Approved 3-18-91
Date

MINUTES OF THE HOUSE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by Carol H. Sader at
Chairperson

1:00 ~~a.m.~~/p.m. on March 8, 1991 in room 423-S of the Capitol.

All members were present except:

Committee staff present:

Emalene Correll, Research
Bill Wolff, Research
Norman Furse, Revisor
Sue Hill, Committee Secretary

Conferees appearing before the committee:

Marvin G. Stottlemire, Director of legal services/Dept. Health/Environment
Joseph Kroll, Department of Health/Environment

Chairperson Sader called meeting to order, noting there are two sets of committee minutes ready for corrections or approval.

Rep. Bishop moved to approve minutes of March 4, and March 5, 1991, as presented. Motion seconded by Rep. Amos. Motion carried.

Chair called attention to hand-outs this date.

(Attachment No. 1, written testimony from Richard Schade/Bethphage Mission.

Fiscal note on **HB 2226** recorded as (Attachment No. 2).

Clarification statement from Department of Health/Environment on **HB 2529** as (Attachment No. 3).

Statement from Kansas Medical Center on **HB 2104** (Attachment No. 4)

Testimony and information packet from Rep. Wagnon on **HB 2226** (Attachment No. 5).

Chair then opened discussion on **HB 2226.**

Rep. Neufeld offered a balloon amendment on **HB 2226.** He explained in detail the proposed changes.

Rep. Neufeld then made a motion to amend **HB 2226** per balloon (Attachment No. 6), by changing title as needed, line 18 to delete "Secretary of SRS", and insert in lieu thereof, "Director of Personnel"; line 19 delete "testing" and insert in lieu thereof, "screening"; strike

in line 20 the word "provide", strike all lines through 43 and add the following, "be established, implemented and administered in the same manner and subject to the same conditions and limitations as the drug screening program established and implemented under K.S.A. 75-4362 and amendments thereto and any rules and regulations adopted pursuant to such section." To amend further on page 2, strike lines 1 through 8. Motion was seconded by Rep. Bishop.
Discussion continued. It was determined the sponsor of the bill Rep. Wagnon, was aware of the proposed amendment, and although she had not seen the balloon was in agreement with the intent proposed.

Vote taken, motion carried.

MINUTES OF THE HOUSE COMMITTEE ON PUBLIC HEALTH AND WELFARE,

room 423-S, Statehouse, at 1:00 ~~a.m.~~/p.m. on March 8, 19 91.

HB 2226

Rep. Hackler moved to amend **HB 2226** in line 18, after the word "services", add language, "of department of administration". Motion seconded by Rep. Lynch. Motion carried.

Discussion continued.

On the bill as a whole, Rep. Neufeld moved to pass **HB 2226** out favorably as amended. Rep. Bishop seconded the motion. No further discussion. Vote taken. Motion carried.
Rep. White will carry **HB 2226** on the floor of the House.

DISCUSSION BEGAN ON HB 2168.

Chair gave background on **HB 2168** in that there had been numerous amendments offered and on the suggestion of the Chair, Mr. Furse was requested to draft amendments in balloon form that would answer concerns raised in earlier meetings.

Mr. Furse noted he had drawn the balloon with all versions to indicate the choices of amendments and he explained in detail each of these options. (Attachment No. 7) indicates all suggested language. Discussion ensued after explanation from Mr. Furse. He answered numerous questions, i.e., the language proposed on Page 4 has 3 versions. Only the Board of Healing Arts and Ks. Osteopathic Medicine Association propose to leave the decision of authority to compel a licensee to submit to a mental or physical examination or drug screen if reasonable cause has been determined to the board, or "a person". The Kansas Medical Society does not propose this same authority.

Ms. Correll drew attention to policy issues that might be involved in proposed language.

Discussion continued.

Rep. Bishop made a motion to amend **HB 2168** on page 4, line 10 by striking "a person", in line 12, add "." after the word "whole", and strike "or the person, or entity approved by the board", in line 14, strike "or the person". No discussion. Vote taken. Motion carried.

Discussion held in regard to language on page 8, line 22 in respect to intentional, fraudulent, falsifying, altering patient or medical care facility records. It was determined there are no standards set out for patient records. Some felt to destroy a document means to alter as well.

Rep. Wiard moved to amend **HB 2168** on page 8 line 22, having it read, "including the intentional falsifying or fradulent altering of a patient or medical care facility record". Rep. Praeger seconded the motion. No further discussion on motion. Vote taken. Motion carried.

Chair drew attention to page 10 of **HB 2168,** asking staff to explain the ramifications if sec. 5 were to be deleted. Mr. Furse did so.

Rep. Bishop moved to amend **HB 2168** on page 10 to restore sec. 5 (a) to the bill. Motion seconded by Rep. Cribbs. No further discussion. Vote taken. Motion carried.

Rep. Hackler moved to amend **HB 2168** by adopting changes proposed in balloon on page 9 beginning on line 40. Motion seconded by Rep. Amos. Motion carried.

MINUTES OF THE HOUSE COMMITTEE ON PUBLIC HEALTH AND WELFARE,

room 423-S Statehouse, at 1:00 a.m./p.m. on March 8, 1991

DISCUSSION CONTINUED ON HB 2168.

Rep. Amos drew attention to attached sections 6 and 7 in balloon of (Attachment No. 7) on **HB 2168.** Discussion began in regard to temporary licensure on page 2 of Sec. 6. Mr. Furse was consulted for language options.

Rep. Amos moved to amend **HB 2168** by deleting language beginning on line 10 after "registration" delete through to line 15, and add language, "shall be in effect". Rep. Samuelson seconded. Motion carried.

Rep. Amos moved to adopt the balloon on **HB 2168** as amendead. Motion seconded by Rep. Praeger. Motion carried.

On **HB 2168** as a whole, Rep. Bishop moved to pass **HB 2168** favorably for passage as amended. Rep. Cribbs seconded the motion. Motion carried.

Rep. Hackler will carry **HB 2168** on the floor of the House.

DISCUSSION BEGAN ON HB 2529.

Chair noted balloon provided on **HB 2529.** (Attachment No. 8.)

Chair called attention to statement from Department of Heath/Environment to clarify language in balloon presented earlier.

Mr. Furse then gave a detailed explanation of the balloon that was offered by the Department.

Chair requested Mr. Furse to explain the hearing procedures in the reporting of a case of abuse/neglect situation. He detailed current law, calling attention to (Attachment No. 9).
Chair then requested the Department of Health/Environment to explain the hand-out from them today.

Mr. Dick Morrissey introduced Mr. Marvin G. Stottlemire, Director of office of legal services who would give the explanation to committee.

Mr. Stottlemire stated the amendment they propose does not take away any rights that existed prior to the passage of **HB 2800** in 1990. Prior to HB 2800, SRS investigated all cases of abuse, made findings, referred findings to the appropriate disciplinary boards. With the passage of HB 2800, investigative authority was transferred to Department of Health/Environment. As **HB 2529** was drafted, the provision for hearing procedures is for all cases. This is not the Department of Health/Environment's understanding of the legislative intent and clarification is needed.

Mr. Stottlemire detailed finding and reporting procedures.

After a lengthy explanation of the position of the Department of Health and Environment, Rep. Amos moved to pass favorably on the balloon as presented by Health/Environment to amend **HB 2529.** Rep. Flower seconded the motion. Discussion continued in regard to specifics in the word "finding".

