Approved 2-28-89
Date

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by SENATOR ROY M. EHRLICH at
Chairperson

10:00 a.m./~~p.m.~~ on February 21, 1989 in room 526-S of the Capitol.

All members were present except:

Committee staff present:
Emalene Correll, Legislative Research
Bill Wolff, Legislative Research
Norman Furse, Revisors Office
Clarene Wilms, Committee Secretary

Conferees appearing before the committee:
Richard Gannon, Executive Director, Kansas Board of Healing Arts
Larry Buening, General Counsel, Kansas Board of Healing Arts
Chip Wheelen, Director of Public Affairs, Kansas Medical Society
Wayne Stratton, General Counsel, Kansas Medical Society

The meeting was called to order with the chairman placing the minutes before the committee for approval or correction.

Senator Hayden moved, with a second from Senator Langworthy, to approve the minutes as presented. The motion carried.

Richard Gannon, Board of Healing Arts, appeared in support of SB-182 stating that this bill includes a number of provisions which would assist the Board in carrying out its statutory duties and obligations. (Attachment 1) Mr. Gannon reviewed the various changes and suggested that Section 3 be phrased to state "A person whose license has been revoked for a period of time, the length of which shall be prescribed by the secretary at the time of revocation, may apply to the secretary for reinstatement. The secretary shall have discretion to accept or reject an application for reinstatement and may hold a hearing to consider such reinstatement." He told the committee that he was not comfortable with the wording in the bill now.

Larry Buening, Board of Healing Arts, spoke to the committee concerning SB-182, Section 5, which enable those persons who are not directly employed by either the Department of Corrections or the Department of Social and Rehabilitation Services to obtain an Institutional License if they were employed by a third party who has a contract to provide medical services at the institutions run by either of these two departments. Mr. Buening reviewed the concept concerning the institutional license which was developed so that the departments of SRS and Corrections could have access to certain individuals who did not qualify to practice privately in the state of Kansas but could practice in a more supervised setting. These licensees do not have to have the residency requirements nor the same type of licensing examination as a fully licensed person would have.

Staff raised questions concerning the supervision in the contract setting such as the Department of Corrections. Mr. Gannon stated some individuals would not be allowed to practice under any circumstances and they were were not trying to provide any sub-standard care.

Chip Wheelen, Kansas Medical Society testified and presented written testimony stating their organization supported language contained at lines 268-273 on page 8 concerning steroids. Serious reservations about the language contained at line 58 on page 2 were voiced as it was felt possible infringement of the rights of licensees could result. (Attachment 2)

Mr. Wayne Stratton, Kansas Medical Society, told the committee that the organization supported the philosophy of SB-182 but cited concern over the thrust of the bill to change the requirement of probable cause to reasonable suspicion. (Attachment 3) He further stated that licensees have already consented to submit to a mental or physical examination when directed in writing by the board and have waived all objections to the admissibility of the testimony or report of the person conducting the examination on the ground that such testimony or examination constitutes a privileged communication. This proposed change would lower the standard upon which the Board could require examination and allow drug screening. Should this amendment be passed the actual determination could be delegated by the board to an investigator and there would be no deliberate or judicial determination of the issue.

The meeting adjourned at 10:55 a.m. and will convene at 10:00 a.m. on Wednesday, February 22, 1989 in room 526-S.

SENATE
PUBLIC HEALTH AND WELFARE COMMITTEE
DATE February 21, 1989

(PLEASE PRINT) NAME AND ADDRESS	ORGANIZATION
Carl Schmitt Leawood	Ks Dental Assn
Rebecca Rice	Ks Ophthalmology Soc.
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Bob Williams	Ks. Pharmacist's Assn.
GARY Robbins	Ks Opt assn
Jennifer Howard	Close-Up
Susan Schwaller	Close-Up
Paul Hyde	"
Mark Doodner	" "
Forest Eaton	Close-Up
Landy Burns	" " Kansas
Don LINDSEY	UTU
Allyn A. Sorkow Topeka	A.R.A.
Chip Wheelen, Topeka	KMS
Jay Shanks Topeka	KMS
Hazel Gibbs Wichita	Farmer
Jacque Oakes Topeka	PA
Kirsten Maggart Junction City	Close up Kansas
Brian Orr Junction City	Close Up Ks
Chong Cho " "	" "

State of Kansas

Office of
RICHARD G. GANNON, EXECUTIVE DIRECTOR
CHARLENE K. ABBOTT, ADMINISTRATIVE ASSISTANT
LAWRENCE T. BUENING, JR., GENERAL COUNSEL
JOSEPH M. FURJANIC, DISCIPLINARY COUNSEL

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Board of Healing Arts

TO: Senate Committee on Public Health & Welfare

FROM: Richard G. Gannon, Executive Director

DATE: February 21, 1989

RE: TESTIMONY ON SENATE BILL NO. 182

I appreciate the opportunity to appear before you on behalf of Senate Bill 182. This bill was requested by the Board to be introduced through your committee and includes a number of provisions that it is felt would assist the Board in carrying out its statutory duties and obligations.

