

Approved \_\_\_\_\_  
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

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

12:00 Noon ~~a.m.~~ on March 5, 1987 in room 519-S of the Capitol.

~~All~~ members ~~xxx~~ present ~~xxxxx~~: Senators Frey, Hoferer, Burke, Langworthy,  
Parrish, Steineger and Talkington.

Committee staff present:

Mike Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department  
Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Matt Lynch, Kansas Judicial Center  
Professor David Ryan, Judicial Council Advisory Committee  
Jo Jenkins, Kansas Corporation Commission  
Carol Williams, Kansas Public Disclosure Commission  
Fred Weaver, Board of Tax Appeals  
David Cunningham, Board of Tax Appeals  
Pam Sjöholm, Kansas Insurance Department  
Peter Rinn, Social and Rehabilitation Services  
Carol Bonebrake, Department of Revenue  
Allen Alderson, individual

Senate Bill 262 - Theft of satellite cable programming.

Senate Bill 263 - Theft of cable television services.

Senator Hoferer, chairperson of the subcommittee to study the bills, reported the committee recommended no action be taken on Senate Bill 262 and Senate Bill 263. The subject matter could possibly be an interim study.

Senate Bill 334 - Kansas administrative procedure act, application thereof.

Senate Bill 318 - Act for judicial review and civil enforcement of agency actions.

Matt Lynch, Kansas Judicial Council, presented background information on the bills.

Professor David Ryan, Judicial Council Advisory Committee, introduced Allen Alderson, John Jandera and Charles Hamm who also served on the committee. Professor Ryan explained this was first proposed in 1984 to cover all state agency actions and as a compromise the legislature limited it to chosen agency functions. The advisory committee held hearings and 10,000 lawyer hours were spent working on the bill. Professor Ryan explained Senate Bill 334 section by section. He then pointed out the amendment in Senate Bill 318 and explained it to the committee.

Professor Ryan stated the law committee of the judicial council would be available for requests for amendments to the act. They would like the opportunity to review the proposed amendments relative to the act.

Jo Jenkins, Kansas Corporation Commission, testified the commission feels that there are two main issues of which this committee should be aware. Based upon the action of the special committee, it appears

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MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
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unlikely that the committee and the commission will agree on the issues, and the commission feels they should be addressed now rather than next year. A copy of her testimony is attached (See Attachment I). She testified the Kansas Corporation Commission is entitled to being exempt from the ex parte rule. She also pointed out their concern with powers of presiding officers.

Carol Williams, Kansas Public Disclosure Commission, appeared on behalf of Dennis Prater, General Counsel for the Kansas Public Disclosure Commission. She testified the procedures established by the bill would not apply to Kansas Public Disclosure Commission hearings. With the deletion of several hearing powers in Section 60 relating to the Campaign Finance Act and Section 150 concerning the Conflict of Interest laws, there could well be no law granting the commission the authority to conduct a due process hearing before reaching its decision on a finding of fact. I strongly suggest Sections 59, 60, 149 and 150 be deleted from the bill. A copy of the testimony is attached (See Attachment II).

Fred Weaver, Board of Tax Appeals, stated the board had three major concerns. The most important is the matter of the mandatory rehearing. The second concern is the matter of the time limits and the third is the de novo language. He testified the Board of Tax Appeals does not believe it is an agency that should be covered under the Kansas Administrative Procedure Act. A copy of his testimony is attached (See Attachment III).

David Cunningham, Board of Tax Appeals, explained the proposed amendments presented by the board (See Attachment IV).

Pam Sjohom, Insurance Department, testified there is one area they believe the act will not work. They like total exception to ex parte in the act. They would like similar exemption the corporation commission has been placed in concerning the technical staff. The department would like a provision be placed in the law the assistant commissioner may act on behalf of the commissioner in his absence. The other recommendations concern the Kansas Insurance Holding Companies Act. A copy of their handout is attached (See Attachment V).

Peter Rinn, Social and Rehabilitation Services, passed out copies of their proposed revisions to the bill. He then explained their proposed amendments. A copy of his handout is attached (See Attachment VI).

Carol Bonebrake, Department of Revenue, pointed out concerns the department had with the bill. She said the concerns are on page 7 of the bill concerning the discovery powers. On page 13 the agency doesn't need second procedural review. Time limits of the act will conflict with pending legislation being considered by the Senate. As the act presently provides restructure hearing procedure, this would move what is now formal hearing to informal procedure and this should not happen.

Allen Alderson stated he is testifying as an individual. He stated he does agree with Mr. Weaver and Mr. Cunningham on the mandatories. In regard to the de novo language Mr. Cunningham presented that is currently in the bill in Section 288, he has no objection. He felt

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it should be denovo. He suggested using Mr. Cunningham's language. Concerning the time limits situation, he agrees with Carol Bonebrake that it be changed to a formal hearing. He will provide written testimony.

The meeting adjourned.

A copy of the guest list is attached (See Attachment VII).

GUEST LIST

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COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 3-5-87

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Carol Foreman		SRS
Jo Jenkins		KCC
Pam Sjolholm		Kansas Ins. Dept
Pete Riun		SRS
Douglas B. Rice		Secretary of State
Carol Williams		KPBC
Jane Atchison		KPBC
Phyllis Jindra	Topeka	Sub-Committee Judicial Council
CAROL B. Bonebrake	Topeka	Department of Revenue
Cleo Murphy	"	"
Mark A. Burghant	"	"
Phil Anderson	"	Budget Division
John Scheirman	"	KDOT
Fred Weaver	Topeka	BoTA
JOAN BENNETT	O.P.	BoTA
Dore Cunningham	<del>BoTA</del> Topeka	BoTA
Terry Jensen	Topeka	Cablevision
Lindy Lutz	Topeka	KASB
ELLEN STACY	Topeka	KS CAP/Asm
Joan McNeill	Topeka	Ko. Corporation Commission
Matt Lyman	Topeka	Judicial Council
ARAN ANDERSON	TOPEKA	JUDICIAL COUNCIL ADVISORY COMMITTEE
Paul Ryan	Topeka	( ) ( )
Charles D. Hamlin	Forbes Field	KDHE
Ron Lutz	Topeka	KBA