Joseph Kroll, Department of Health/Environment spoke to clarify a statement misinterpreted at an earlier meeting, saying, "he meant the Department had worked on a solution for HB 2529 right up to the 11th hour before his coming to committee with the proposed amendment the day of the hearing." He noted also, "he did not say that members of the Department had concerns with the constitutionality of the amendment proposed."

MINUTES OF THE HOUSE COMMITTEE ON PUBLIC HEALTH AND WELFARE,

room 423-S, Statehouse, at 1:00 ~~a.m./~~p.m. on March 8, 1991.

DISCUSSION CONTINUED ON HB 2529.

Mr. Furse indicated the key element here is "due process". Due process essentially is fair play. That is the basic legal decision, and it is clear this can be interpreted in different ways.

Vote taken. Motion carried.

Rep. Hackler recorded as "NO" vote.

On **HB 2529** as a whole, Rep. Samuelson moved to pass the bill favorably as amended. Rep. Lynch seconded the motion. Discussion continued. Question called for, vote taken. Motion carried.

Rep. Hackler recorded as "NO" vote.

Rep. Sader will carry **HB 2529** on the floor of the House.

Chair reviewed schedule for committee bills that have been requested to be exempt.

Chair adjourned the meeting.

GUEST REGISTER

HOUSE PUBLIC HEALTH AND WELFARE COMMITTEE

DATE 3-8-91

NAME	ORGANIZATION	ADDRESS
Chip Wheelen	Ks Medical Soc.	Topeka
Julie Dunn	Occupational Therapy Assn	"

BETHPHAGE MISSION WEST, INC.

102 East Second Street • Ellsworth, KS 67439 • 913-472-4081

FEB 20 1991

February 19, 1991

Committee on Health and Welfare
c/o Mr. John Peterson
1206 West 10th
Topeka, KS 66604-1291

Dear Mr. Peterson:

As a caregiver, teacher and advocate of people with developmental disabilities, I must concur with KSHA's position to license speech-language pathologists and audiologists.

In my line of work, quality and consistency, rank high as priority attributes to good service provision. The practice of licensure would help to assure consistency of qualifications and ethics. Likewise, consistency of standards and practices would help to promote quality and reduce malpractice.

Standard licensing procedures would hopefully aid in attracting more practioners to rural areas and ease shortages. Currently, some speech pathologists are qualified to work with elementary school children, but are not with my clientele. The distinction between qualified and unqualified, in this instance, is unclear and apparently arbitrary.

If I may be of service to you in the future, please feel free to contact me at anytime.

Most sincerely,

Richard D. Schade
Area Director
Bethphage at Ellsworth

PH&W
3-8-91
Attm #1.

115-5

STATE OF KANSAS

JOAN FINNEY, GOVERNOR

DIVISION OF THE BUDGET
Room 152-E
State Capitol Building
Topeka, Kansas 66612-1578

(913) 296-2436
FAX (913) 296-0231

March 5, 1991
CORRECTED

The Honorable Carol Sader, Chairperson
Committee on Public Health and Welfare
House of Representatives
Third Floor, Statehouse

Dear Representative Sader:

SUBJECT: Fiscal Note for HB 2226 by Representative Wagnon

In accordance with KSA 75-3715a, the following corrected fiscal note concerning HB 2226 is respectfully submitted to your committee.

HB 2226 would permit the Secretary of the Department of Social and Rehabilitation Services to establish an alcohol and drug testing program for employees of the state mental health and retardation institutions. If implemented, testing would be permitted only if there were probable cause to suspect an employee of use, possession or impairment while at work. Testing procedures are set forth in the bill, and the employee could have a portion of the test sample retested, at the employee's expense, at a laboratory of his or her choice. The results of any tests would be confidential.

The Department of Social and Rehabilitation Services estimates 120 tests per year at $100 per test for a total of $12,000 would be required. No funding in addition to the *FY 1992 Governor's Budget Report* would be required.

Sincerely,

Louis S. Chabira
Deputy Director

cc: Karen DeViney, SRS

2962

PNW
3-8-91
attm #2

State of Kansas
Joan Finney, Governor
Department of Health and Environment
Office of the Secretary
Landon State Office Bldg., Topeka, KS 66612-1290

Acting
Stanley C. Grant, Ph.D., Secretary

Respond to: (913) 296-1522
FAX (913) 296-6231

Office of Legal Services
Suite 904, Landon State Office Building
(913) 296-1330

March 6, 1991

M E M O R A N D U M

TO: Carol Sader, Chair, House Committee on Public Health and Welfare

FROM: Marvin G. Stottlemire, Director
Office of Legal Services

RE: HB 2529

After appearing before the committee this week, Joe Kroll informed me that some committee members and staff members had questions about the constitutionality of our proposed amendment. He asked me to address the issue with you.

At the outset it is important to know that the amendment we have proposed does not deny any rights that existed prior to the passage of HB 2800 last session. Under the statutes prior to last year, SRS had the responsibility for investigating all adult abuse. When they discovered adult abuse by a licensed professional they were to notify the licensing board that licensed that professional. They were not required to provide a hearing before notifying the board of that finding. In fact, the statute is still in effect for abuse that is investigated by SRS. K.S.A. 39-1404(d). When the responsibility for investigating institutional adult abuse was transferred to KDHE we sought the language requiring due process hearings because we certify nurse aides (CNA's) and federal law mandates that we maintain a public register and give CNA's an opportunity for a hearing before placing them on the register as a confirmed perpetrator of abuse, neglect or exploitation. We did not intend to change the status quo relating to health professionals licensed by other agencies.

During the period that SRS was responsible for all adult abuse investigation the issue of due process hearings for findings referred to other agencies was raised with the attorney general who concluded, "that if the only state action resulting from the

BNW
3-8-91
attm # 3

Charles Konigsberg, Jr., M.D., M.P.H., Director of Health (913) 296-1343

[redacted], P.E., Director of Environment (913) 296-1535

Lorne Phillips, Ph.D., Director of Information Systems (913) 296-1415

Roger Carlson, Ph.D., Director of the Kansas Health and Environmental Laboratory (913) 296-1619

placement of someone's name on the state register by SRS (as required by K.S.A.39-1401 et seq.) is notification of the required authorities, that agency is not required to provide constitutional due process procedures." Attorney General Opinion No. 89-8, page 8. (I have attached a copy of that opinion to this memo.)

I agree with the reasoning in the Attorney General Opinion. The Fourteenth Amendment protects individuals from the deprivation of life, liberty, or property without due process of law. While a professional license is property, there is no right to due process until an action is taken which can deprive a person of his or her license. Since the finding made by KDHE is not public, see, K.S.A. 39-1411(d), and since KDHE cannot take an action against a nurse's or doctor's license, the nurse or doctor is not entitled to a hearing before KDHE forwards its finding to the appropriate licensing authority. It is, in a way, analogous to a police investigation report.

Thank you for the opportunity to clarify this matter from a legal standpoint. If you have any questions please feel free to give me a call.

