

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~pm~~ on February 10, 1986 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~ Senators Frey, Hoferer, Burke, Feleciano, Langworthy, Parrish, Talkington, Winter and Yost.

Committee staff present:

Mary Sue Hack, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Matt Lynch, Kansas Judicial Council
Art Griggs, Department of Administration
Alan Alderson, Judicial Council Board Member
Jo Jenkins, Kansas Corporation Commission

Senator Frey opened the meeting with several drafting requests; one from Senator Burke in regard to hazing, a request from the Kansas County and District Attorneys Association in regard to criminal procedure, an amendment and a repealer. Later in the meeting Senator Yost moved that the three bills be introduced. Senator Burke seconded the motion, and the motion carried.

Senate Bill 473 - Technical amendments to act for review and enforcement of agency actions.

Senate Bill 478 - Technical amendments to Administrative Procedure Act.

Senate Bill 479 - Application of Administrative Procedure Act to all state agencies.

Matt Lynch, Kansas Judicial Council, stated that Senate Bill 479 is new law to expand the application of the administrative procedure act, and went on to interpret the measure.

Art Griggs spoke to the objections and the recommendations of the Department of Administration (See Attachment I). Senator Frey stated that there will be another legislative session before Senate Bill 479 becomes effective, July, 1987. He said various changes, discrepancies and omissions would no doubt be addressed at that time.

Alan Alderson, Judicial Council Board Member, disagreed with the Department of Administration and said his agency is firmly convinced this is the correct approach.

Jo Jenkins pointed out some of the concerns of the Kansas Corporation Commission but stated they would work with the committee in solving the various objections and problems they feel they would have unless some changes were made. Copy of testimony is attached (See Attachment II).

Chairman Frey stated that the committee would continue the hearing on the above bills at a later meeting, Wednesday, if possible.

The meeting adjourned.

Copy of the guest list is attached (See Attachment III).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: Feb. 10, 1986

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Richard S Funk	Topeka	KASB
AAnn Anderson	"	Advisory Comm.
To Jenkins	Topeka	KCC
John Wine	Topeka	Sec of St.
Peter Rinn	Topeka	SRS
Dopna Smith	Topeka	Kansas Bar Assoc.
Loyce Lovett	Topeka	KCCR
John R Scheerman	"	KDOT
Linn Clark	"	KCOAA
Edward R. DeSugnie	"	KDOT
Mike Rees	Topeka	KDOT
Carol Francis	Topeka	SRS
Ken Morse	Topeka	DOA
Art Cuzzo	"	Dept of Admin.
Pam Spelman	Topeka	Ks. Ins. Dept
Ken Nicks	✓	Bd of Ind. Def
Charles Swinn	Topeka	Dept. of Corrections
Faith Lovett	"	Dep. Dept. of Admin.
Jean Sagan	Topeka	Board of Regents
Kenneth M. Wilke	"	Board of Agriculture
PATRICIA HENSHALL	TOPEKA	OJA
Paul Vandergort	Topeka	DHR

STATE OF KANSAS



DEPARTMENT OF ADMINISTRATION
Office of the Secretary

JOHN CARLIN,
Governor
ALDEN K. SHIELDS,
Secretary of Administration

Room 263-E
State Capitol Building
Topeka, Kansas 66612-1572
(913) 296-3011

M E M O R A N D U M

TO: Senate Judiciary Committee

FROM: Arthur H. Griggs, Chief Attorney
Department of Administration

DATE: February 10, 1986

SUBJECT: S.B. 479

Thank you for the opportunity to share some of my thoughts on the Administrative Procedures Act and its expansion by S.B. 479. While I have some specific language changes, I wanted first to make some general observations and suggestions.

Having served as a bill drafter for the Judiciary Committees for several years, the topic of an APA for Kansas is familiar. From this past background, I viewed the writing of an APA as having two major parts. The first component, the new procedural sections, has now been drafted and passed by the 1984 Legislature. I commend the Judicial Council committee for their work on this part. The second part - amending the numerous agency-specific statutes - represents a large undertaking as well.

When the 1984 Legislature was considering the Judicial Council committee's draft, I both observed and experienced concerns on the part of state agencies. I attribute this concern to the fact that it was not clear to agencies what they were changing to. It was not clear, because as introduced the Act did not include amendments to agencies' existing procedural statutes. Because it was not clear what agency functions and activities would fall under the APA, this element of uncertainty caused resistance to the passage of the APA.

