

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARYThe meeting was called to order by Representative Bob Frey at
Chairperson3:30 ~~am~~ p.m. on January 24, 1983 in room 526-S of the Capitol.

All members were present except:

Representative Whitaker.
Representative Douville was excused.

Committee staff present:

Mark Burghart, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Nedra Spingler, Secretary

Conferees appearing before the committee:

Representative Joan Adam
Representative David Heinemann
James Concannon, Professor of Civil Procedure, Washburn University School of Law
Adrian Farver, Kansas Shorthand Reporters Association
Jess Danner, Court Reporter, Shawnee County, Kansas Shorthand Reporters Association
Charles Hamm, General Counsel, Department of Social and Rehabilitation Services

The minutes of January 17, 1983, were approved.

The Chairman introduced Representative Joan Adam who presented a proposal to be considered for introduction as a bill. The proposal would change the magistrate judgeship in the 1st Judicial District, which includes Atchison and Leavenworth Counties, to an associate judgeship. She noted that all of the representatives and senators concerned with the district support this change. Rather than their introducing the proposal as sponsors, the group believes that going through the Committee would remove political connotations. Representative Adam said passage of the bill would bring Atchison into conformity with the judgeship in Leavenworth. Her statement is attached (Attachment No.1).

Representative Peterson moved, seconded by Representative Matlack, to introduce the proposal as a bill to be referred back to the Committee. Motion carried. (The proposal will be HB 2114).

HB 2033 - An act relating to civil procedure and depositions.

Representative Heinemann appeared in support of the bill. He said it was a cleanup bill to reinsert, on page 3, line 84, "party" which was inadvertently stricken in 1982 legislation.

James Concannon, professor of civil procedure, Washburn University School of Law, said reinsertion of "party" in Section 1 (b) (4) was needed to bring the law back into conformity with federal rules of civil procedure. By removing "party", the right to impose sanctions on party defendants for failure to obey subpoenas is removed.

Adrian Farver, representing the Kansas Shorthand Reporters Association, said free-lance court reporters were concerned with provisions on pages 4 and 5 and believed they should have better control over transcripts submitted to witnesses for signatures. He had no specific language for amendments to correct the situation.

Jess Danner, an official court reporter for Shawnee County, pointed out the problems reporters have when cases are ready for depositions to be read in court and they are not available since no one has control over the return with signature of depositions sent to witnesses.

A member suggested the responsibility for obtaining signatures and returning depositions be placed on the attorney. Another member suggested an extra copy be sent to the witness with the original being retained by the reporter for filing if necessary, the cost of the extra copy to be addressed. Mr. Danner had no objections to these suggestions.

The Chairman suggested that the court reporter group put its suggestions for amendments in writing for the Committee's consideration.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 526-S, Statehouse, at 3:30 ~~xxx~~ p.m. on January 24, 1983.

HB 2034 - An act relating to the Kansas Code for the Care of Children.

Representative Heinemann said the bill was another cleanup measure. It addresses truancy and exceptional children only and does not involve gifted children. He noted revisions of the Juvenile Code had created a coverage gap in ages 18-20. The intent of HB 2034 is to pick up exceptional children in this age group. He noted the gap has existed only since January 1, 1983.

The question was raised if the gap was created intentionally to remove exceptional children from being required to go to school longer than other children. Representative Heinemann pointed out that exceptional children need more assistance than other children, and, if this bill is not passed, school districts might have legal problems where, in later life, an exceptional child might sue for due process because he/she was not sent to school during these years.

HB 2039 - An act concerning wards' accounts administered by SRS.

Charles Hamm, attorney for SRS, said provisions for the wards' accounts were inadvertently repealed in revision of the Kansas Code for the Care of Children and the Juvenile Offenders Code in 1982. His statement containing figures on these accounts is attached (Attachment No.2).

In additional remarks, Mr. Hamm noted HB 2039 was shorter but almost identical with the repealed provisions with the exception of Section 1 (d) relating to interest earnings on deposits. Although there are only 4 children involved under the Juvenile Offenders Code, he said the bill's title should refer to both the Kansas Code for the Care of Children and the Juvenile Offenders Code. He did not believe the Code for the Care of Children makes any distinction for the handicapped in handling wards' accounts.

HB 2040 - An act relating to investigative and subpoena powers for SRS.