PXHW
3-8-91
attm #3-2

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

February 2, 1989

MAIN PHONE (913) 296-2215
CONSUMER PROTECTION 296-3751

ATTORNEY GENERAL OPINION NO. 89- 8

The Honorable Winston Barton
Secretary
Social and Rehabilitation Services
Docking State Office Bldg., 6th Floor
Topeka, Kansas 66612

Re: Mentally Ill, Incapacitated and Dependent Persons; Social Welfare -- Reporting Abuse or Neglect of Certain Persons -- Reporting Abuse or Neglect of Residents; Reporting Abuse, Neglect or Need of Protective Services; Contents of Report; Evaluation of Reports; Statewide Register

Amendments to the U.S. Constitution -- Rights and Immunities of Citizens -- Privileges or Immunities; Due Process Clause

Synopsis: K.S.A. 39-1401 et seq. confidentiality provisions do not prohibit due process procedures, but such procedures are not absolutely mandated if the placement of a name on a list by the State Department of Social and Rehabilitation Services pursuant to K.S.A. 39-1401 et seq. does not threaten or cause the loss of a constitutionally protected interest in liberty or property. Cited herein: K.S.A. 38-1523 (Ensley 1986); 39-938; 39-1401; 39-1404; 39-1422; K.S.A. 1988 Supp. 65-516; K.S.A. 65-3508; K.A.R. 30-51-1; U.S. Const., Amend. XIV.

* * *

ON FW
3-8-91
attn #3-3

Dear Secretary Barton:

You request our opinion regarding K.S.A. 39-1401 et seq. and the need for notice and hearing on findings of abuse or neglect of adults. You are concerned that providing notice and hearing opportunity to a person listed as an abuser pursuant to this act may be contrary to disclosure restrictions. You believe that providing such procedures represents a futile remedy while creating a great burden and expense to both the alleged perpetrator and the agency. It is your position that, under K.S.A. 39-1401 et seq., a finding of abuse by the Department of Social and Rehabilitation Services (SRS) has no practical effect and that due process procedures set forth in Attorney General Opinion No. 86-163 should not be applicable to K.S.A. 39-1401 et seq. procedures because entry or non-entry of a name on the statewide register is not controlling as to decisions or actions taken by other state authorities.

K.S.A. 39-1401 et seq. establish the procedures whereby suspected cases of adult abuse are reported and investigated. K.S.A. 39-1404 and 39-1422 set forth the duties of SRS with regard to investigation, evaluation and written findings. These procedures provide that the secretary shall maintain a statewide register of the reports received, the findings, evaluations and the actions recommended. This register is available for inspection by SRS personnel. Additionally, pursuant to K.S.A. 39-1404(b), when the alleged abuse involves a resident (as defined under K.S.A. 39-1401) a copy of the report of abuse or neglect is forwarded to the secretary of the Department of Health and Environment (KDHE) and in some cases to the secretary of the Department on Aging (KDOA). You also inform us that local law enforcement officers may be contacted.

K.S.A. 39-1404(c) and 39-1422(d) state that neither the report nor the written evaluation of findings shall be deemed a public record. K.S.A. 39-1404(c) also states that "[n]o information contained in the statewide register shall be made available to the public in such a manner as to identify individuals." K.S.A. 39-1422(d) provides that "the name of of the person making the original report or any person mentioned in such report shall not be disclosed unless the person making the original report specifically requests or agrees in writing to such disclosure or unless an administrative or judicial proceeding results therefrom." (Emphasis added). These confidentiality provisions limit dissemination of certain information to the general public.

OAG
3-8-91
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You are concerned that notice and hearing procedures set forth at K.A.R. 30-51-1 et seq. may violate confidentiality provisions. However, K.S.A. 39-1422(d) expressly permits disclosure in the event of "an administrative or judicial proceeding." A hearing on the matter under K.A.R. 30-51-1 et seq. and notification of the availability of such a hearing takes the form of an administrative proceeding. Thus, the statute contemplates a limited exception to the mandated confidentiality protections. It is our opinion that notifying the alleged perpetrator that an administrative hearing is available does not violate the confidentiality protections provided by K.S.A. 39-1401 et seq.

Your principle concern appears to be whether constitutional protections require the provision of due process procedures to a person whose name is to be entered on the mandated state register. Attorney General Opinion No. 86-163 discussed due process notice and hearing procedures in the context of child abuse validation by SRS. That opinion concluded that such due process procedures must be provided before inclusion of a name on the validated abuser list because "[v]alidating an individual as an abuser, which results in the stigma to name, coupled with a loss of employment opportunity, is an action by the state 'sufficient to invoke the procedural protection of the due process clause.'"

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." This due process clause was designed to "protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." Stanley v. Illinois, 405 U.S. 645, 646, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Human service agencies must operate within constitutional limits, including due process requirements. Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); See also 16A Am. Jur. 2d Constitutional Law, § 822 (1979).

A person has a constitutional right to due process if a state action threatens loss of a constitutionally protected interest in life, liberty or property. 16A Am. Jur. 2d Constitutional Law, §§ 837, 845 (1979). The issue thus becomes whether the state action of SRS in maintaining the mandated statewide register or notifying other authorities pursuant to K.S.A. 39-1401 et seq. in any way threatens an

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individual with the loss of a constitutionally protected interest.

As recognized in Attorney General Opinion No. 86-163, a person's interest in his reputation alone, apart from some more tangible interest such as employment, has been held not to be a liberty interest by itself sufficient to invoke the due process procedural protections. Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405, reh den 96 S.Ct. 2194, 48 L.Ed.2d 811 (1976). Rather, the injury to reputation must occur together with some alteration of a constitutionally protected status. Id. at 706-710. See also Board of Regents v. Roth, 408 U.S. 622 (1972); Wisconsin v. Constanineau, 400 U.S. 433 (1971); Owens v. City of Independence, Mo., 445 U.S. 622 (1979).

In McGhee v. Draper, 639 F.2d 639 (10th Cir. 1981), the court stated that failure to renew a teacher's contract may diminish the protected liberty interest to engage in "the common occupation of life" and thus "if plaintiff can show the trier of fact that nonrenewal caused or enhanced her alleged reputational damage, she will have shown that she was entitled to hearing or other reasonable opportunity to clear her name." Id. at 643. In Morgan v. Mansfield, 569 F.Supp. 710 (D. Co. 1983), the plaintiff sought recovery due to loss of employment as a government contractor which resulted from the public release of a defamatory government report about the company. The court held that there was no constitutional guarantee against this state action without due process of law. Id. at 715. In Miller v. City of Mission, Kansas, 705 F.2d 368 (10th Cir. 1983), the court found that an assistant police chief was denied due process when he was dismissed and stated that:

> "'The concept of liberty recognizes two particular interests of a public employee: 1) the protection of his good name, reputation, honor and integrity, and 2) his freedom to take advantage of other employment opportunities.' Weathers v. West Yuma County School District R-J-1, 530 F.2d 1335, 1338 (10th Cir. 1976)
>
> The manner in which a public employee is terminated may deprive him of either or both of these liberty interests. When the termination is accompanied by public dissemination of the reasons for

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atm #3-6

> dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the proffered grounds for dismissal."