Section 1 of the bill amends three subsections of K.S.A. 1988 Supp. 65-2836. Over the last several years, the legislature has made a concerted attempt to increase the various grounds for which the Board may take disciplinary action. In working with the statutes, we have discovered several areas which we feel would, if amended, improve the Board's abilities in this area. Section 1 would amend subsection (k) of K.S.A. 1988 Supp. 65-2836 to enable the Board to obtain drug screens from those individuals who may be impaired by alcohol or drugs. Further, this subsection would be amended to reduce the evidentiary proof required to either order an evaluation or obtain a drug screen from probable cause to reasonable suspicion. This is in accordance with the action taken by the legislature last session regarding the Governor and other certain sensitive positions. Subsection (u) would be expanded to include sanctions by governmental agencies or departments as being <u>prima facie</u> proof of a violation of the Healing Arts Act for which disciplinary action could be taken. At present, sanctions by either the United States Department of Health & Human Services or the State Department of Social & Rehabilitation Services are not automatically grounds for disciplinary action. Instead, the Board must obtain the information from each of these governmental agencies and proceed to determine if the conduct which led to the sanctions are grounds for which disciplinary action could be taken. The amendment proposed would enable the Board to take disciplinary action more expeditiously against an individual who had been sanctioned by such a governmental agency. K.S.A. 1988 Supp. 65-2836(w) also is amended to add surrender authority to utilize

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controlled substances and voluntary limitation or restriction of hospital privileges as grounds for disciplinary action. At present, voluntary surrender of a DEA registration or voluntarily limiting hospital privileges in lieu of formal action by the hospital do not constitute grounds for which the Board may initiate disciplinary proceedings.

Section 2 of the bill would make it unprofessional conduct for a licensee to prescribe or otherwise utilize anabolic steroids for body building purposes. This is a companion to SB 181 which is basically aimed towards the use and possession of anabolic steroids by unlicensed individuals.

Section 3 of the bill would increase the time after which a license is revoked from three years to the present 1 year.

Section 4 of the bill classifies violation of the Healing Arts Act on the first offense as a class A misdemeanor and on subsequent offenses as a class E felony. The present statute has been found to be not punitive enough and the local county and district attorneys have not shown a great deal of interest in prosecuting individuals for the unlawful practice of the healing arts when the maximum penalty that can be imposed is $200. By adopting these amendments, it is felt that both the Attorney General and the local county and district attorneys will have a greater interest in prosecuting unlawful practice cases.

Section 5 would enable persons who are not directly employed by either the Department of Corrections or the Department of Social and Rehabilitation Services to obtain an Institutional License if they were employed by a third party who has a contract to provide medical services at the institutions run by either of these two departments. This amendment was proposed as a result of the change in which the Department of Corrections is presently staffing its prison facilities.

The Board strongly supports SB 182 and requests your favorable action on it.

Thank you very much for the opportunity to appear before you and I am happy to answer any questions you might have.

RGG:LTB:sl

(4) is mentally ill or physically disabled to an extent that impairs the individual's ability to engage in the practice of dietetics;

(5) has used any advertisement or solicitation which is false, misleading or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed;

(6) has violated any lawful order or rule and regulation of the secretary; or

(7) has violated any provision of this act.

(b) Such denial, refusal to renew, suspension or revocation of a license may be ordered by the secretary after notice and hearing on the matter in accordance with the provisions of the Kansas administrative procedure act.

(c) ~~Upon the end of the period of time established by the secretary for the revocation of a license, application may be made~~ *A person whose license has been revoked for a period of time, the length of which shall be prescribed by the secretary at the time of revocation, may apply* to the secretary for reinstatement. The secretary shall have discretion to accept or reject an application for reinstatement and may hold a hearing to consider such reinstatement. An application for reinstatement shall be accompanied by the application fee established by the secretary.

Sec. 5. K.S.A. 1988 Supp. 65-5902, 65-5903, 65-5908 and 65-5911 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

SB-35
1989

1989 SB 102 - Licensure of dieticians

1-3

KANSAS MEDICAL SOCIETY
1300 Topeka Avenue · Topeka, Kansas 66612 · (913) 235-2383

February 21, 1989

TO: Senate Public Health and Welfare Committee

FROM: Kansas Medical Society Chip Wheelen

SUBJECT: Senate Bill 182, As Introduced

The Kansas Medical Society appreciates this opportunity to express our conditional support of Senate Bill 182. We endorse the language contained at lines 268-273 on page 8. This amendatory language is a companion to the provisions of Senate Bill 181 which we have supported for purposes of reducing the abuse of anabolic steroids in Kansas.

