the impact of procedural due process in effecting a determination.

4. Exhaustion Violation-Commission Deprived of Effective Order.

When a true de novo proceeding is allowed in the district court on "review" it is really no review at all. It is simply a retrial. Under such circumstances, when the litigant is not limited to the record created before the agency as in other normal reviews, it is simply a fact of life that counsel for litigants will conduct their Civil Rights Commission hearing in a manner so as to support a relitigation in district court. In other words, it has been historically observed and has been observed by the Civil Rights Commission repeatedly since the Stephens case, that adjudicatory hearings before the Commission do not result in the full case being presented to the Commission.

Under the normal limited scope of review, a party must fully litigate his case before the Commission. This re-enforces the so called "exhaustion doctrine". This provides some authenticity to the Commission's order. However, with de novo review that does not obtain. For example as one brief filed by respondent

before the Commission has bluntly stated "This will be a blunt brief. It is not intended in any degree to be disrespectful, but it is common knowledge that undoubtedly this case ultimately will be decided by the Supreme Court of Kansas." (Respondent's Brief in Docket No. 695-71) If respondent lost before the Commission he fully intended to relitigate before the district court. And, if respondent lost in the district court he fully intended to appeal under the more limited appeal available through the supreme court. Furthermore, respondent did not feel inclined to fully litigate his case before the Commission, nor develop his full argument there. He would save his best points for the meaningful trial at the district court level. In other words, the two trial system undercuts a complete first trial and promotes reliance on a second trial. There is less reason or motovation to fully resolve matters at the agency level. A factor of extreme significance.

5. Settlement Reduction.

It is a simple fact of life that when the agency is reduced in effectiveness as has been the Civil Rights Commission and there is not a uniform policy of regulation imposition as would result with Commission determination, that respondents are thus less inclined to settle cases with the Commission. They are in fact encouraged by virtue of the "de novo" status, to fully litigate their matter before the district court. Hence we find we have created a procedure in opposite to what is intended. The theory would have it that the Commission is to promote settlement of Civil Rights disputes, but now we have a procedural system which promotes counsel to resist settlement of Civil Rights differences, on a theory that they really do not need to deal seriously with the Commission since it has no effectiveness.

6. Increased Adjudicatory Hearings.

Because "de novo" promotes a refusal to settle, as previously discussed, the Commission's "trial" docket then enlarges considerably and we have more adjudicatory hearings which consume far more of the Commission's time, and which requires considerably more Commission staff just to process the current case load. We thus have a multiplying factor to the expense of the state's funding of the Commission. Full due process of adjudicatory hearings before the Commission are costly to the state. They consume considerable time and effort on the part of the staff.

7. Increase District Court Litigation Expense.

Not only is the expense to the state significantly increased by virtue of additional adjudicatory hearings before the K.C.C.R. as mentioned previously, but there will be a significant increase to the state in the cost of attorneys and staff necessary to process the increased district court review attention necessary under the de novo doctrine. Since we do not have the limited scope of review now, each case that might have previously been appealed and required only a limited court hearing now requires a full fledged due process adjudicatory event. This consumes many times the time, attention and expense relative to district court litigation. In addition to increasing the time and expense of each appeal that would otherwise have normally obtained under other circumstances, the existence of a true "de novo" relitigation in district court not only theoretically but in practicality, has resulted in far more district court appeals. Thus the number of district court trials increases, again multiplying the burden and expense to be borne by the state fiscal resources.

8. Uniformity of Law Destroyed, Significant Decrease in Justice.

The dissent in the Stephens case adequately identifies the problem: "There is no sound basis stated in the majority opinion for the singular treatment of appeals from orders of the K.C.C.R. as compared to the treatment of all other appeals from the orders of other administrative agencies in Kansas. The opinion will add confusion to the law regarding scope of review and it will result in channeling a great mass of the business of the K.C.C.R. through the district courts of this state. The effect of the majority opinion will be to remove the power and authority to minimize discrimination from the K.C.C.R and place the ultimate power and authority in the various district courts of this state. Discrimination will no longer be dealt with on a state-wide basis. Attempts to minimize discrimination will be finally handled and determined by twenty-nine (29) separate district courts in this state."

CONCLUSION

With true "de novo", a devastating change has occurred to Civil Rights in the State of Kansas. Uniformity is destroyed. The effectiveness of the Civil Rights Commission is seriously impaired. The effectiveness of conciliation and settlement of Civil Rights disputes is seriously impaired. Civil Rights litigation is promoted.

District court litigation is significantly increased, expanded, and promoted, all to the expense of state and local fiscal sources relative to Commission staff time and district court involvement. "Justice" to the Civil Rights complainant is seriously impaired. The Civil Rights complainant is singled out by the law of Kansas and significantly discriminated against by the two trial system of procedure he or she must now endure to effect a simple resolution of a grievance. It is wrong. True "de novo" is no one's "Civil Rights" law, and must be repealed.

DLR/mks

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 strikout 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 of 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 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 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.