The 7th Circuit recognized in Perry v. FBI, 759 F.2d 1271 (7th Cir. 1985) that the disclosure of an unfavorable FBI report about an individual (Perry) seeking employment with the government entitled the plaintiff to due process protections. Although the decisions made by other entities concerning the plaintiff's employment were not controlled by the FBI report, the court recognized that by releasing false information the government virtually made it impossible for Perry to obtain work within the government. In Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987), the ninth circuit court considered a case wherein a former counselor supervisor for a private nonprofit corporation was discharged after his employers were unfavorably evaluated by government officials who then threatened the company with the loss of federal funding if they did not fire the supervisor. The court found that, under state law, the counselor had a protected property interest in his employment and that his due process rights had therefore been violated. Id. at 1373. In Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988), the 10th circuit found that there was no change in the plaintiff's status and that therefore he had not been deprived of a protected property or liberty interest. In discussing when the government must provide due process the court stated:

> "'The liberty interest that due process protects includes the individual's freedom to earn a living.' Lentsch v. Marshall, 741 F.2d 301, 303 (10th Cir. 1984). However, as the Supreme Court has stated, injury to one's 'reputation alone, apart from some more tangible interests such as employment,' is not subject to the requirements of due process. . . . Our cases recognize that the 'more tangible interests' involve something more than an investigation of the sort conducted by the Hospital in this case. See Dickeson v. Quarberg, 844 F.2d 1435 (10th Cir. 1988) (plaintiffs' employment terminated);

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attm # 3-7

Harris v. Blake, 798 F.2d 419 (10th Cir. 1986) (plaintiff required to withdraw from graduate study program), cert. denied, _____ U.S. _____, 107 S.Ct. 882, 93 L.Ed. 2d 836 (1987); Koerpel v. Heckler, 797 F.2d 858 (10th Cir. 1986) (plaintiff excluded from eligibility for Medicaid reimbursements); Mangels v. Pena, 789 F.2d 836 (10th Cir. 1986) (plaintiff's employment terminated); Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985) (plaintiff suspended without pay and demoted); Asbill v. Housing Auth. of Choctaw Nation, 726 F.2d 1499 (10th Cir. 1984) (plaintiff discharged); Walker v. United States, 744 F.2d 67 (10th Cir. 1984) (plaintiff's employment terminated)."

Wade v. Goodwin, 843 F.2d 1150 (8th Cir. 1988), concerns the erroneous placement of an individual's name on a list of "survivalists" by the police and the release of that list to the news media. The court did not believe that Wade had stated a due process violation claim based on a deprivation of a state created right. "One's reputation alone is neither is 'liberty' nor a 'property' interest protectible by the due process clause of the Fourteenth Amendment. . . . Wade's claim of injury to his ability to make a living and obtain loans and credit, even if true, do not implicate any action by the state of Arkansas beyond general injury to his reputation." Id. at 1152.

This rather lengthy discussion of recent court decisions demonstrates the complexity of the issue and the difficulty of determining whether a particular state action requires due process notice and hearing procedures. In Attorney General Opinion No. 86-163 we concluded that due process procedures were necessary when placing someone's name on the child abuse validation list because such a listing not only stigmatized the individual, but was coupled with a loss of employment as a result of K.S.A. 65-516(a)(3) requirements. Those requirements precluded someone (who might otherwise be completely entitled to employment pursuant to state law) from working in or maintaining a boarding home for children or a family day care if previously validated as an "abuser" by SRS pursuant to K.S.A. 38-1523 (Ensley 1986). Thus, because state action pursuant to K.S.A. 38-1523 (Ensley 1986) caused a name to be placed on a list, and K.S.A.

ONW 3-8-91 atm #3-8

65-516(a)(3) precluded employment or licensing of that person, due process procedures were necessary before that protected interest could be deprived.

If the actions of SRS, as dictated by K.S.A. 39-1401 et seq., deprive an individual of a constitutionally protected interest in life, liberty or property, that individual must be provided with notice of the action and the opportunity to defend himself before that action is taken. If, however, the state action has no impact on a constitutionally protected interest, due process procedures are not required. The test can be simply stated, but the many state actions possibly involved makes the issue difficult to answer.

You state that, unlike the validation process for child abuse, the adult abuse findings by SRS and the mandated listing on the state register have no necessary or binding force and effect on any action taken by other state authorities. Attorney General Opinion No. 86-163 focused, in part, on the automatic state action that occurred as a result of being labled an abuser by SRS. Once SRS validated a person as a child abuser, existing statutes required results that could negatively impact on an individual's protected constitutional interests in future or current employment. Thus, because actions taken by SRS in placing a person's name on the validated child abuser list resulted in such a deprivation, due process procedures were required.

Unlike the situation discussed in Attorney General Opinion No. 86-163, it appears that the only state action required by K.S.A. 39-1401 et seq. is the placement of a person's name on a list and the notification of certain other state entities. We are unaware of any state action required or automatically resulting from the placement of a person's name on the state register of adult abuse or as a result of the notification of other state authorities. It is your belief that before action against a person whose name has been placed on the state register may be taken by other notified state authorities, those other authorities must conduct their own investigation and, if warranted, those agencies must provide due process procedures. Thus, it is your contention that, unlike the child abuse validation process, SRS actions to list and notify cause no deprivation of a constitutionally protected interest.

Research of statutory and regulatory authority concerning the Kansas Department of Health and Environment (KDHE) and discussion with KDHE personnel affirms that neither

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3-8-91
attm # 3-9

statutory nor regulatory KDHE authority prohibit employment or licensing of a person listed on the registry. If there is a choice not to employ an individual in an adult home, that decision is made by the private employer and is not required or requested by the state. However, when KDHE notifies an employer-licensee that their employee has been listed as an adult abuser by SRS, that employer-licensee may independently decide to take action against an employee rather than face proceedings against their license. It may be persuasively argued that this action by a private employer is caused by the state action in maintaining a list and is the result of KDHE contacting the employer-licensee. See Merritt v. Mackey, Id. Thus, prior to state action affecting constitutionally protected interests in certain employment, due process procedures must be available to the affected individual. If a person is currently employed in an adult home, SRS, KDHE or other pertinent state authorities must provide due process notice and hearing procedures to the individual employee prior to affecting any constitutionally protected interest. Should a change in the law allow future employers to obtain the information as to who is listed on the abuse register (thus effectively precluding future employment by such employers), placement of a name on the register may require due process procedures. See Perry v. F.B.I., 759 F.2d 1271 (7th Cir. 1985).

Although placement of a person's name on the state register by SRS as mandated by K.S.A. 39-1401 et seq., may represent the stigmatization of a persons character by the government, it appears that state law does not result in or require SRS actions to automatically impact upon a constitutionally protected interest. State law does not dictate that findings under K.S.A. 39-1401 et seq. result in any action other than maintaining a list and notifying other authorities that they may need to investigate a certain person or situation. This is in some ways analogous to notifying the police that a crime is suspected. Should facts or authority previously not considered or presented result in SRS actions causing an injury to a constitutionally protected interest, due process procedures would obviously be required.

Therefore, it is our opinion that if the only state action resulting from the placement of someone's name of the state register by SRS (as required by K.S.A. 39-1401 et seq.) is notification of the required authorities, that agency is not required to provide constitutional due process procedures. However, actions of SRS or other state authorities that have an impact upon a constitutionally

PNW
3-8-91
Attm #3-10

protected interest require provision of due process protections.

Very truly yours,

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Theresa Marcel Nuckolls
Assistant Attorney General

RTS:JLM:TMN:bas

GN&W
3-8-91
Atch #3-11

Session of 1991

HOUSE BILL No. 2529

By Committee on Public Health and Welfare

2-27

AN ACT concerning reporting of abuse, neglect or exploitation of certain residents; amending K.S.A. 1990 Supp. 39-1411 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1990 Supp. 39-1411 is hereby amended to read as follows: 39-1411. (a) The secretary of health and environment shall maintain a register of the reports received and investigated by the department of health and environment under K.S.A. 39-1402 and 39-1403, and amendments to such sections, and the findings, evaluations and actions recommended by the department with respect to such reports. The findings, evaluations and actions shall be subject to such notice and appeals procedures as may be adopted by rules and regulations of the secretary of health and environment, which rules and regulations shall be consistent with any requirements of state or federal law relating thereto. The register shall be available for inspection by personnel of the department of health and environment as specified by the secretary of health and environment and to such other persons as may be required by federal law and designated by the secretary of health and environment by rules and regulations. The secretary of health and environment shall forward a copy of any report of abuse, neglect or exploitation of a resident of an adult care home to the secretary of aging.