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I believe the amendments the 1984 Legislature made largely cured this uncertainty; however, in this process the scope of the APA was narrowed. As I perceive the future course of the APA and its extension to more agency functions, I believe care needs to be given in how the Act is extended. The second part of an APA - the amendments to existing agency statutes - is not merely a clerical function. The task will involve policy issues. I would encourage this Committee to not leave this second task solely to be done after the passage of S.B. 479.

I say this primarily for two reasons. As you have S.B. 479 before you, I believe it has shortcomings in two areas: 1) it will not result in uniformity of administrative procedures; and 2) there has been inadequate time for consideration of the state agency functions to which it applies, leaving questions as to whether the provisions in the KAPA fully address these functions. Before giving examples of this, I want to make clear my admiration for the Judicial Council committee that worked on this bill. You gave them a huge assignment and they have proceeded with diligence. They already have heard from many groups and state agencies and have expressed a clear willingness to consider ideas and suggestions from others in the future.

Uniformity

In general terms, uniformity for its own sake is not necessarily required or desirable. However, with regard to an APA, I do believe it is desirable to adopt general rules for procedural matter and deviate from these general rules only when the interests of citizens or the circumstances surrounding the agency activity in question justify a deviation. S.B. 479 takes a different approach. Section 2(a) provides:

"This act governs procedures for the formulation and issuance of any order except to the extent that other statutes expressly provide such procedures." (Emphasis added)

Thus, to the extent that current statutes for specific state agencies' functions deviate from the

KAPA, there will not be uniformity as to who receives notices and how, who has standing, time frames for agency actions to be accomplished, the scope of permissible discovery or use of subpoenas, etc.

There are many, many statutes that speak to procedural matters before various state agencies for various agency activities. These "mini-APA's" need to be reviewed and their procedures conformed to the KAPA except when there are valid policy reasons for a deviation.

State Agency Functions

Section 3(b) of the bill permits a person "to whom any order is directed" to request an adjudicative proceeding. "Order" is defined as "state agency action of particular applicability that determines legal rights, duties, privileges, immunities or other legal interest of one or more specific persons. Because of the broad definition of order, a number of agency functions arguably could now become subject to the adjudicative proceeding requirement.

Attached is a memo relating to the Capitol Area Plaza Authority. It is an example of ambiguities that arise when the APA and existing statutes are not considered concurrently.

Because of the shortness of time since the introduction of the bill and today's hearing, I do not have a complete list of other examples. The following areas may raise similar questions assuming that actions in these areas are "orders."

1. Actions of the State Rules and Regulations Board in considering temporary regulations and agency adoption of permanent and temporary regulations.
2. Determinations of the Director of General Services relating to workers' compensation claims under the state self-insurance program.
3. Decisions of the Secretary of Administration relating to public use of Capitol Complex buildings and grounds, e.g. whether a rally or other meeting can be held on the Capitol steps.

4. Actions of the State Health Care Benefits Commission in administering the health benefits program, such as setting out co-pay requirements and deductibles for state employees' health insurance.
5. Actions by the Director of Architectural services approving or disapproving sale, within the State of Kansas, of particular types of "tie-downs" for mobile homes.
6. Decisions by the State Awards Committee as to an eligibility of a state employee for a cash award for a suggestion or the size of such an award.
7. Decisions by the Secretary as to whether the state will agree to pay special assessments against the state (see K.S.A. 12-3501 et seq.).
8. Decisions made by the Director of Accounts and Reports in administering social security contributions for local units of government, e.g. whether interest penalties for delinquent payments should be assessed.
9. Actions by the Director of Accounts and Reports to withhold payment to an auditor for failure to meet municipal accounting standards.
10. Actions of the Advisory Committee on Deferred Compensation approving or disapproving withdrawal of funds by participants in the program.

Attached are some "balloon" amendments that address several areas discussed above. My office will continue to work with the Judicial Council Committee on this subject.

I hope that you will seriously consider the amendments to existing statutes concurrently with the consideration of S.B. 479. This would, I believe, eliminate numerous ambiguities and result in the Legislature, rather than the Courts, making the attendant policy decisions.