Mr. Hamm said SRS requested the bill, and, although it was not a major issue, it was important to the Department. Its provisions have been introduced before. The bill requires subpoenaed witnesses to produce records, papers, and other documents of evidence for SRS investigations. Mr. Hamm said SRS needs the bill in order to have access to evidence before the evidence is tampered with. A copy of an Attorney General's opinion (Attachment No.3) which states, under present law, SRS has no authority to subpoena records is attached. Attachment No.4 contains statutes that give other administrative agencies the power to subpoena records. A member pointed out the SRS Review Commission will recommend this legislation.

The Chairman adjourned the meeting at 4:30 p.m.

I WANT TO THANK CHAIRMAN BOB FREY FOR ALLOWING ME A FEW MINUTES OF YOUR MEETING TIME TODAY.

I THINK THAT I HAVE MET MOST OF YOU, BUT IN THE EVENT THAT I HAVE NOT, I AM JOAN ADAM, A NEW LEGISLATOR FROM THE 48th DISTRICT, WHICH IS MOST OF ATCHISON COUNTY INCLUDING THE CITY OF ATCHISON AND A SMALL CORNER OF JEFFERSON COUNTY.

I AM HERE ON BEHALF OF THE SIX REPRESENTATIVES AND TWO SENATORS WHO REPRESENT THE 1st JUDICIAL DISTRICT OF KANSAS, WHICH INCLUDES ALL OF ATCHISON AND LEAVENWORTH COUNTIES.

ALSO HERE WITH ME TODAY ARE MARGERY VAN BUREN FROM THE JUDICIAL CENTER AND MR. JOHN BROOKENS FROM THE KANSAS BAR ASSOCIATION.

BY AUTHORITY UNDER KSA 20-338 ATCHISON COUNTY NOW HAS 1 DISTRICT JUDGE AND 2 DISTRICT MAGISTRATE JUDGES. THE OTHER MEMBERS OF THE DELEGATION AND I PROPOSE A CHANGE WHICH WOULD REQUIRE THAT NEITHER MAGISTRATE POSITION BE FILLED AND AT THE TIME BOTH OF THESE POSITIONS ARE VACANT, THE POSITION WOULD CHANGE TO AN ASSOCIATE DISTRICT JUDGE POSITION.

MY REASON FOR BEING HERE TODAY IS TO RESPECTFULLY REQUEST THAT THE JUDICIARY COMMITTEE CONSIDER CARRYING THIS BILL AS A COMMITTEE BILL.

THERE ARE SEVERAL POINTS ABOUT THIS PROPOSED CHANGE THAT I WOULD LIKE TO MENTION. FIRST, THIS CHANGE ALLOWS FOR SHIFT IN JUDGE POSITIONS TO OCCUR IN A PLANNED WAY. AFTER THE RETIREMENT OF BOTH MAGISTRATE JUDGES, THIS APPROACH WILL RESULT IN COST SAVINGS OVER OTHER APPROACHES. (i.e. 1 1/2 MAGISTRATE JUDGES WILL CONVERT TO 1 ASSOCIATE RATHER THAN ONE MAGISTRATE JUDGE POSITION TO AN ASSOCIATE JUDGE POSITION.

SECONDLY, THE ASSOCIATE DISTRICT JUDGE WILL HAVE A BROADER JURISDICTION AND WILL ELIMINATE THE NEED FOR ASSOCIATE JUDGES TO BE REASSIGNED FROM LEAVENWORTH TO ATCHISON.

THIRDLY, THE CHANGE IS BASICALLY IN LINE WITH THE UNIFICATION PLAN WHICH HAS SHIFTED DISTRICT MAGISTRATE POSITIONS TO DISTRICT JUDGE OR ASSOCIATE DISTRICT JUDGE POSITIONS.

FOURTH, THE PROPOSED CHANGE WILL ALLOW MORE CONFORMITY WITHIN THE JUDICIAL DISTRICT ITSELF, AS LEAVENWORTH NOW HAS 1 DISTRICT JUDGE AND 2 ASSOCIATE JUDGES.

SEN. REILLY AND GORDON, REPRESENTATIVES AMBROSE DEMPSEY, ROBIN LEACH, AL RAMIREZ, JIM MURPHY, DON SALLEE JOIN ME IN REQUESTING THAT THE JUDICIARY COMMITTEE CONSIDER THIS MATTER.

HOUSE BILL NO. 2039

Excerpts of testimony by Charles V. Hamm,
General Counsel, State Department of
Social and Rehabilitation Services
Phone 296-3967

The wards' account has been in existence for as long as children have been committed to the State Department of Social and Rehabilitation Services or its predecessor the State Department of Social Welfare. The statute creating this account, which was inadvertently repealed as one of the long list of repealers contained in the act which created the new Kansas Code for Care of Children and the Kansas Juvenile Offenders Code in the 1982 legislative session, was K.S.A. 38-828a.