(b) The secretary of health and environment shall forward any ~~finding~~ *report* of abuse, neglect or exploitation alleged to be committed by a provider of services licensed, registered or otherwise authorized to provide services in this state to the appropriate state authority which regulates such provider. The appropriate state regulatory authority may consider the finding in any disciplinary action taken with respect to the provider of services under the jurisdiction of such authority. The secretary of health and environment may consider the finding of abuse, neglect or exploitation in any licensing action taken with respect to any adult care home or medical care facility under the jurisdiction of the secretary.

[except that the secretary shall not be required to conduct a hearing in cases forwarded to the appropriate state authority under subsection (b)

[finding

[, after notice to the alleged perpetrator and a hearing on such matter if requested by the alleged perpetrator,

KANSAS MEDICAL SOCIETY
1300 Topeka Avenue • Topeka, Kansas 66612 • (913) 235-2383
Kansas WATS 800-332-0156 FAX 913-235-5114

March 7, 1991

To: House Public Health and Welfare Committee

From: Kansas Medical Society Chip Wheeler

Subject: House Bill 2104

In response to Representative Neufeld's question, we have examined our membership records to determine that 41 members of the KMS are specializing in otolaryngology at this time. There may be other physicians specializing in ENT who are not members of the KMS.

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3-8-91
Attm # 4

From:- Rep. Wagnon

Plan threatens jobless benefits

■ Aimed at employees who consume illicit drugs or who are tardy or absent

By ROGER MYERS
The Capital-Journal

The House Labor and Industry Committee will introduce legislation establishing rules under which workers can be disqualified for unemployment insurance benefits because of drug usage or tardiness.

The proposed statutory standards were developed and approved by the 12-member Employment Security Advisory Council and have been approved by Michael Johnston, secretary of the Kansas Department of Human Resources.

They must be passed by the Legislature and approved by Gov. Joan Finney before they can take effect.

The guidelines on disqualification for unemployment benefits because of drug usage are a result of increased use of drug testing by Kansas businesses. The guidelines on disqualification for tardiness or absenteeism are the first such standards proposed to define what constitutes that type of misconduct.

The guidelines on drug usage provide that the use of, possession of, or impairment caused by alcohol or non-prescribed controlled substances constitutes evidence of misconduct, which could disqualify a worker from receiving unemployment benefits.

The guidelines also provide that refusal to take a drug test, or the results of a drug test, can't be used as evidence to prove misconduct, unless the following conditions are met:

- There was probable cause to believe an individual used, possessed or was impaired by controlled substances while working.
- The test sample was taken in the same period as events leading to probable cause.
- Collection and labeling of test samples was performed by an independent health-care professional.
- Drug testing was performed by a laboratory approved by the U.S. Department of Health and Human Services. Blood samples for alcohol can be tested by a lab commonly used by law enforcement agencies for that purpose.
- The initial test results are confirmed by a follow-up test.
- Evidence must establish beyond a reasonable doubt the test results came from the individual tested.

Workers can be terminated for violating a company's drug policies, even though they might remain eligible for unemployment benefits.

The guidelines on tardiness provide that repeated absence from work, including lateness, constitutes misconduct. However, to be disqualified for unemployment benefits, the facts must show:

- The individual was absent without good cause.
- The absence was substantially adverse to the employer.
- The employer must give the worker written notice that future absence could result in termination.
- The worker continued the pattern of absence without good cause.

to begin next fall

Attached 3-8-91 Attm # 5

K.S.A. 44-706(b)

(2) For the purposes of this subsection, the use of, possession of, or impairment caused by a non-prescribed controlled substance by an individual while working shall be prima facie *evidence of conduct which was substantially adverse to the employer's interests. A controlled substance is defined as alcohol or those substances specified in 21 U.S.C. 812, Schedules I, II, III, IV, and V as amended. An individual's refusal to submit to a chemical test shall not be admissable evidence to prove misconduct unless there was probable cause to believe that the individual used, possessed, or was impaired by a controlled substance while working. The results of a chemical test shall not be admissable evidence to prove misconduct unless the following conditions were met:*

(A) there was probable cause to believe that the individual used, had possession of, or was impaired by the controlled substance while working; and

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause; and

(C) the collecting and labeling of the test sample was performed by an independent health care professional; and

(D) the test was performed by a laboratory approved by the U.S. Department of Health and Human Services; provided, however, that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies; and

(E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method; provided, however, that no such confirmation is required for a blood alcohol

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3-8-91
Attn 5-2

sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the individual.

(3) For the purposes of this subsection, misconduct shall include, but not be limited to repeated absence, including lateness, from scheduled work if the facts show:

(A) the individual was absent without good cause, and

(B) the absence was substantially adverse to the employer's interests, and

(C) the employer gave written notice to the individual that future absence may result in discharge, and

(D) the individual continued the pattern of absence without good cause.

P Hall
3-8-91

Attn # 5-3

CSG Backgrounder

118801

States Information Center
The Council of State Governments
Iron Works Pike
P.O. Box 11910
Lexington, KY 40578
(606) 252-2291

Date: November 1988

Topic: DRUG TESTING STATE EMPLOYEES
(Update to BG 038702, March 1987)

Infokey: Drugs, Drug Abuse and Alcoholism
(NT) Drug Testing

STATE EMPLOYEE DRUG TESTING UPDATE

Drug abuse has become an increasingly pervasive problem in modern society. A 1987 study by the National Institute for Drug Abuse found that 10 to 23 percent of American workers use "dangerous drugs" on the job.[1] Federal estimates place drug abuse costs to the U.S. economy at nearly $100 billion in lost productivity each year.[2]

In 1982 ten percent of all Fortune 500 companies conducted drug testing; by 1987 that figure had increased to nearly 50 percent.[3]

State governments are also grappling with employee drug abuse and are testing employees for it. Public welfare, public safety and declining productivity are the primary concerns of state managers, particularly as related to occupations like state police officers and corrections officials. Like their private sector counterparts, the problem confronting states is finding a balance between the employer's interest and the rights of the employee.

Opponents of drug testing contend it violates civil liberties protected under the U.S. Constitution. Critics also claim the accuracy of many drug tests is questionable.[4] Proponents suggest drug testing will rid the workplace of drugs by identifying and thus discouraging drug abusers.

STATE ACTIVITY (For additional information see BG 038702)

At least 24 states, as well as the District of Columbia, have implemented some form of drug testing or have developed guidelines for drug testing programs (see Table 1). States have enacted drug testing through:

- o statutes, e.g. Iowa,
- o executive order, e.g. California,
- o attorney general's opinion, e.g. Maryland,
- o collective bargaining agreement, e.g. Massachusetts,
- o state personnel rules, e.g. Michigan,
- o and departmental rules or procedures, e.g. Florida.

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* This CSG Backgrounder was compiled by Kevin Devlin, Research Assistant, Center for Management and Administration, Associated Programs and Leadership Development.

P Hall 3-8-91 Attach 5-4

Random drug testing of all state employees is not considered feasible in most states because of the expense involved in testing a large number of employees and the possible litigation which would result from performing testing without cause.