AHG:cm

Enclosures

STATE OF KANSAS
DEPARTMENT OF ADMINISTRATION
JOHN CARLIN, Governor
ALDEN K. SHIELDS, Secretary of Administration
Room 263-E, Capitol Building
(913) 296-3011

MEMORANDUM

TO: Arthur H. Griggs, Chief Attorney

FROM: Faith D. Loretto, Administrative Assistant *FDL*

DATE: February 10, 1986

SUBJECT: S.B. 479

This memo is in response to your request to review the effect of various functions involving our department if S.B. 479 is enacted.

The Capitol Area Plaza Authority (CAPA) is responsible under K.S.A. 75-3620 for approving any zoning changes or variances that would affect the "state zoning area." This area is roughly a square mile area surrounding the State Capitol. CAPA does not meet frequently and has an operating budget of only \$500, but it does have authority to make final decisions of a controversial nature.

K.S.A. 75-3620 provides that, when the governing body of the City of Topeka or the Board of Zoning Appeals has acted on a change in zoning, in height or set-back restrictions, or on a variance or exception within the state zoning area, the city clerk must notify the secretary of CAPA. Within sixty days after receipt of that notice, CAPA must approve or disapprove the zoning change or variance. If the Authority disapproves the change, the statute states that the change shall not take effect; the statute does not provide any hearing or appeal process. However, it does provide that if the Authority takes no action to approve or disapprove the proposed change within sixty days, the proposed change takes effect automatically.

S.B. 479 would create some ambiguities about the extent to which the provisions of K.S.A. 75-3620 would override the administrative procedures act and about the manner in which other provisions of the act would function.

Subsection (b) of S.B. 479, section 3, states:

"Unless prohibited by law, a state agency may issue an order subject to the right of the person to whom the order is directed to request an appropriate adjudicative proceeding within fifteen days after service of the order."

This raises the question - to whom is a CAPA order directed? Arguably, the person who actually requested the zoning change is the "person to whom the order is directed." Other persons, such as residents who oppose construction of a parking lot within the zoning area, clearly have an interest in CAPA's action. S.B. 479 does not appear to provide guidance as to whether such persons would be permitted to request a proceeding before CAPA.

Currently, if the Capitol Area Plaza Authority does not take action to approve the proposed zoning change, the change automatically takes effect. In that situation, it is unclear whether the Board actually issued an order.

Because of the broad definition of "order" in S.B. 479, whereby any "action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interest of one or more specific persons" is covered, there will be numerous Department of Administration functions that should be reviewed.

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0119 of persons in the custody of the secretary of corrections;

0120 (14) decisions of the Kansas parole board relating to parole
0121 or revocation of parole; ~~and~~

0122 (15) decisions relating to the granting or denial of benefits
0123 pursuant to the employment security law;

0124 Sec. 4. K.S.A. 1985 Supp. 77-509 is hereby amended to read
0125 as follows: 77-509. (a) A state agency may provide an adjudicative
0126 proceeding at any time with respect to an order within the
0127 agency's jurisdiction.

0128 (b) A state agency shall provide *an opportunity* for an ad-
0129 judicative proceeding with respect to an order upon the written
0130 application of any person, unless:

0131 (1) The state agency lacks jurisdiction of the subject matter;

0132 (2) resolution of the matter requires the state agency to exer-
0133 cise discretion within the scope of subsection ~~(a)~~ (c) of K.S.A.
0134 1985 Supp. 77-508 *and amendments thereto*;

0135 (3) a statute vests the state agency with discretion to conduct
0136 or not to conduct an adjudicative proceeding ~~before issuing an~~
0137 ~~order~~ to resolve the matter and, in the exercise of that discretion,
0138 the state agency has determined not to conduct an adjudicative
0139 proceeding;

0140 (4) resolution of the matter does not require the state agency
0141 to issue an order that determines the applicant's legal rights,
0142 duties, privileges, immunities or other legal interests;

0143 (5) the matter was not timely submitted to the state agency,
0144 or

0145 (6) the matter was not submitted in a form substantially
0146 complying with any applicable provision of law.