The wards' account receives and disburses funds belonging to children who are in the custody of SRS. As of December 31, 1982, there was \$130,510.52 in the wards' account representing monies belonging to approximately 110 children. This is the account which receives social security payments made on behalf of these children, many of whom are orphans. Other sources of payments are Veterans Administration funds, settlements from workers' compensation cases, wrongful death actions usually involving the death of a parent in a motor vehicle accident, etc. Social Security and the Veterans Administration recognize SRS as a caretaker and name SRS as the caretaker payee for beneficiaries of these benefits.



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

August 28, 1979

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ATTORNEY GENERAL OPINION NO. 79- 194

Mr. Peter E. Rinn
Director, Fraud and Recoupment Section
Kansas Department of Social and
Rehabilitation Services
State Office Building
Topeka, Kansas

Re: Department of Social and Rehabilitation Services--
Investigations--Subpoena Power of Secretary of
Social and Rehabilitation Services

Synopsis: In conducting investigations pursuant to K.S.A.
75-3306, the subpoena power of the Secretary of
Social and Rehabilitation Services extends to any
person possessing information which is relevant
and material to the inquiry, and is not confined
to those persons who are under investigation.
However, the above-cited statute grants only the
power to subpoena witnesses, and does not authorize
the issuance of subpoenas duces tecum.

* * *

Dear Mr. Rinn:

You have requested our opinion relative to the following two
questions:

1. May the Secretary of Social and Rehabilitation
Services issue an administrative subpoena to a
person in the course of an investigation, even
though such person is not under investigation?

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2. May the Secretary of Social and Rehabilitation Services issue a subpoena duces tecum requiring the production of business records, materials, and other papers during the course of an investigation?

K.S.A. 75-3306 enumerates the investigative and subpoena powers of the Secretary of Social and Rehabilitation Services and provides, in part, as follows:

"The secretary of social and rehabilitation services shall have authority to investigate any claims and vouchers and persons or businesses who provide services to the secretary of social and rehabilitation services or to welfare recipients and the eligibility of persons to receive assistance or of providers of services. The secretary of social and rehabilitation services shall have authority, when hearing appeals or conducting investigations as provided for in this section, to subpoena witnesses, administer oaths, take testimony, and render decisions"

Answering your first question, K.S.A. 75-3306 must be construed as granting power to issue subpoenas to any person possessing information which is relevant and material to the investigation being conducted, and such subpoena power is not limited to those persons who are under investigation. Numerous cases support such a construction of similar statutes granting subpoena powers to administrative agencies. Pope & Talbot, Inc. v. Smith, 340 P.2d 960, 965 (1959); Federal Communications Commission v. Cohn, 154 F.Supp. 899, 906 (1957); Freeman v. Fidelity-Philadelphia Trust Company, 248 F.Supp. 487, 492 (1965).

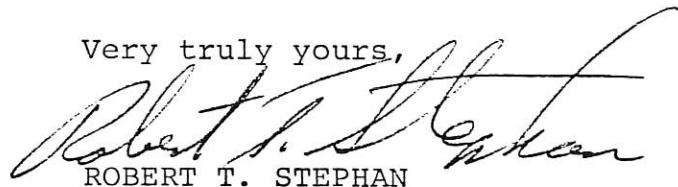
In response to the second question, it is clear that K.S.A. 75-3306 grants only the power to subpoena witnesses, and does not authorize the issuance of subpoenas duces tecum by the Secretary of Social and Rehabilitation Services. The power to subpoena witnesses does not, in the absence of other statutory provisions, include the power to require the production of records. Donatelli Building Co. v. Cranston Loan Company, 140 A.2d 705 (1958). Further, it has been held that "the power to issue subpoenas duces tecum does not inhere in administrative agencies

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or committees and can be exercised by such committees only when expressly authorized by statute." (Emphasis added.) Id. at 707. In accordance with this authority, it is our opinion that K.S.A. 75-3306 cannot be construed to authorize the issuance of subpoenas duces tecum by the Secretary of Social and Rehabilitation Services because such statute does not expressly grant such power.