Attach VII  
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TESTIMONY OF STATE CORPORATION COMMISSION  
BEFORE THE SENATE JUDICIARY COMMITTEE

Senate Bill 334

March 5, 1987

Good afternoon. My name is Jo Jenkins, and I am an Assistant General Counsel with the State Corporation Commission. I am here today to testify regarding Senate Bill 334. Due to the shortness of time since the bill was introduced, I have not had an opportunity to review all of the sections which will affect the Commission. However, the Commission did work with the special Committee this past fall in developing the changes, and it appears we will have some time next year to continue working with that same Committee.

The Commission feels that there are two main issues of which this Committee should be aware. Based upon the action of the special committee, it appears unlikely that the committee and the commission will agree on the issues, and the Commission feels they should be addressed now rather than next year.

EX PARTE RULE. The ex parte rule appears in KAPA as K.S.A. 77-525 and appears, as amended at Section 10 of Senate Bill 334. The rule 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. The Commission brought testimony before this committee on this issue last year, and if you think back to last year, you may have thought this issue had been resolved. So had the KCC. As a matter of fact, exactly one year ago today, in a meeting of this committee, a representative of the special committee told you that in the trailer bill to last year's SB 179, it had been agreed that the KCC would be excepted from the ex parte rule and its current rule would be codified. I am sure the committee is aware that SB 179 was vetoed and that SB 334 now includes both amendments to KAPA as well as the agency-specific statutes.

Now, this year, the special committee has agreed only to except out the KCC's adjudicative rate proceedings. Everything else would be subject to the KAPA ex parte rule. The exception appears in K.S.A. 77-525(h) in section 10 of the bill. The KCC's current rule has been codified, with some changes which we agreed to, in section 355 of the bill; however, it does not apply to all KCC proceedings as was agreed upon last year and as you were informed.

There have been no changes in the KAPA rule which makes it any more palatable to the Commission. And there has been no restructuring at the Commission which would enable the Commission to operate under that rule. At the present time, the commission has one staff which investigates, advises the commission and sometimes testifies as experts before the

*Attach. I  
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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 rule permits aid from "staff assistants" (which is not defined) 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 Commission opposes such a rule because it would make it very difficult if not impossible 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. The exception proposed is not broad enough. The commission deals with complex accounting, engineering and other technical policy issues which affect all public utilities, the state's oil and gas industries, and perhaps most important, the Kansas ratepayers. The commission needs to have access to its advisory staff whenever there is a need. The requirement of having to give notice and give all parties an opportunity to participate in the communication would impose a great hardship upon the commission.

I won't use Wolf Creek as an example because many people believe that was a unique situation. In addition, it was also a rate proceeding. However, the Infill hearing was not a rate case, and there will be future Infill-related issues before the Commission. There were 21 parties in that hearing, including intervenors from other states. It would have been very time-consuming for the Commission to require notice and an opportunity for the parties to participate in every single meeting which took place between staff and the commission.

I, too, am not meaning to indicate that all communications between staff and a commission member during an adjudicative proceeding are ex parte in nature. But it seems that there are other safeguards already in place to prohibit the commission from using evidence outside the record in making its decisions. First, the decisions are subject to a possible rehearing by the commission if a party requests the rehearing. Secondly, the commission's decisions are subject to judicial review, and I am confident the courts would remand any commission decision not based upon evidence in the record.

At this time, it is the commission's position that if it is required to comply with KAPA's ex parte rule, the commission would need substantial restructuring which would have a great fiscal impact. The commission does not have sufficient duplication of staff so that some personnel could advise the commission while not participating in hearings. If that additional staff is hired, it is possible that all KCC staff would be fully utilized. 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. However, we would be willing to put together a fiscal note if the committee would like that information.

At this time, the commission requests that the committee consider amending Section 10 of SB 334 to broaden the exception in

paragraph (h) to apply to all commission proceedings. In addition, Section 355 of SB 334 needs to be broadened to apply to all commission proceedings.

PRESIDING OFFICERS. The KAPA makes reference to the powers of "presiding officers." As used, that term is broader than the term "agency head" and would include the commission's hearing examiners. At the present time, KCC hearing examiners have limited authority under K.S.A. 66-1511. They are appointed by the commissioners. They are designated to hear matters and present recommendations and findings to the commission which ultimately makes every decision and issues orders. Under KAPA, presiding officers are given very broad powers. Presiding officers may convert proceedings from informal to formal proceedings, as vice versa (K.S.A. 77-506). They may grant intervention (77-521) as well as default judgments (77-520). K.S.A. 77-522 permits a presiding officer to issue subpoenas, discovery orders and protective orders.

In addition, presiding officers who are not agency heads must issue initial orders which become final orders unless reviewed in accordance with 77-527 or unless otherwise required by law to be finally determined by the agency head. K.S.A. 77-530(b) provides that an initial order becomes effective as a final order 30 days after service if no party has filed a petition for review by the agency head, the agency head does not review it on its own motion or a final determination is not otherwise required by law.

It is the commission's position that KAPA grants its hearing examiners more authority than was originally intended by the legislature, and that it does not desire its examiners to have such broad authority.

