

Approved April 7, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

1:00 ~~xxx~~/p.m. on April 1, 1987 in room 527-S of the Capitol.

All members were present except: Representatives Duncan and Peterson, who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Professor David Ryan, Washburn University Law School
Senator Robert Frey
Art Griggs, Assistant Secretary of Administration
Dick Koerner, Kansas Department of Corrections

S.B. 7 was considered for final action by the Committee.

Representative O'Neal moved and Representative Douville seconded to amend line 30 to change the number of years to 8 years. The motion failed 6 yeas to 6 nays.

Representative O'Neal moved and Representative Whiteman seconded to amend S.B. 7 to include that portion of S.B. 6 which extends the length of vesting for district judges' retirement and delete the amendment to change the qualification from 5 years to 10 years. The motion passed.

Representative O'Neal moved and Representative Adam seconded to report Substitute for S.B. 7 favorably for passage. The motion passed.

Hearing on S.B. 318 - Judicial review and civil enforcement of agency actions

Professor David Ryan explained there is an amendment to K.S.A. 77-617 on page 3, (b) "the agency action subject to judicial review is a rule and regulation and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue". The other amendment on page 1 is clarifying language about the court's role and is not a change in the law.

The hearing was closed on S.B. 318.

Representative Wagon moved and Representative Whiteman seconded to report S.B. 318 favorable for passage. The motion passed.

Hearing on S.B. 334 - Kansas Administrative Procedure Act

Senator Frey informed the Committee that the Senate Judiciary Committee had hearings on this bill. He said the state of Kansas needs this bill. The bill was vetoed last year because it did not include the trailer bill. This bill includes the trailer bill. He stated Senator Johnston has prepared an amendment to this bill.

Professor Ryan testified the major accomplishment of the bill is on page 3 and all of the changes to the Administrative Procedure Act are on pages 2 through 16. The balance of the bill is the trailer bill. The heart of the bill is the definition of "order" and how it is triggered. The bill, as amended, would change the Kansas Administrative Procedure Act by expanding the act to apply to all orders and adjudicative proceedings unless expressly exempt by statute, regarding agency activity and not merely licensing functions as is the case in current law.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 527-S, Statehouse, at 1:00 ~~xxx~~/p.m. on April 1, 1987

Art Griggs testified the bill does not amend those areas of agency statutes that don't require a hearing. He stated language struck on page 3 in Section 2 was the triggering language and now the triggering language is the definition of "order". He recommended the stricken language be restored as the trigger. He said the act will make it difficult for individual citizens to represent themselves. (See Attachment I)

The Chairman made inquiries of all agency heads present if they had any objections to S.B. 344 and no objections were raised.

Hearing on S.B. 369 - Contraband in penal institutions

Dick Koerner testified this bill amends the statute to expand the definition of items which are prohibited to be brought into, taken from, or possessed while in a penal institution or jail, as any item whatsoever without the consent of the Secretary of Corrections, Director, Superintendent or jailer. (See Attachment II).

The meeting was adjourned at 2:12 p.m.

STATE OF KANSAS



DEPARTMENT OF ADMINISTRATION

State Capitol
Topeka 66612-1572
(913) 296-3011

H. Edward Flentje, *Secretary*

March 13, 1987

M E M O R A N D U M

TO: Ed Flentje, Secretary of Administration

FROM: Art Griggs, Assistant Secretary of Administration

SUBJECT: Senate Bill 334; Background and Proposed Amendments

The purpose of this memo is to comment on SB 334, a bill that would greatly expand the application of the Kansas Administrative Procedures Act (KAPA). The KAPA sets forth procedures to be followed by state agencies and individuals in state administrative proceedings.

Background

The current KAPA act was enacted in 1984 and was made applicable to only certain, specified state agencies that issue licenses. The approach taken at that time included amendments to the various licensing agencies' procedural statutes, thereby harmonizing the state agencies' procedural statutes with the procedures required by the KAPA. In the 1986 session, SB 479 was introduced and passed both houses. This bill would have broadly expanded the coverage of the KAPA. However, Governor Carlin vetoed SB 479. His concern was that SB 479 did not amend existing statutes relating to state agencies and their procedures (1) to identify when the KAPA applied, and (2) to harmonize existing procedural statutes with the procedures contained in KAPA.