0147 (c) An adjudicative proceeding commences when the state
0148 agency or a presiding officer:

0149 (1) Notifies a party that a prehearing conference, hearing or
0150 other stage of an adjudicative proceeding will be conducted, or

0151 (2) begins to take action on a matter that appropriately may
0152 be determined by an adjudicative proceeding, unless this action
0153 is:

0154 (A) An investigation for the purpose of determining whether
0155 an adjudicative proceeding should be conducted; or

(16) decisions relating to the state health care benefits program and deferred compensation program;

(17) matters pertaining to the administration of the state workmen's compensation self-insurance fund other than workmen compensation proceedings before the director of workers compensation or the director's appointees;

(18) adoption of temporary or permanent rules and regulations pursuant to the rules and regulations filing act and decisions of the state rules and regulations board; and

(19) decisions of the secretary of administration with respect to public use of state-owned buildings and grounds under the management and control of the secretary.

75-6207. Same; request for hearing; issues; notice of determination and findings to debtor, appeal. (a) If the director receives a timely written request for a hearing under K.S.A. 75-6206 and amendments thereto, the director shall request the secretary of administration to appoint a hearing officer who shall hold a hearing to determine whether the debt claim is valid. Subject to the provisions of subsection (b), the designated hearing officer shall determine and prepare findings after the hearing as to whether the claimed sum asserted as due and owing is correct, and if not, shall order an adjustment to the debt claim which shall be forwarded to the director and to the agency to which the debt is owed. No issue may be considered at the hearing which has been previously litigated and no collateral attack on any judgment shall be permitted at the hearing. The hearing officer shall notify the debtor by mail of the amount determined as due, if any, and that setoff pro-

cedures have been ordered to proceed in accordance with this act. If the setoff is to be made against earnings of the debtor, the notice also shall include a statement that the setoff may be postponed in accordance with K.S.A. 75-6208 and amendments thereto.

(b) In cases where there is only one known present or future payment due from the state to the alleged debtor, the hearing officer may limit the hearing issue to a determination of whether the debt owed the state is at least equal to the amount of the payment owed to the debtor by the state.

(c) Pending final determination in the findings of the designated hearing officer of the validity of the debt asserted by the state agency, no action shall be taken in furtherance of collection through the setoff procedure allowed under this act.

(d) Appeals to the courts from a decision of a hearing officer under this section shall be in accordance with the provisions of the act for judicial review and civil enforcement of agency actions.

History: L. 1981, ch. 342, § 7, L. 1982, ch. 376, § 1, L. 1984, ch. 358, § 30, July 1,

Dept. of Adm.

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In any such appeal, except as provided in subsection (e), the department of administration and the secretary of administration shall not be named parties to the proceedings.

(e) Parties to an appeal from a decision of a hearing officer under this section shall be: (1) the debtor; (2) the state agency which requested assistance in collecting the debt or which certified the debt; and (3) any party the district court permits to intervene in the district court action. Applications for a stay or other temporary remedies shall be to the state agency described in part (2) of this subsection.

Senate Bills 478 and 479

TESTIMONY OF STATE CORPORATION COMMISSION
BEFORE THE SENATE JUDICIARY COMMITTEE

February 10, 1986

Mr. Chairman, members of the Senate Judiciary Committee. I am Jo Jenkins, a Hearing Examiner of the State Corporation Commission. I am here today to offer testimony to the committee with respect to Senate Bills 478 and 479. I am offering the testimony with respect to both bills simultaneously because both bills amend the Kansas Administrative Procedures Act (KAPA). The amendments in Senate Bill 478, if passed, would become effective upon publication in the statute book. The amendments in Senate Bill 479, if passed, would become effective July 1, 1987.

At this time, the State Corporation Commission is not subject to the provisions of KAPA. Therefore, the amendments in SB 478 would not affect the commission at this time. The amendments in Senate Bill 479 could, unless certain agencies or agency actions are excepted, make the KAPA applicable to all agencies, including the commission. The commission understands there will be a trailer bill which will be filed in the next session which in accordance with the provisions of section 2 of Senate Bill 479, may make certain agencies or agency procedures not subject to KAPA. However, as the commission is uncertain at this time as to what those provisions will be, the commission wishes to point out some concerns it has with some of the proposed amendments in Senate Bills 478 and 479. In addition, the commission wants the committee to be aware that it is not opposed to all provisions of the bills, but does have concerns with certain provisions.