There is also at least one additional problem of a procedural nature which arises when hearing examiners hear rate cases which they sometimes do. Under K.S.A. 66-117, the commission can suspend rate changes for a period of up to 240 days. However, by that time the commission must have made a decision. In my reading of K.S.A. 66-117 a final order within that 240 days is required. The commission does have the hearing examiners hear rate cases, and due to scheduling at the commission, a rate case may not be heard until toward the end of that 240-day period. At this time, the hearing examiner would hear the case, make recommendations to the commission and draft an order for the commissioners' signatures. At times this may need to be done in a short period of time to meet the 240-day requirement.

Under KAPA, if a hearing examiner heard a rate case subject to the 240-day rule, it would need to issue an initial order at least 45 days before the end of the 240-day period and probably before that. The initial order could become effective 30 days after issuance. However, a party or the agency head has 15 days to seek review of the initial order. If granted, the commission can request briefs, etc. and has at least 30 days to make a decision and issue a final order or remand for further proceedings. This is a real problem and substantially shortens the 240-day period. The KCC is not trying to artificially lengthen the period, but the inclusion of the KCC under these provisions substantially shortens that period when a hearing examiner is used.

ere would be several impacts as a result of the commission's examiners becoming presiding officers under KAPA.

First, the commission's decisions often deal with policy matters as well as legal issues. The use of examiners would likely produce some inconsistency, even if only on an initial basis, in the commission's decisions. Second, it will likely decrease the use of examiners by the commission. This will increase the workload of the commissioners and will likely slow down the processing and handling of commission matters. Third, if the commission's examiners have such broad powers, it is likely the commission will as a matter of course review each and every decision made by a hearing examiner.

The commission does not have any specific language changes at this time. However, the commission requests the committee to consider leaving the authority of the hearing examiners as it currently exists in K.S.A. 66-1511. K.S.A. 77-526(b) does provide that it can be otherwise required by law that orders must finally be determined by the agency head. I think that language could apply here, but a statute would need to so provide.

The commission once again states these are not the only concerns which it has, but feels they can be worked out with the special committee over the next year. It has taken a lot of work over several years to get where we are today. In the last year and a half, I feel the commission has worked closely with the special committee. However, given the special committee's treatment of the ex parte rule issue, the commission is not persuaded that the special committee will be greatly motivated to entertain changes once these provisions have been approved by the legislature this year. Therefore, the commission requests these issues be addressed this session.

Thank you for your consideration of the commission's position. If you have any questions or would like additional information, you may contact me at 296-7090 or Judith McConnell, the KCC's Executive Director, at 296-3326.



3-5-87 noon

STATE OF KANSAS



KANSAS PUBLIC DISCLOSURE COMMISSION

109 W. NINTH  
TOPEKA, KANSAS 66612  
PHONE: (913) 296-4219

Statement in Opposition to the Inclusion of  
K.S.A. 25-4161, 25-4163, 46-256, and 46-258 in  
Senate Bill 334.

Prepared by Dennis Prater, General Counsel  
for the Kansas Public Disclosure Commission

The Kansas Public Disclosure Commission has several functions, one of which is to make a finding of fact whether a person has violated provisions of the Campaign Finance Act & the Conflict of Interest laws at the State level. Such findings are made only after an administrative hearing where procedural due process is guaranteed by current legislation contained in each Act. The findings of fact are then referred to the Attorney General or appropriate District or County Attorney for their review on whether to institute criminal proceedings.

It is my view that the findings of fact do not constitute "orders" as that term is defined in Section 1(d) of Senate Bill 334, since a finding of fact does not "determine the legal rights, duties, etc" of one or more specific persons.

If my analysis is correct, the procedures established by Senate Bill 334 would not apply to Kansas Public Disclosure Commission hearings.

Thus, with the deletion of several hearing powers in Section 60 relating to the Campaign Finance Act & Section 150 concerning the Conflict of Interest laws, there could well be no law granting the Commission the authority to conduct a due process hearing before reaching its decision on a finding of fact.

I strongly suggest Sections 59, 60, 149 & 150, be deleted from Senate Bill 334.

Respectfully Submitted  
Dennis Prater, General Counsel

*Attach. II.  
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The Board of Tax Appeals does not believe it is an agency that should be covered under the Kansas Administrative Procedure Act. This act is designed to afford parties adequate due process in their dealing with state agencies and, as currently defined with respect to orders that are issued by the state agency which pertain to the issuance or revocation of a license. Senate Bill 334 amends KAPA to include orders which determine the legal rights, duties, privileges, amenities or other legal interests of one or more specific persons; therefore, with this amended definition the Board of Tax Appeals would be under KAPA.

The Board of Tax Appeals does not engage in the type of activities whereby a taxpayer would be denied due process if the Board was excepted from KAPA since the Board operates in a manner similar to the courts and has specific statutes that confer procedural rights to those appearing before the Board. In other words, KAPA is not necessary to protect a taxpayer rights. In fact, if the Board is to be covered under KAPA there would be situations under which the taxpayer would be required to take certain actions to preserve certain rights within a shorter period of time than is currently provided in the Board's existing statutes.

If, however, the legislature makes a policy decision that the Board of Tax Appeals should be covered under KAPA, there are some specific problems that must be addressed. They are as follows:

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1. K.S.A. 1986 Supp. 77-511 provides for specific time frames in which certain actions must be taken by the agency. For example, in Section (a)(1) the Board would be required within 30 days after receipt of an application to examine the application, notify the applicant of any apparent errors or omissions and notify the applicant of the individual within our office who may be contacted regarding the application. This would substantially increase the time and amount of correspondence that is currently necessary. For example, the Board receives several hundred applications for exemption of property acquired by the Kansas Department of Transportation. Currently the Board reviews the application and issues an order exempting the property within a time frame of approximately one to two weeks. If, however, the Board were required to advise KDOT and the county that the application had been received, reviewed, and a contact person specified, you have merely lengthened the time it takes to prepare an order granting the requested relief and increased the Board's personnel and communications expenses.