Most states only test employees who hold "safety sensitive" positions, usually state police officers and corrections officials. Such employees carry firearms and any impairment of their ability to perform their duties could prove to be a threat to public safety. New Jersey and Minnesota may test both current employees and applicants. In others, applicants or trainees are sometimes subjected to "blanket" testing or are tested as part of a physical examination, as is done in Indiana.

States usually test employees on the basis of "reasonable suspicion" or "probable cause." Reasonable suspicion is defined as a basis for forming a belief predicated upon specific facts and reasonable inferences drawn from those facts, while probable cause is a stricter standard requiring some evidence that illegal activity may have occurred.[5] For example, Illinois utilizes the reasonable suspicion standard. Reasonable suspicion has been consistently upheld in federal court cases.[6]

Some state programs encourage managers to utilize employee assistance programs for rehabilitating employees who use drugs. The Michigan Civil Service Commission does this under a recently adopted drug testing policy.[7]

States which have collective bargaining agreements with their employees must discuss drug testing as part of the negotiation process. For example, Massachusetts' drug testing program for public safety officers is written into their collective bargaining agreement.

LEGAL AND CONSTITUTIONAL ISSUES

State governments have had relatively few legal precedents to follow concerning drug testing. Only in recent years has a complex set of court decisions accumulated on the topic. Also, during this term, the U.S. Supreme Court will hear National Treasury Employees Union v. Von Raab, a case which will have a crucial impact on the Reagan administration's drug testing programs for federal employees.[8]

Drug testing impacts the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. The Fourth Amendment guarantees that the "right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated." Federal and state courts have ruled that collection of urine samples for drug testing constitutes search and seizure. Courts have held that a public employer must have a "reasonable suspicion" that an employee is using drugs to conduct urinalysis without a warrant.[9]

The Fifth Amendment protects individuals from being "compelled in any criminal case to be a witness against himself." Urinalysis testing may be perceived by some as forcing employees to produce evidence which can be used against them.[10]

PHRC 3-8-91

Attm # 5-5

The Fourteenth Amendment of the Constitution prohibits state governments from denying any person "life, liberty, or property without due process of law" or "the equal protection of the laws." In NTEU v. Von Raab, the case to be decided by the Supreme Court this year, the federal court ruled that drug testing is unreliable and concluded that customs workers were denied due process of law when they were tested prior to being promoted. Although the federal Court of Appeals disagreed with the District Court on the merits of this particular question, this is a matter the Supreme Court may choose to consider.[11]

Although there is no explicit "right to privacy" in the Constitution, drug testing opponents use it as an argument against urinalysis. They point out that the Ninth Amendment to the U.S. Constitution says that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In the case of Griswold v. Connecticut in 1965 Justice William O. Douglas of the Supreme Court wrote that "the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. These penumbras form a right to privacy which is judicially cognizable." In NTEU v. Von Raab, the lower court found the Customs Service drug testing program in violation of rights to privacy because individuals being tested were observed.[12]

Several states have provisions in their constitutions guaranteeing a right to privacy for their citizens, as well as provisions ensuring protection from unreasonable searches and seizures and self-incrimination. At least nine states have constitutional provisions establishing a right to privacy: Alaska, Arizona, California, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. Also, many states have statutes establishing a right to privacy.[13]

ENSURING ACCURACY

A major concern for those administering drug testing programs is whether the tests are accurate. Drug tests are estimated to give false positive results in as many as one of every 20 cases.[14]

One way to ensure accuracy is to guarantee that all positive test results will be retested by a second laboratory. Test manufacturers usually recommend that positive results be confirmed by an alternative testing method. Another way to ensure accuracy is for states to license laboratories to do drug testing. Iowa is an example of a state which has licensing programs for labs. Licensing programs enable states to inspect laboratories and assess the quality of work and the reliability of the test results performed by the lab.

CONCLUSION

As states seek to eradicate drug abuse from their workforce they are forced to assess the extent to which it is a reality in the workplace versus the costs of enacting a drug testing program. States which decide to enact drug testing must take steps to protect the rights of employees.

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3-8-91

Attm # 5
5-6

TABLE 1

State	Performs Drug Testing
Alabama	Yes*
Alaska	No
Arizona	No
Arkansas	No
California	Yes*
Colorado	No
Connecticut	Yes*
Delaware	No
District of Columbia	No*
Florida	Yes*
Georgia	Yes*
Hawaii	No
Idaho	Yes*
Indiana	Yes*
Iowa	Yes*
Kansas	Yes*
Kentucky	No
Louisiana	No
Maine	No
Maryland	Yes*
Massachusetts	Yes*
Michigan	Yes*
Minnesota	Yes*
Mississippi	Yes*
Missouri	Yes*
Montana	No
Nebraska	No
Nevada	No*
New Hampshire	No
New Jersey	Yes*
New Mexico	Yes*
New York	Yes*
North Dakota	No
Ohio	No
Oklahoma	No
Oregon	Yes*
Pennsylvania	No
Rhode Island	No
South Dakota	No
Tennessee	Yes*
Texas	No
Utah	Yes*
Virginia	No
Washington	Yes*
Wisconsin	No
Wyoming	No

State	Performs Drug Testing
Illinois	Yes*
North Carolina	No
South Carolina	No
Vermont	No*
West Virginia	No

* Program description included below.

3-8-91

Attm 5-7

CSG Backgrounder -- Drug Testing Update

Alabama - There is no centralized testing policy, but the Department of Corrections and the Department of Forensic Sciences administer drug tests to prospective employees.

California - Department of Personnel Administration is currently developing drug testing rules for employees and the State Personnel Board is developing rules for pre-employment testing under a 1986 Executive Order issued by Gov. George Deukmejian. The program will focus upon safety sensitive positions. Some testing is already done for state police, firefighters, and correctional officers.

Connecticut - Personnel Division requires state agencies to comply with pre-employment standards laid out in P.A. 87-522, even though it does not apply to state government. Random testing is permissible if included as part of employee assistance programs.

District of Columbia - Drug testing program is in the development stages.

Florida - Law enforcement and correctional officers undergo mandatory testing during pre-employment and testing for cause during employment. This policy has been authorized under departmental rules.

Georgia - The Department of Corrections tests its employees, and random testing is conducted on employees at high security prisons.

Idaho - Corrections and law enforcement agencies utilize drug testing.

Illinois - Department of Corrections use drug testing for current and prospective employees under the "reasonable suspicion" standard. Department of Transportation tests some applicants.

Indiana - State Police and Corrections have drug testing. State Police do drug testing as part of a physical examination at the time of hire.

Iowa - Developed drug testing standards under legislation approved in 1987. Only applicants for corrections and state peace officer jobs are eligible.

Kansas - Law enforcement officers authorized to carry firearms, corrections officers, employees on the governor's staff, cabinet secretaries appointed by the governor, and individuals holding the office of governor, lieutenant governor, or attorney general. Under the statute authorizing the procedure, all applicants and current employees are tested under the "reasonable suspicion" standard.

Maryland - State Department of Personnel is currently devising drug testing standards based upon Attorney General's opinion of 1986.

Massachusetts - Testing is performed on state police officers and other public safety officials under collective bargaining agreements.

Michigan - The State Civil Service Board recently completed standards for state agencies who wish to implement drug testing.