In passing, we note that the legislature has enacted numerous statutes expressly authorizing certain administrative agencies and public officials to issue subpoenas to compel the production of records and documents: K.S.A. 1978 Supp. 44-1004(5) (Civil Rights Commission); K.S.A. 74-3902 (Board of Abstracters); K.S.A. 1978 Supp. 75-2929d(c) (Civil Service Commission); K.S.A. 74-1707 (Board of Embalming); K.S.A. 22-3720 (Kansas Adult Authority); K.S.A. 79-3233 and 79-3419 (Director of Taxation); K.S.A. 74-1106(d) (Nursing Board); K.S.A. 74-1504(g) (Optometry Board); K.S.A. 74-5309(b) (Board of Psychologists); K.S.A. 58-3016(c) (Real Estate Commission); K.S.A. 17-1265(b) (Securities Commission); and K.S.A. 74-2437a (Board of Tax Appeals). Action by the legislature is necessary, however, if the Secretary of Social and Rehabilitation Services is to be granted such subpoena powers in investigations under K.S.A. 75-3306.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:jm

K.S. 44-1004(5)
Kansas Acts Against Discrimination

(5) To subpoena witnesses, compel their appearance, require the production for examination of records, documents and other evidence or possible sources of evidence and to examine, record and copy such materials and take and record the testimony or statements of such persons. The commission may issue subpoenas to compel access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent to the same extent and subject to the same limitations as would apply if the subpoena or interrogatories were issued or served in aid of a civil action in the district court. The commission shall have access at all reasonable times to premises and may compel such access by application to a court of competent jurisdiction: *Provided, however,* That the commission first complies with the provisions of article 15 of the Kansas bill of rights and the fourth amendment to the United States constitution relating to unreasonable searches and seizures. The commission may administer oaths and take depositions to the same extent and subject to the same limitations as would apply if the deposition was taken in aid of a civil action in the district court. In case of the refusal of any person to comply with any subpoena, interrogatory or search warrant issued hereunder, or to testify to any matter regarding which such person may be lawfully questioned, the district court of any county may, upon application of the commission, order such person to comply with such subpoena or interrogatory and to testify; and failure to obey the court's order may be punished by the court as contempt. No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which such person testifies or produces evidence, except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The immunity herein provided shall extend only to natural persons.

K.S.A. 1981 Supp. 79-3233
Director of Taxation

The director may issue subpoenas to compel access to or for the production of such books, papers, records or memoranda in the custody of or to which the taxpayer has access, or to compel the appearance of such persons, and may issue interrogatories to any such person to the same extent and subject to the same limitations as would apply if the subpoena or interrogatories were issued or served in aid of a civil action in the district court. The director or an agent or representative designated by the director for that purpose may administer oaths and take depositions to the same extent and subject to the same limitations as would apply if

ATTACHMENT # 4

the deposition was in aid of a civil action in the district court. In case of the refusal of any person to comply with any subpoena or interrogatory or to testify to any matter regarding which such person may be lawfully questioned, the district court of any county may, upon application of the director, order such person to comply with such subpoena or interrogatory or to testify. Failure to obey the court's order may be punished by the court as contempt. Subpoenas or interrogatories issued under the provisions of this section may be served upon individuals and corporations in the manner provided in K.S.A. 60-304 and amendments thereto for the service of process by any officer authorized to serve subpoenas in civil actions or by the director of taxation or an agent or representative designated by said director.

K.S.A. 1981 Supp. 75-2929d
Kansas Civil Service Act

(c) The board, or the director of personnel services when authorized by majority vote of the board, may take deposition of witnesses or may issue subpoenas to compel the attendance of witnesses at such place as may be designated in this state and to compel the production of books and papers pertinent to any inquiry or investigation authorized by this act. Subpoenas shall also be issued at the request of the parties to the proceedings other than the board and the director. The board or any member thereof, or the director when authorized by the board, may administer oaths and take testimony. The board or the director may examine such public records as may be required in relation to any matter which the board has authority to investigate. All officers and other persons shall attend and testify when required to do so by the board, or by the director when authorized by the board.

(d) In case of the refusal of any person to comply with any subpoena issued under this section or to testify to any matter regarding which the person may be lawfully interrogated, the district court of any county, on application of any one of the members of the board, or on application of the director when authorized by the board, may issue an order requiring such person to comply with the subpoena and to testify, and any failure to obey the order of the court may be punished by the court as a contempt thereof. Unless incapacitated, the person placing a claim or defending a privilege before the board shall appear in person and may not be excused from answering questions and supplying information, except in accordance with such person's constitutional rights and lawful privileges.