Section (a)(2) requires that the Board take final action or commence a formal adjudicative hearing within 90 days of the receipt of an application. It is not always realistic given the complexity of a case or the location of the parties to hear or resolve an issue within 90 days. For example, the Board travels to western Kansas only once or twice each fiscal year to assist taxpayers who reside in western Kansas by providing them a more convenient location to present their case. If the Board is bound by the provisions of KAPA it would be necessary to require taxpayers who have small tax problems to travel to Topeka in order to present their case. This would cause the taxpayer to consider the expense of traveling to Topeka in relation to the amount of tax dollars at issue and in some cases would prevent the taxpayer from having a legitimate issue considered.

2. K.S.A. 1986 Supp. 77-529 provides for a discretionary rehearing following the issuance of a final order by the Board rather than a mandatory rehearing as currently required by K.S.A. 1986 Supp. 74-2426. The Board of Tax Appeals should be included in

the exceptions to this provision thereby requiring a rehearing before a party can appeal to the appropriate court. There are several reasons the parties should be required to request a rehearing before the Board. They are:

A. To protect a taxpayer who is unfamiliar with the tax laws of this state. The Board receives many applications from taxpayers who, for example, believe they qualify for exemption when in fact they do not. Several taxpayers believe they qualify for exemption simply because they are a 501(c) organization and present no evidence in their application as to how they are using the property. The Board denies the application for exemption and the taxpayer currently must file a motion for rehearing before going to court. If the taxpayer believed that simply being a 501(c) organization was sufficient to qualify for exemption from ad valorem taxation, why should we expect the taxpayer

to be any more knowledgeable about the advantage of electing to file a motion for rehearing and presenting additional evidence to the Board rather than immediately appealing to the Shawnee County District Court. The court would not have sufficient evidence to review the appeal and would either deny the taxpayer because there would be no showing the Board was arbitrary, capricious or unreasonable, or the court could remand the case to the Board to take additional evidence to determine if the organization qualified for exemption. This only serves to delay the process.

- B. A rehearing gives not only the taxpayer but also the Board an opportunity to have considered all possible situations in a given case. This provides a much better record for the courts should the case be appealed as well as providing the parties and the Board every opportunity insure the correct decision has been made.

C. It is not uncommon for the Board to receive a valuation case where there is some question whether the Board has jurisdiction to hear the case or does not provide enough information to adequately determine what the value of the property should be. If the taxpayer is not required to file a motion for rehearing, the district court will receive a case that is incomplete because the taxpayer will not have presented arguments as to why the Board has jurisdiction or evidence as to what the true value of the property should be. This will require the court to remand the matter to the Board for further evidentiary hearings and simply delay the taxpayer's attempt to have the value of his property determined.

D. Without a mandatory rehearing, the costs to not only the courts by also the Board will be increased because each level will be required to review one case at least two

times.

E. Without a mandatory rehearing, the number of appeals from the Board will increase. This adds to the district court backlog as well as the backlog at the Board.

3. The Board also believes it is necessary to amend K.S.A. 1986 Supp. 74-2426 and K.S.A. 74-2438. See attached handout.



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Bill July 6 25

Amendment to K.S.A. 1986 Supp. 74-2426

Section 286 p. 316 - 318 S.B. 334

Add after line 156, p. 317 and before line 157, p. 318  
(b)(5). The petitioning party for review shall pay the costs of certifying the record to the Board prior to certification of the record. The cost of the record may be apportioned between the parties as the reviewing court deems appropriate in its final order.

Amendment to K.S.A. 74-2438

Sec. 288 p.319

Add after line 211 p. 319 and before line 212.

The hearing before the Board shall be a de novo hearing unless the parties agree to submit the case on the record made before the director.

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For purposes of administrative proceedings held under Chapter 40 of Kansas Statutes Annotated pursuant to the Kansas Administrative Procedures Act, the term "Agency Head" will refer to the Commissioner of Insurance or the Assistant Commissioner of Insurance, when acting on behalf of the Commissioner.

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~~(2) The public hearing referred to in paragraph (1) of subsection (d) of this section shall be held as soon as practical after the statement required by this subsection (a) of this section is filed, and at least 20 days' notice thereof shall be given by the commissioner of insurance to the person filing the statement. Not less than seven days' notice of such public hearing shall be given by the person filing the statement to the insurer and to such other persons as may be designated by the commissioner of insurance. The commissioner of insurance shall issue an order after the conclusion of such hearing setting forth the commissioner's findings. At such hearing, the person filing the statement, the insurer, any person to whom notice of hearing was sent, and any other person whose interests may be affected thereby shall have the right to present evidence, examine and cross-examine witnesses, and offer oral and written arguments. The statement referred to in subsection (a) shall be deemed an application for an order and shall be processed in accordance with the time limits prescribed in K.S.A. 1986 Supp. 77-511 and amendments thereto.~~

(d)(2) The public hearing referred to in (d)(1) above shall be conducted in accordance with the provisions of the Kansas Administrative Procedure Act except as follows:

(A) Notice shall be given by the commissioner of insurance to the person filing the statement. Not less than seven (7) days' notice of such public hearing shall be given by the person filing the statement to the insurer and to such other persons as may be designated by the commissioner of insurance. The insurer shall give such notice to its securityholders.

(B) For purposes of administrative hearings held pursuant to the Kansas Administrative Procedures Act under this act, "party to state agency proceedings" shall refer to the acquiring party and "agency head" will refer to the commissioner

of insurance or the assistant commissioner of insurance, when acting on behalf of the commissioner.

(3) The statement referred to in subsection (a) shall be deemed an application for an order and shall be processed in accordance with the time limits prescribed in K.S.A. 1986 Supp. 77-511 and amendments thereto.

New Section 356. (a) This section applies to adjudicative proceedings before the Commissioner of Insurance concerning any rate, or any rule, regulation or practice pertaining to the rates over which the Commissioner of Insurance has jurisdiction.