PHall 3-5-91

Attn't 5-8

CSG Backgrounder -- Drug Testing Update

Minnesota - Statute authorizes drug testing. State police applicants are currently tested and the state is preparing to test prison guards and state police on a "for cause" basis and treatment monitoring.

Mississippi - Mississippi highway patrolmen and prison guards are tested as part of the pre-employment screening process and on a "reasonable suspicion" basis.

Missouri - Some agencies test when there is "probable cause" to believe a person has been using drugs. This is done as part of disciplinary investigations and is not policy per se.

Nevada - Drug testing legislation is expected to be introduced into the legislature in 1989.

New Jersey - The Department of Law and Public Safety has adopted a policy whereby applicants for positions as law enforcement officials may undergo drug testing. Also, officers may undergo testing during basic training. Current officers may undergo testing on the basis of "reasonable suspicion." The Department of Corrections recently adopted a policy patterned after this plan.

New Mexico - Drug testing is performed on applicants for positions as correctional officers.

New York - Drug testing is permissible on a "for cause" basis under state rules.

Oregon - Under Executive Order by Gov. Victor Atiyeh issued in 1986, the Corrections Department may test applicants and new hires without informed consent.

Tennessee - Testing is performed as part of the interview process for prospective employees in "safety sensitive" positions such as correctional and security officers. These procedures are authorized by statute and departmental rules.

Utah - Law enforcement agencies and the Department of Transportation perform drug testing on the basis of cause, including poor job performance.

Vermont - State law prohibits drug testing by public and private employers as a condition of employment except as part of a physical examination.

Washington - The State Personnel adopted drug testing guidelines for agencies under its jurisdiction earlier this year. No employees tested to date.

*Source -- 1988 Survey by the Council of State Governments Center for Management and Administration in cooperation with the National Association of State Departments of Administration and General Services and the National Association of State Personnel Executives.

NOTES

1. Tom Watson, "Drug Testing Laws Are Catching On," Governing, June 1988, p. 61.

Attch 3-8-91

Attch # 5-9

2. The Direct Selling Foundation, "Drug Testing of Employees: Is It Appropriate?," At Home With Consumers, Washington, D.C., December 1986, p.2.

3. Watson.

4. Watson.

5. Michigan Civil Service Commission, "Controlled Substance Testing Policy," March 1, 1988.

6. Memorandum from the California Department of Personnel Administration, to Personnel Management Liaisons, State Employee Organizations, Interested Parties, "Revisions of Proposed Rules on State Employee Substance Abuse Policy," May 27, 1988, p. 2.

7. Michigan Civil Service Commission.

8. Watson, p. 62.

9. Jay E. Bovilsky, "Constitutional Issues in the Public Sector," Drug Testing: Protection for Society or a Violation of Civil Rights?, Lexington, KY, 1987, p. 15.

10. Ibid.

11. Ibid.

12. Ibid, p. 18.

13. Maureen Murphy and Vincent E. Treacy, "Drug Testing and Urinalysis in the Workplace: Legal Aspects," Congressional Research Service, Washington, DC, April 1986, p. 2.

14. Anne Knapp and Brad Ervin, "Drug Testing in the Workplace," Minnesota Senate Research Report, January 1987, p. 3.

Price -- $5.00

3-8-91

5-10

- Drug testing of all state employees would provide an overwhelming number of samples. Delays and errors in processing could cause employees needless worry and thus decrease their productivity.

Major Issues

Constitutional and Legal Issues

Drug testing raises complex and novel constitutional and legal questions because there are relatively few directly applicable legal precedents. Only recently have courts ruled on screening public employees for drug use.

Federal courts have ruled that extraction of bodily fluids is unconstitutional under the Fourth Amendment's ban on unreasonable searches and seizures. McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Io. 1985) specifically included urine as being protected from unreasonable searches and seizures.[19]

In most cases, warrants are required to conduct searches. There are cases where warrantless searches are permitted, but a consent form signed by government employees authorizing urinalysis was ruled inadequate in the McDonnell case. Consent forms were generally signed prior to hiring, a procedure which was viewed as involuntary and insufficient as a waiver of constitutional rights. The ruling did include reasoning which would allow testing of employees upon whom reasonable suspicion could be derived from specific facts.[20]

The Fifth Amendment protects individuals from self-incrimination. Enforcing urinalysis tests could be seen as the equivalent of forcing employees to produce evidence which could be used against them. Possible questions include whether positive results require retesting to ensure the accuracy of results, whether workers could be dismissed solely on the basis of test results and whether any rehabilitation program is available.[21]

Drug testing for state employees can be challenged in some states under state constitutional provisions for the right to privacy as well as state constitutional protections from unreasonable searches and seizures and self-incrimination. At least nine states (Alaska, Arizona, California, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington) have specific constitutional provisions protecting the right to privacy. These are vaguely phrased and are no doubt subject to judicial interpretation. Many state privacy statutes are also subject to judicial interpretation.[22]

Most state statutes related to worker privacy establish provisions restricting specific practices by employers, such as the use of polygraph tests and the ability of employers to obtain information about employees' off the job activities.[23]

Mandatory random drug testing has not fared well in courts because probable cause or reasonable suspicion could not be established. For example, in September, 1986, a federal judge found random testing of Plainfield, New Jersey police officers and fire fighters to be unconstitutional. The judge said that

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Attm # 5-11

the tests should only be employed where there is a strong suspicion that an individual employee is using drugs.[24]

Another possible hurdle for drug testing is justifying testing for certain groups of employees. Testing police officers could be more easily justified than testing typists, for example.[25]

Administrative Issues

Public employers can test for drugs in various ways. Drug testing can be a part of pre-employment screening of job applicants in order to eliminate drug users from consideration for jobs. Drug testing for current employees can be conducted randomly, periodically or on the basis of "reasonable suspicion" or cause. These methods are intended to discourage drug use by employees. Tests for cause are used to provide explanations for unusual behavior on the job.[26]

States administer drug testing through various agencies. In California, for example, the state personnel system oversees drug testing, while some prison facilities in Georgia's Department of Corrections implement their own programs. States may decide to give personnel systems responsibility for state employee drug testing programs. States also face a choice of hiring their own personnel or contracting with private laboratories to carry out drug tests.

Technical Issues

There are technical and procedural concerns about drug testing. Drug tests may give false positive results in one out of 20 cases. If drug testing were to be widely implemented in state government, thousands of workers could be wrongly stigmatized or dismissed unless expensive follow-up tests are performed.[27]

For example, a legal drug such as ibuprofen, an aspirin substitute, can produce positive test results for illegal drug use. False positive results may occur because some legal drugs produce chemical byproducts similar to those of illegal drugs or due to naturally occurring chemical substances in the blood. Similarly, some research shows that blacks have been found to have a relatively large amount of a substance in their blood which is similar to a substance found in marijuana. According to some experts, this increases the likelihood that blacks will falsely test positive for drug use. Further, the reliability of drug tests depends heavily upon the quality of testing laboratories.[28]

Blood tests can be used to test for drugs as well as urinalysis and radiation of samples of hair. It is unlikely that blood testing will be widely used, however, since it is perceived as more intrusive than urinalysis.

Rehabilitation Programs

Some state governments are developing rehabilitation programs for employees as an alternative to punishment for drug use. Generally, drug rehabilitation is implemented as part of an employee assistance program. For example, the Massa-

DRAFT 3-8-91

Attm't 5-12

Session of 1991

HOUSE BILL No. 2226

By Representative Wagnon

2-13

AN ACT concerning certain state institutions; authorizing the establishment and implementation of an alcohol and drug testing program for employees thereof; prescribing certain limitations.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) As used in this section:

(1) "Controlled substance" has the meaning provided by K.S.A. 65-4101 and amendments thereto.