Greater Reliance on Legal Counsel

Attached is a paste-up of the KAPA, including the way it would read if SB 334 is enacted. I encourage you to scan the attachment. I believe a brief review of KAPA will disclose the difficulty the average citizen would have in trying to represent himself or herself in an administrative proceeding

Attachment I

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under KAPA, with its many exceptions and internal references to other sections. To me, this is reminiscent of the difficulties confronting those who wish to represent themselves in probate proceedings.

Likewise, I believe state agencies, particularly small ones, would have a greater need for legal counsel to advise them on how to comply with the act. This is particularly so with regard to ruling on matters relating to depositions, interrogatories, requests for admissions, protective discovery orders and similar discovery procedures typically used in court proceedings.

Overly Broad Expansion of KAPA

Amendments to KAPA in SB 334 result in an overly broad and ambiguous application of KAPA to state agency actions. Under SB 334, if someone can reasonably argue that something an agency does, or refuses to do, affects their "legal rights, privileges, immunities or other legal interests," the agency must give that person an opportunity for an adjudicative proceeding (hearing) or summary proceeding under KAPA. The only exceptions are agency actions exempted from KAPA by some other statute and agency actions fitting within a list of exemptions in SB 334, such as state purchasing decisions and the budget process. Thus, decisions about when the KAPA applies will turn on interpretations of whether a particular agency action fits within the definition of order, and if so, whether it falls within a listed exemption. Such ambiguities provide fertile ground for litigation and could create additional costs for state government and the public.

For example, it could be argued that someone's legal rights, privileges or other legal interests are affected when the Governor grants a pardon, issues executive reorganization orders, makes decisions regarding the use of Cedar Crest grounds by outside groups or makes decisions about how to resolve disputes between state agencies. For the functions involved in the above examples, it appears the Governor would have to conduct hearings or summary proceedings under KAPA. None of the proposed exemptions to KAPA in Section 3 of Senate Bill 334 clearly applies to these activities. I have attached lists of other functions of the Department of Administration and the Governor's Office which could be subject to KAPA.

There are a number of other consequences of KAPA's broad application.

1. Unintended application to agency actions presently not requiring hearings. It is not possible to anticipate all agency actions that could become subject to KAPA. It appears inappropriate to invoke KAPA for every agency action that could possibly affect someone's legal interests. KAPA's more formal adjudicative proceedings and summary proceedings may increase agency legal and clerical staffing needs and the size of state government without any clear benefit.

2. Inappropriate procedures. During the interim, the Judicial Council reviewed state statutes that currently require hearing. They made a number of policy decisions to create deviations from the KAPA procedures and to continue use of existing procedures in certain agency procedural statutes. This kind of policy review and decision-making did not occur for any agency actions which currently do not require a hearing. Automatic application of KAPA to all situations does not, in fact, serve to protect individual rights and privileges if KAPA makes interaction between state agencies and citizens more cumbersome, complicated and rigid.

3. Insertion of an additional "hoop" before judicial relief may be sought. Under current law, any person wishing to challenge an agency action in the courts must do so under the Act for Judicial Review and Civil Enforcement of Agency Actions (K.S.A. 1986 Supp. 77-602 et seq.) The Judicial Review Act requires that plaintiffs exhaust available administrative hearings before seeking judicial review of an agency order. For matters that do not currently require administrative hearings, the expansion of KAPA contained in SB 334 would result in a new step that must be completed before a party can seek judicial review for agency actions. The time and cost incurred by all parties to the action would therefore be increased.

Although I question whether any further expansion of KAPA will be beneficial, I believe that, at a minimum, SB 334 should be amended so that its application is greatly narrowed to only those agency actions governed by statutes specifically requiring use of KAPA. This could be accomplished by restoring the stricken language in SB 334, Sec. 2, (a).