Whether or not SB181 becomes law, we believe that the definition of prescribing anabolic steroids for other than a medical purpose as "unprofessional conduct" is important. This would allow the State Board of Healing Arts to initiate disciplinary action against any physician who might irresponsibly prescribe anabolic steroids for muscle building or some other athletic purpose, rather than those few medical purposes for which anabolic steroids may be prescribed.

We do, however, have some serious reservations about the language contained at line 58 on page 2. While this would appear to be a very minor change in the Healing Arts Act, it is our understanding that it could possibly infringe upon the rights of licensees of the three branches of the Healing Arts. For this reason, we would respectfully request that the Committee deliberate very seriously upon the ramifications of the proposed amendment contained in Section 1 of the Bill. On the other hand, we urge you to proceed with passage of the amendatory language contained in Section 2 of the Bill.

Thank you very much for considering our concerns and for allowing us the opportunity to express them.

CW:lg

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Mr. Chairman and Members of the Committee:

Re: Senate Bill 182

My name is Wayne Stratton and I am General Counsel for the Kansas Medical Society. While the Kansas Medical Society supports some of the philosophy of Senate Bill 182, there is one specific portion which causes concern. I would like to briefly discuss the amendments to K.S.A. 65-2836(k) which allows the board to compel a licensee to submit to mental or physical examination or drug screens based upon reasonable suspicion of such inability. The thrust of this Bill is to change the requirement from probable cause to reasonable suspicion.

Pursuant to this statute, licensees have already consented to submit to a mental or physical examination when directed in writing by the board and have waived all objections to the admissibility of the testimony or report of the person conducting the examination on the ground that such testimony or examination constitutes a privileged communication.

Now the suggested change would be to lower the standard upon which the board could require the examination and specifically allow drug screening.

The Fourth Amendment to the Constitution of the United States provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but on probable cause, supported by oath or affirmation, and particular describing the place to be searched, and the persons or things to be seized."

When conducted by the government, urinalysis drug testing is a search and seizure within the meaning of the Fourth Amendment. National Federation of Federal Employees v. Weinberger, 818 F.2d 935, 942 (D. C. Circuit 1987) In Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 853, 16 L.Ed 2d 908 (1966) the United States Supreme Court held that blood testing for the presence of alcohol "plainly involves a broadly conceived breach of a search and seizure under the Fourth Amendment". The court further noted that the Fourth Amendment "expressly provides that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches shall not be violated. . .'" The supreme court went on to hold that "it could not reasonably be argued. . .that the administration of the blood tests in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons" and depend anacedently upon seizures of "persons within the meaning of that amendment".

In McDonell v. Hunter, 612 F.Supp. 1112 (D.C. Iowa 1985) the court found a reasonable expectation of privacy from a search of mandatory urine testing for drugs and said:

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> Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

"Probable cause" is a well-known term in the law and means something is more probable than not or has more evidence for it than against it. Blacks Law says: "It is an apparent state of facts found to exist upon reasonable inquiry, which would induce a reasonably intelligent and prudent man to believe that a cause of action existed or in a criminal case, that the accused person had committed the crime charged." It is equivalent to a 51% standard, that is that something is more likely than not to exist. It is a lesser standard than that required at the time of trial.

Reasonable suspicion is not as high a standard as probable cause. It is something more than mere suspicion but how it may be applied in the present instance is open to question.

If licensees of the Kansas Board of Healing Arts are required to produce urine samples, as mandated by this Bill, there is no reason why many other licensees from other professions may not also be required. While the case law may permit the type of search which is proposed for public employees it must be done under clearly defined standards, and our research has not revealed any legislation attempting to apply such a standard to health care providers by licensing boards.

In Schmerber v. State of California, Supra, the court said:

> Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of

being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Johnson v. United States of America, 333 U.S. 10, 13 - 14, 92 L.Ed 436, 440, 68 S. Ct. 367; see also Aquilar v. Texas, 378 U.S. 108, 110 - 111, 12 L. Ed 2d 723, 725, 726, 84 S.Ct 1509. The importance of informed, detached and deliberate determinations of the issue whether or not to invalid another's body in search of evidence of guilt is indisputable and great."

The Kansas Medical Society is concerned that if this amendment should be passed that the actual determination of the issue would be delegated by the board to an investigator and there would be no deliberate or judicial determination of the issue. Rather, every licensee would be subject to invasions of privacy and searches and seizures at the request of employees of the board. At the very minimum, some procedural protection should be included within the Bill.

I appreciate your kind attention. I would be glad to respond to any questions.