(b)(1) After the Commissioner has determined and announced that a hearing should be held, and prior to the issuance of a final order, no parties to the proceeding, or their counsel, shall discuss the merits of the matter or proceeding, or their counsel, shall discuss the merits of the matter or proceeding with the presiding officer unless reasonable notice is given to all parties who have appeared to enable the parties to be present at the conference.

(2) After the Commissioner has determined and announced that a hearing should be held, prior to the issuance of a final order, copies of any written communications from any party regarding the proceeding that are directed to the presiding officer shall be mailed to all parties of record and proof of service shall be furnished to the Commissioner. Communications requested by the Commissioner's staff from any party and any written communications received by the Commissioner's staff from any party shall be made a part of the file and the docket and shall be made available to all persons who desire to use them, provided that the Commissioner's requests for information from a party shall be mailed to all parties of record.

(3) The person or persons to whom any ex parte communication has been made shall promptly and fully inform the Commissioner of the substance of the communication, and the circumstances thereof, to enable the Commissioner to take appropriate action.

(c) For purposes of this section, no member of the Commissioner's technical staff shall be considered a party to any proceeding before the Commissioner, regardless of participation in staff investigations with respect to the proceeding or of participation in the proceeding as a witness. Since the purpose of the staff is to aid the Commissioner in the proper discharge of Commissioner's duties, the presiding officer shall be free at all times to confer with any staff member with respect to any proceeding. However, no facts that are outside the record, and that reasonably could be expected to influence the decision in any matter pending before the Commissioner, shall be furnished to any presiding officer unless all parties to the proceeding are likewise informed and afforded a reasonable opportunity to respond. Subsection (b) shall apply to staff counsel who have participated in the proceeding in regard to any adjudicatory proceeding before the Commissioner.

(d) All letters and written communications that are received by the presiding officer from members of the general public, and that are in the nature of ex parte communications, shall be made a part of the file in the docket and shall be made available to all persons who desire to see them. The deposit of such written communications and letters in the file shall not make them a part of the official record of the case.

0387 statements. If the presiding officer proposes to consider a state-  
0388 ment by a nonparty, the presiding officer shall give all parties an  
03 opportunity to challenge or rebut it and, on motion of any party,  
0390 the presiding officer shall require the statement to be given  
0391 under oath or affirmation.

0392 (d) The presiding officer may conduct all or part of the  
0393 hearing by telephone or other electronic means, if each partici-  
0394 pant in the hearing has an opportunity to participate in the entire  
0395 proceeding while it is taking place.

0396 (e) The presiding officer shall cause the hearing to be re-  
0397 corded at the state agency's expense. The state agency is not  
0398 required, at its expense, to prepare a transcript, unless required  
0399 to do so by a provision of law. Any party, at the party's expense  
0400 and subject to such reasonable conditions as the state agency  
0401 may establish, may cause a person other than the state agency to  
0402 prepare a transcript from the state agency's record, or cause  
0403 additional recordings to be made during the hearing.

0404 (f) The hearing is open to public observation, except for the  
0405 parts that the presiding officer states to be closed pursuant to a  
0406 provision of law expressly authorizing closure.

0407 Sec. 10. K.S.A. 1986 Supp. 77-525 is hereby amended to read  
0408 as follows: 77-525. (a) A presiding officer serving in an adjudica-  
0409 tive proceeding may not communicate, directly or indirectly,  
0410 regarding any issue in the proceeding while the proceeding is  
0411 pending, with any party or participant, with any person who has  
0412 a direct or indirect interest in the outcome of the proceeding or  
0413 with any person who presided at a previous stage of the pro-  
0414 ceeding, without notice and opportunity for all parties to par-  
0415 ticipate in the communication.

0416 (b) A member of a multimember panel of presiding officers  
0417 may communicate with other members of the panel regarding a  
0418 matter pending before the panel, and any presiding officer may  
0419 receive aid from staff assistants if the assistants do not:

0420 (1) Receive *ex parte* communications of a type that the pre-  
0421 siding officer would be prohibited from receiving; or

0422 (2) furnish, augment, diminish or modify the evidence in the  
0423 ord.

(1) This section shall not apply to adjudicatory proceedings before the  
Commissioner of Insurance concerning any rate filing, or proceedings held  
pursuant to the Kansas Insurance Holding Companies Act.

Attach. F  
Senate Jnd.  
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0424 (c) Unless required for the disposition of *ex parte* matters  
0425 specifically authorized by statute, no party to an adjudicative  
0426 proceeding, and no person who has a direct or indirect interest in  
0427 the outcome of the proceeding or who presided at a previous  
0428 stage of the proceeding, may directly or indirectly communicate  
0429 in connection with any issue in that proceeding, while the  
0430 proceeding is pending, with any person serving as presiding  
0431 officer unless notice and an opportunity are given all parties to  
0432 participate in the communication.

0433 (d) If, before serving as presiding officer in an adjudicative  
0434 proceeding, a person receives an *ex parte* communication of a  
0435 type that could not properly be received while serving, the  
0436 person, promptly after starting to serve, shall disclose the com-  
0437 munication in the manner prescribed in subsection (e).

0438 (e) A presiding officer who receives an *ex parte* communica-  
0439 tion in violation of this section shall place on the record of the  
0440 pending matter all written communications received, all written  
0441 responses to the communications and a memorandum stating the  
0442 substance of all oral communications received, all responses  
0443 made and the identity of each person from whom the presiding  
0444 officer received an *ex parte* communication and shall advise all  
0445 parties that these matters have been placed on the record. Any  
0446 party desiring to rebut the *ex parte* communication must be  
0447 allowed to do so, upon requesting the opportunity for rebuttal  
0448 within 10 days after notice of the communication.