Governor's Functions Potentially Subject to
Kansas Administrative Procedures Act

1. Applications or petitions for executive pardon, commutation of sentence or clemency [Paragraph (9)].*

2. Application or petitions for the appointment of a named individual to public office when a vacancy occurs and when the Governor is restricted to the appointment of nominees so submitted [Paragraph (5)].*

3. Applications or petitions for the appointment of a person from a list of persons submitted by an association, agency or committee where the Governor is limited to make an appointment only from that list [Paragraph (5)].*

4. Applications for the approval of grants where the Governor's approval is a condition precedent to the making of such grants either by a state agency or by the federal government [Paragraph (5)].*

5. Applications or petitions for declarations of emergency pursuant to K.S.A. 48-924. However, K.S.A. 48-925 gives the Governor authority to suspend the provisions of any regulatory statute prescribing procedures for conduct of state business if necessary to avoid delay or hindrances to action necessary in coping with the disaster.

6. Hearing and determining appeals by any state agency from final decisions or final actions of the Secretary of Administration or the Director of the Division of Information Services and Communication, pursuant to paragraph (a)(1) of K.S.A. 75-3711.

7. Decisions to grant or deny use of Cedar Crest grounds to outside groups.

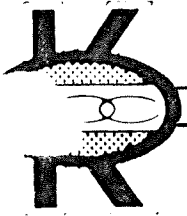
8. Issuance of Executive Orders.

9. Decisions to accept or to terminate express trust created in real or personal property or both, or in any estate or interest, with the state as the beneficiary thereof under K.S.A. 58-2431 and 2438.

* Paragraphs cited in brackets indicate possible exemptions from KAPA as set out in S.B. 334, §3, subsection (c), which amends K.S.A. 1986 Supp. 77-508.

Department of Administration Functions
Potentially Subject to Kansas
Administrative Procedures Act

1. 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.
2. Actions of the Division of Accounts and Reports in auditing claims, reports, records and accounts of state agencies and employees.
3. Any actions by the Division of Accounts and Reports relating to pre-audits or post-audits of expenditures by state agencies for the purchase of materials, equipment, supplies or services by or for state agencies.
4. Decisions of the state award board in rendering merit awards to state employees for meritorious suggestions and accomplishments.
5. Approval of Memorandums of Agreement entered into by state agencies under K.S.A. 75-4321 et seq.
6. Decisions by the Secretary of Administration as to the applicability of any special assessment taxes to property owned by the state.



KANSAS DEPARTMENT OF CORRECTIONS

MIKE HAYDEN — GOVERNOR

RICHARD A. MILLS — SECRETARY

JAYHAWK TOWERS • 700 JACKSON • TOPEKA, KANSAS • 66603-3798
913-296-3317

RE: SENATE BILL 369

TOPIC: CONTRABAND IN PENAL INSTITUTION

ISSUE: SHOULD K.S.A. 21-3826 BE AMENDED TO BROADEN THE
DEFINITION OF "CONTRABAND" IN PENAL INSTITUTIONS OR
JAILS?

BACKGROUND:

K.S.A. 21-3826 lists particular items which are unlawful to take into, take from, or possess while in any institution or jail. A review of the items listed reveals that a number of items which could potentially compromise the security of an institution are not included in the language of the statute and therefore would not be a violation of law. For example, bringing items, such as yeast with which to make alcoholic beverages, or materials with which to make officer uniforms, would not violate this statute. In addition, bringing in escape materials, such as hacksaw blades or lock-picking devices, would also not be a violation of this statute. In addition, bringing in a firearm would be a violation of this statute while bringing in a firearm, a piece at a time, would not be a violation of the statute.

RECOMMENDATION:

It is recommended that K.S.A. 21-3826 be amended to expand the definition of items which are prohibited to be brought into, taken from, or possessed while in a penal institution or jail. The amendment would bring the Kansas statute into conformity with federal statutes on this subject and would provide that no item could be brought into the prison without the approval of the secretary of corrections, director of the institution, or jailer.

Attachment II
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