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Section 2 of Senate Bill 478 amends K.S.A. 1985 Supp. 77-511(a)(1) which requires that except where a statute provides other time limits, a state agency must examine an application and within 30 days after receipt notify the applicant of any apparent errors or omissions and provide other information to the applicant. Last summer, the commission expressed concern about the effect of missing errors or omissions within the initial 30 days. Section 2 amends the statute to provide that failure to detect all errors and omissions would not preclude the state agency from raising them at a later stage of the proceeding.

The commission fully supports this amendment; however, Senate Bill 479 also makes other amendments to K.S.A. 77-511 but neglects to include the amended language proposed in Senate Bill 478 with respect to subsection (a)(1). The commission suggests that Section 5 of Senate Bill 479 be amended to include the language proposed in Section 2 of Senate Bill 478 so that the amendment would continue to apply after July 1, 1987.

Section 4 of Senate Bill 478 makes amendments to K.S.A. 1985 Supp. 77-515 which provides that no person needs to be represented by counsel in appearing before an agency. The commission currently has rules requiring a commission be represented by counsel in appearing before the commission. Due to the complexity of a number of the matters handled by the commission, the commission feels that corporations should be represented by counsel.

Section 7 of Senate Bill 478 amends K.S.A. 1985 Supp. 77-525 which contains the ex parte communications rule. The current provision prohibits communications between a presiding officer and a party, participant or a person with a direct or indirect interest in the outcome of an adjudicative proceeding. During hearings last summer, the commission opposed application of this provision to the commission.

At the present time, the commission has one staff which investigates, advises the commission and sometimes testifies as experts before the commission in hearings. The rule as currently written would prohibit the presiding officers from communicating with staff who had testified in a hearing without giving notice and an opportunity for all parties to participate in the communication.

The proposed amendment provides that presiding officers may have aid from staff assistants if the assistants do not receive communications which would be ex parte if received by the presiding officers or do not furnish, augment, diminish or modify the evidence in the record. The term "staff assistant" is not defined.

The commission interprets the new language to still prohibit presiding officers from communicating with staff witnesses (who would be participants) without notice and an opportunity for all parties to participate in the communication. The commission opposes such a rule because it would make it very difficult for the commission to operate as currently structured. Time constraints on the commission would make it impractical if not impossible to give notice in all situations. If the commission is required to comply with the KAPA's ex parte rule, either as currently drafted or as proposed to be amended, the commission would need some substantial restructuring which would have a great fiscal impact.

At this time, the commission does not have sufficient duplication of staff so that some personnel could advise the commission while not participating as witnesses in hearings. For example, the commission has only one employee who offers testimony and advises the commission with respect to rate of return, an important issue in all public utility cases.

The commission has not had the opportunity to measure the entire fiscal impact of hiring additional staff which would be used to advise the commission. At the current time, the utilities division has

suggested that, at a minimum, 6 additional positions would be required. Additional legal staff and possibly additional support staff would also be necessary. Finally, an increase in administrative expenses would also be required for space and supplies. More detailed fiscal information can be obtained from a fiscal note which will be filed with the Division of Budget and the Legislative Research Department in the very near future.

With respect to Senate Bill 479, the commission has no specific objections at this time. The commission has in the past taken the position that it should not be subject to the KAPA. Although Senate Bill 479 intends to make all agencies subject to KAPA, it is the commission's understanding that Section 2 of Senate Bill provides that as of July 1, 1987, if an agency has procedures governing the formulation and issuance of an order, then KAPA would not apply. If, on the other hand, an agency does not have procedures governing the formulation and issuance of an order, the KAPA applies. The commission has also been informed that a trailer bill will be filed next year which will make amendments to various agency statutes. Of course, the commission does not know the nature and extent of those amendments at this time. Therefore, the commission wishes to point out further concerns the commission still has with KAPA at this time.

As discussed above, the commission is concerned with the ex parte provisions. It is also concerned with the requirement that orders be issued within 30 days following the hearing or 30 days after findings are requested, with some exceptions. The commission is further concerned with the conflict between time limitations set forth in KAPA which conflict with statutory time limits currently in existence under commission-related statutes. The commission understands that these issues may very well be the subject of the trailer bill to be introduced in the next session. However, the commission wants the committee to be aware of its concerns and hopes that the commission's input will be

sought in further work on KAPA.

Thank you for the committee's attention to the commission's testimony. The commission would be glad to answer any questions and provide other information upon request.