0449 (f) If necessary to eliminate the effect of an *ex parte* commu-  
0450 nication received in violation of this section, a presiding officer  
0451 who receives the communication may be disqualified and the  
0452 portions of the record pertaining to the communication may be  
0453 sealed by protective order.

0454 (g) The state agency shall, and any party may, report any  
0455 willful violation of this section to appropriate authorities for any  
0456 disciplinary proceedings provided by law. In addition, each state  
0457 agency, by rule and regulation, may provide for appropriate  
0458 sanctions, including default, for any violations of this section.

0459 (h) This section shall not apply to adjudicative proceedings  
0460 before the state corporation commission concerning any rate.



0461 joint rate, toll, charge or classification or schedule of charges, or  
0462 any rule or regulation or practice pertaining to the service or  
0463 rates of a public utility or common carrier. Such proceedings  
0464 shall be subject to the provisions of section 355.

0465 Sec. 11. K.S.A. 1986 Supp. 77-527 is hereby amended to read  
0466 as follows: 77-527. (a) The agency head, upon its own motion  
0467 may, and upon petition by any party or when required by law  
0468 shall, review an initial order, except to the extent that:

0469 (1) A provision of law precludes or limits state agency review  
0470 of the initial order; or

0471 (2) the agency head (A) determines to review some but not all  
0472 issues, or not to exercise any review, (B) delegates its authority to  
0473 review the initial order to one or more persons, *unless such*  
0474 *delegation is expressly prohibited by law*, or (C) authorizes one  
0475 or more persons to review the initial order, subject to further  
0476 review by the agency head.

0477 (b) A petition for review of an initial order must be filed with  
0478 the agency head, or with any person designated for this purpose  
0479 by rule and regulation of the state agency, within 15 days after  
0480 service of the initial order. If the agency head on its own motion  
0481 decides to review an initial order, the agency head shall give  
0482 written notice of its intention to review the initial order within  
0483 15 days after its service. *If the agency head determines not to*  
0484 *review an initial order in response to a petition for review, the*  
0485 *agency head shall, within 20 days after filing of the petition for*  
0486 *review, serve on each party an order stating that review will not*  
0487 *be exercised.*

0488 (c) The petition for review shall state its basis. If the agency  
0489 head on its own motion gives notice of its intent to review an  
0490 initial order, the agency head shall identify the issues that it  
0491 intends to review.

0492 (d) In reviewing an initial order, the agency head shall exer-  
0493 cise all the decision-making power that the agency head would  
0494 have had to render a final order had the agency head presided  
0495 over the hearing, except to the extent that the issues subject to  
0496 review are limited by a provision of law or by the agency head  
0497 upon notice to all parties.

A-V

3-5-87 - noon  
P. Reim SRS

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

PROPOSED REVISIONS TO SB 334

ATTACH. II.  
Senate Publishing  
3-5-87

Office of the Secretary  
296-3271  
March 5, 1987

0202 judicative proceeding with respect to an order upon the written  
0203 application of any person, unless:

0204 (1) The state agency lacks jurisdiction of the subject matter;  
0205 (2) resolution of the matter requires the state agency to exer-  
0206 cise discretion within the scope of *subsection (c) of K.S.A. 1985*  
0207 *1986 Supp. 77-508* and amendments thereto;

0208 (3) a statute vests the state agency with discretion to conduct  
0209 or not to conduct an adjudicative proceeding ~~before issuing an~~  
0210 ~~order~~ to resolve the matter and, in the exercise of that discretion,  
0211 the state agency has determined not to conduct an adjudicative  
0212 proceeding;

0213 (4) resolution of the matter does not require the state agency  
0214 to issue an order that determines the applicant's legal rights,  
0215 duties, privileges, immunities or other legal interests;

0216 (5) the matter was not timely submitted to the state agency;  
0217 ~~or~~

0218 (6) the matter was not submitted in a form substantially  
0219 complying with any applicable provision of law ; or

0220 (c) An adjudicative proceeding commences when the state  
0221 agency or a presiding officer:

0222 (1) Notifies a party that a prehearing conference, hearing or  
0223 other stage of an adjudicative proceeding will be conducted; or

0224 (2) begins to take action on a matter that appropriately may  
0225 be determined by an adjudicative proceeding, unless this action  
0226 is:

0227 (A) An investigation for the purpose of determining whether  
0228 an adjudicative proceeding should be conducted; or

0229 (B) a decision which, under *subsection (c) of K.S.A. 1985*  
0230 *1986 Supp. 77-508* and amendments thereto, the state agency  
0231 may make without conducting an adjudicative proceeding.

0232 Sec. 5. K.S.A. 1986 Supp. 77-511 is hereby amended to read  
0233 as follows: 77-511. (a) Except to the extent that the time limits in  
0234 this subsection are inconsistent with limits established by an-  
0235 other statute for any stage of the adjudicative proceedings, a state  
0236 agency shall process an application for an order, other than a  
0237 declaratory order, as follows:

0238 (1) Within 30 days after receipt of the application, the state

(7) the request for an adjudicative pro-  
ceeding concerns the validity of a federal  
or state law or regulation. However, a  
state agency shall provide an opportunity  
for an adjudicative proceeding for any  
portion of a request that does not concern  
the validity of a federal or state law or  
regulation.

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0461 *joint rate, toll, charge or classification or schedule of charges, or*  
 0462 *any rule or regulation or practice pertaining to the service or*  
 0463 *rates of a public utility or common carrier. Such proceedings*  
 0464 *shall be subject to the provisions of section 355.*

0465 Sec. 11. K.S.A. 1986 Supp. 77-527 is hereby amended to read  
 0466 as follows: 77-527. (a) The agency head, upon its own motion  
 0467 may, and upon petition by any party or when required by law  
 0468 shall, review an initial order, except to the extent that:

0469 (1) A provision of law precludes or limits state agency review  
 0470 of the initial order; or

0471 (2) the agency head (A) determines to review some but not all  
 0472 issues, or not to exercise any review, (B) delegates its authority to  
 0473 review the initial order to one or more persons, *unless such*  
 0474 *delegation is expressly prohibited by law*, or (C) authorizes one  
 0475 or more persons to review the initial order, subject to further  
 0476 review by the agency head.

0477 (b) A petition for review of an initial order must be filed with  
 0478 the agency head, or with any person designated for this purpose  
 0479 by rule and regulation of the state agency, within 15 days after  
 0480 service of the initial order. If the agency head on its own motion  
 0481 decides to review an initial order, the agency head shall give  
 0482 written notice of its intention to review the initial order within  
 0483 15 days after its service. *If the agency head determines not to*  
 0484 *review an initial order in response to a petition for review, the*  
 0485 *agency head shall, within 20 days after filing of the petition for*  
 0486 *review, serve on each party an order stating that review will not*  
 0487 *be exercised.*

0488 (c) The petition for review shall state its basis. If the agency  
 0489 head on its own motion gives notice of its intent to review an  
 0490 initial order, the agency head shall identify the issues that it  
 0491 intends to review.

0492 (d) In reviewing an initial order, the agency head shall exer-  
 0493 cise all the decision-making power that the agency head would  
 0494 have had to render a final order had the agency head presided  
 0495 over the hearing, except to the extent that the issues subject to  
 0496 review are limited by a provision of law or by the agency head  
 0497 upon notice to all parties.

0498 (e) The agency head shall afford each party an opportunity to  
0499 present briefs and may afford each party an opportunity to  
0500 present oral argument.

0501 (f) The agency head may shall render a final order disposing  
0502 of the proceeding or may remand the matter for further proceed-  
0503 ings with instructions to the person who rendered the initial  
0504 order. Upon remanding a matter, the agency head may order  
0505 such temporary relief as is authorized and appropriate.

or designee

0506 (g) A final order or an order remanding the matter for further  
0507 proceedings shall be rendered in writing and served within 30  
0508 days after receipt of briefs and oral argument unless that period  
0509 is waived or extended with the written consent of all parties or  
0510 for good cause shown.

0511 (h) A final order or an order remanding the matter for further  
0512 proceedings under this section shall identify any difference  
0513 between this order and the initial order and shall include, or  
0514 incorporate by express reference to the initial order, all the  
0515 matters required by subsection (c) of K.S.A. 1985 Supp. 77-526  
0516 and amendments thereto.

0517 (i) The agency head shall cause copies of the final order or  
0518 order remanding the matter for further proceedings to be served  
0519 on each party in the manner prescribed by K.S.A. 1985 1986  
0520 Supp. 77-531 and amendments thereto.

0521 (j) A final order rendered on review of an initial order is  
0522 subject to review in accordance with the act for judicial review  
0523 and civil enforcement of agency actions. An initial order which  
0524 has not been reviewed under this section is not subject to  
0525 judicial review unless a provision of law precluded administra-  
0526 tive review of the initial order or the agency head determined  
0527 not to review the initial order in response to a petition for  
0528 administrative review.

0529 Sec. 12. K.S.A. 1986 Supp. 77-529 is hereby amended to read  
0530 as follows: 77-529. Unless otherwise provided by statute or rule  
0531 and regulation: (a) Any party, within 15 days after service of a  
0532 final order, may file a petition for reconsideration with the  
0533 agency head, stating the specific grounds upon which relief is  
0534 requested. The filing of the petition is not a prerequisite for

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0158 burden of proof shall be upon the employee to establish that the  
0159 appointing authority did not act reasonably in taking such action.

0160 (g) No employee shall be disciplined or discriminated  
0161 against in any way because of the employee's proper use of the  
0162 appeal procedure.

0163 (h) A permanent employee who is demoted pursuant to this  
0164 section need not meet the qualifications for the class of positions  
0165 to which demoted if the appointing authority determines that the  
0166 employee can reasonably be expected to perform satisfactorily  
0167 the duties of the position to which the employee is demoted. A  
0168 permanent employee who is demoted pursuant to this section  
0169 shall have permanent status in the class to which demotion is  
0170 made, effective on the date of the demotion.

0171 (i) In case of a situation in which the possibility of proposing  
0172 dismissal, suspension or demotion of a permanent employee is  
0173 indicated, but where the appointing authority needs time to  
0174 conduct an investigation before proposing such action, or in a  
0175 situation where immediate removal of an employee from such  
0176 employee's job is needed to avoid disruption of work, or for the  
0177 protection of persons or property, or for a similar reason, the  
0178 appointing authority may relieve the employee of duties or  
0179 change the duties of the employee for a limited period and keep  
0180 the employee in pay status. The secretary of administration shall  
0181 provide by rules and regulations, adopted pursuant to K.S.A.  
0182 75-3706 and amendments thereto, procedures to be followed in  
0183 such cases.

0184 Sec. 302. K.S.A. 75-3306 is hereby amended to read as fol-  
0185 lows: 75-3306. (a) The secretary of social and rehabilitation  
0186 services shall provide a fair hearing for any person who is an  
0187 applicant, client, inmate, other interested person or taxpayer  
0188 who appeals from the decision or final action of any agent or  
0189 employee of the secretary. The hearing shall be conducted by an  
0190 employee or employees of the secretary of social and rehabilita-  
0191 tion services to be designated by the secretary as an appeals  
0192 referee or committee. The secretary of social and rehabilitation  
0193 services shall prescribe the procedure for hearing all appeals in  
0194 accordance with the provisions of the Kansas administrative

, except as set forth in the Kansas adminis-  
trative procedure act and subsection (f) of  
this section,

subject to an order, as defined in K.S.A.  
1986 Supp. 77-502 and amendments thereto,  
issued by

and who appeals such order

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0195 *procedure act.*

0196 It shall be the duty of the secretary of social and rehabilitation  
0197 services to have available in all intake offices, during all office  
0198 hours, forms for filing complaints for hearings, and appeal forms  
0199 with which to appeal from the decision of the agent or employee  
0200 of the secretary. The forms shall be prescribed by the secretary of  
0201 social and rehabilitation services and shall have printed on or as  
0202 a part of them the basic ~~rules and regulations~~ *procedure* for  
0203 hearings and appeals prescribed by state law and the secretary of  
0204 social and rehabilitation services.

0205 (b) The secretary of social and rehabilitation services shall  
0206 have authority to investigate (1) any claims and vouchers and  
0207 persons or businesses who provide services to the secretary of  
0208 social and rehabilitation services or to welfare recipients, (2) the  
0209 eligibility of persons to receive assistance and (3) the eligibility  
0210 of providers of services.

0211 ~~(c) The secretary of social and rehabilitation services shall~~  
0212 ~~have authority, when hearing appeals or conducting investiga-~~  
0213 ~~tions as provided for in this section, to issue subpoenas; compel~~  
0214 ~~the attendance of witnesses at the place designated in this state;~~  
0215 ~~compel the production of any records, books, papers or other~~  
0216 ~~documents considered necessary; administer oaths; take testi-~~  
0217 ~~mony; and render decisions. A copy of each decision shall be~~  
0218 ~~delivered to the appellant, provider of services or agent or~~  
0219 ~~employee of the secretary, as the case may be, who shall comply~~  
0220 ~~with the decision. If a person refuses to comply with any sub-~~  
0221 ~~poena issued under this section or to testify to any matter~~  
0222 ~~regarding which the person may lawfully be questioned, the~~  
0223 ~~district court of any county, on application of the secretary, may~~  
0224 ~~issue an order requiring the person to comply with the subpoena~~  
0225 ~~and to testify, and any failure to obey the order of the court may~~  
0226 ~~be punished by the court as a contempt of court. Unless inca-~~  
0227 ~~pacitated, the person placing a claim or defending a privilege~~  
0228 ~~before the secretary shall appear in person and may not be~~  
0229 ~~excused from answering questions and supplying information,~~  
0230 ~~except in accordance with the person's constitutional rights and~~  
0231 ~~lawful privileges.~~

(c) The secretary of social and rehabilita-  
tion services shall have authority, when  
conducting investigations as provided for in  
this section, to issue subpoenas; compel the  
attendance of witnesses at the place designated  
in this state; compel the production of any  
records, books, papers or other documents  
considered necessary; administer oaths; take  
testimony; and render decisions. If a person  
refuses to comply with any subpoena issued  
under this section or to testify to any matter  
regarding which the person may lawfully be  
questioned, the district court of any county,  
on application of the secretary, may issue an  
order requiring the 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 of court. Unless  
incapacitated, the person placing a claim or  
defending a privilege before the secretary  
shall appear in person and may not be excused  
from answering questions and supplying infor-  
mation, except in accordance with the perso  
constitutional rights and lawful privileges

0232 ~~(e)~~ The presiding officer may close any portion of a hearing  
0233 conducted under the Kansas administrative procedure act when  
0234 matters made confidential, pursuant to federal or state law or  
0235 regulation are under consideration.

(d)

0236 ~~(d)~~ Except as provided in subsection (c) of K.S.A. 77-511 and  
0237 amendments thereto and notwithstanding the other provisions  
0238 of the Kansas administrative procedure act, the secretary may  
0239 enforce any order issued pursuant to subsection (b) of K.S.A.  
0240 77-508 and amendments thereto, prior to the disposition of a  
0241 person's application for an adjudicative proceeding unless pro-  
0242 hibited from such action by federal or state statute, regulation  
0243 or court order.

(e)

0244 Sec. 303. K.S.A. 75-3340 is hereby amended to read as fol-  
0245 lows: 75-3340. (a) The division of services for the blind of the  
0246 department of social and rehabilitation services shall:

0247 ~~(a)~~ (1) Provide for each licensed blind person such vending  
0248 facility equipment, and adequate initial stock of suitable articles  
0249 to be vended therefrom as may be necessary: ~~Provided, however,~~  
0250 ~~That.~~ Such equipment and stock may be owned by ~~said the~~  
0251 division of services for the blind, or by the blind individual to  
0252 whom the license is issued: ~~And provided further, That.~~ If  
0253 ownership of such equipment is vested in the blind licensee,:

0254 ~~(1)~~ ~~said (A)~~ The division of services for the blind shall retain  
0255 a first option to repurchase such equipment; and

0256 ~~(2)~~ (B) in the event such individual dies or for any other  
0257 reason ceases to be a licensee or transfers to another vending  
0258 facility, ownership of such equipment shall become vested in  
0259 ~~said the~~ division of services for the blind ~~(,~~ for transfer to a  
0260 successor licensee), subject to an obligation on the part of the  
0261 division of services for the blind to pay to such individual or to  
0262 ~~his or her such individual's~~ estate the fair value of ~~his or her such~~  
0263 ~~individula's~~ interest therein as later determined in accordance  
0264 with regulations of the division of services for the blind and after  
0265 opportunity for a fair hearing.

(f) Decisions relating to the administration of the support enforcement program set forth in K.S.A. 39-753 et seq. and amendments thereto except for federal debt set off activities shall be exempt from the provisions of the Kansas administrative procedure act and subsection (a) of this section.

0266 ~~(b)~~ (2) If any funds are set aside, or caused to be set aside,  
0267 from the proceeds of the operation of the vending facilities such  
0268 funds shall be set aside, or caused to be set aside, only to the

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