(2) "Institution of mental health" means an institution as defined by K.S.A. 76-12a01 and amendments thereto.

(b) The secretary of social and rehabilitation services may establish and implement an alcohol and drug testing program for employees of institutions of mental health. Such program shall ~~provide~~ for testing of an employee only if there is probable cause to believe that the employee used, had possession of or was impaired by alcohol or a controlled substance while engaged in the employee's employment and the procedures for testing shall require that:

(1) The test sample be collected at a time contemporaneous with the events establishing probable cause;

(2) the collecting and labeling of the test sample be performed by a qualified independent health care professional;

(3) the test be performed by a laboratory approved by the U.S. department of health and human services, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(4) the test be confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;

(5) such safeguards as necessary be observed to insure that the test results are from the sample taken from the employee; and

(6) the employee be permitted to have a portion of the test sample retested, at the employee's expense, at a laboratory chosen by the employee.

(c) The secretary of social and rehabilitation services and the superintendent of each institution of mental health shall inform the

screening

director of personnel (Services & Dept of Administration"

Hackler - 1st
Lynch - 2nd

screening

be established, implemented and administered in the same manner and subject to the same conditions and limitations as the drug screening program established and implemented under K.S.A. 75-4362 and amendments thereto and any rules and regulations adopted pursuant to such section.

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3-8-91
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employees of such institutions of the provisions of any program established under this section.

(d) The results of any test administered as a part of any program established under this section shall be confidential and shall not be disclosed publicly.

(e) The secretary of social and rehabilitation may adopt such rules and regulations as necessary to carry out the provisions of this section.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

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Attm. 6-2

PH&W
3-8-91
attm #6-2

N. Furse Draft

Session of 1991

HOUSE BILL No. 2168

[Bracketed Material Would Be Deleted]

By Committee on Public Health and Welfare

2-6

AN ACT concerning the healing arts; relating to grounds and proceedings for discipline and for denial of licenses; amending K.S.A. 65-2842 and 65-2851a and K.S.A. 1990 Supp. 65-2809, 65-2836 and 65-2837 and repealing the existing sections; also repealing K.S.A. 65-2805. [state board of concerning temporary registrations;

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1990 Supp. 65-2809 is hereby amended to read as follows: 65-2809. (a) The license shall expire on June 30 each year and may be renewed annually upon request of the licensee. The request for renewal shall be on a form provided by the board and shall be accompanied by the prescribed fee, which shall be paid not later than the expiration date of the license.

(b) Except as otherwise provided in this section, the board shall require every licensee in the active practice of the healing arts within the state to submit evidence of satisfactory completion of a program of continuing education required by the board. The requirements for continuing education for licensees of each branch of the healing arts shall be established by the members of such branch on the board. The board shall adopt rules and regulations prescribing the requirements established by the members of each branch of the healing arts for each program of continuing education as soon as possible after the effective date of this act. In establishing such requirements the members of the branch of the healing arts establishing them shall consider any programs of continuing education currently being offered to such licensees. If, immediately prior to the effective date of this act, any branch of the healing arts is requiring continuing education or annual postgraduate education as a condition to renewal of a license of a licensee of such branch of the healing arts, such requirement as a condition for the renewal of such license shall continue in full force and effect notwithstanding any other provision of this section to the contrary.

(c) The board, prior to renewal of a license, shall require the licensee, if in the active practice of the healing arts within the state, to submit to the board evidence satisfactory to the board that the licensee is maintaining a policy of professional liability insurance as

Attached 3-8-91 Attn. #1

PN&W 3-8-91 attn #1

required by K.S.A. 40-3402 and amendments thereto and has paid the annual premium surcharge as required by K.S.A. 40-3404 and amendments thereto.

(d) At least 30 days before the expiration of a licensee's license, the board shall notify the licensee of the expiration by mail addressed to the licensee's last place of residence as noted upon the office records. If the licensee fails to pay the annual fee by the date of the expiration of the license, the licensee shall be given a second notice that the licensee's license has expired, that the board will suspend action for 30 days following the date of expiration, that upon receipt of the annual fee together with an additional fee of not to exceed $500 within the thirty-day period ~~no order of revocation will be entered~~ *the license shall not be canceled* and that, if both fees are not received within the thirty-day period, the license shall be cancelled.

(e) Any licensee who allows the licensee's license to ~~lapse~~ *be canceled* by failing to renew as herein provided may be reinstated upon recommendation of the board and upon payment of the renewal fees then due and upon proof of compliance with the continuing educational requirements established by the board.

(f) There is hereby created a designation of exempt license. The board is authorized to issue an exempt license to any licensee who makes written application for such license on a form provided by the board and remits the fee for an exempt license established pursuant to K.S.A. 65-2852 and amendments thereto. The board may issue an exempt license only to a person who has previously been issued a license to practice the healing arts in Kansas, who is no longer regularly engaged in such practice and who does not hold oneself out to the public as being professionally engaged in such practice. An exempt license shall entitle the holder thereof to all privileges attendant to the branch of the healing arts for which such license is issued. Each exempt license may be renewed annually subject to the provisions of this section. Each exempt licensee shall be subject to all provisions of the healing arts act, except as otherwise provided in this subsection (f). The holder of an exempt license shall not be required to submit evidence of satisfactory completion of a program of continuing education required by K.S.A. 65-2809 and amendments thereto. Each exempt licensee may apply for a license to regularly engage in the practice of the appropriate branch of the healing arts upon filing a written application with the board and submitting evidence of satisfactory completion of applicable continuing education requirements established by the board. The request shall be on a form provided by the board and shall be accompanied

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3-8-91
Attm. # 7-2

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3-8-91
attm # 7-2

by the license fee established pursuant to K.S.A. 65-2852 and amendments thereto. The board shall adopt rules and regulations establishing appropriate continuing education requirements for exempt licensees to become licensed to regularly practice the healing arts within Kansas. Nothing in this subsection (f) shall be construed to prohibit a person holding an exempt license from serving as a coroner.

Sec. 2. K.S.A. 1990 Supp. 65-2836 is hereby amended to read as follows: 65-2836. A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured, *or an application for a license or for reinstatement of a license may be denied* upon a finding of the existence of any of the following grounds:

(a) The licensee has committed fraud or misrepresentation in applying for or securing an original ~~or~~, renewal *or reinstated* license.

(b) The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency.

(c) The licensee has been convicted of a felony or class A misdemeanor, whether or not related to the practice of the healing arts.

(d) The licensee has used fraudulent or false advertisements.

(e) The licensee is addicted to or has distributed intoxicating liquors or drugs for any other than lawful purposes.

(f) The licensee has willfully or repeatedly violated this act, the pharmacy act of the state of Kansas or the uniform controlled substances act, or any rules and regulations adopted pursuant thereto, or any rules and regulations of the secretary of health and environment which are relevant to the practice of the healing arts.

(g) The licensee has unlawfully invaded the field of practice of any branch of the healing arts in which the licensee is not licensed to practice.

~~(h) The licensee has failed to pay annual renewal fees specified in this act.~~

~~(i) The licensee has failed to take some form of postgraduate work each year or as required by the board.~~

~~(j)~~ *(h)* The licensee has engaged in the practice of the healing arts under a false or assumed name, or the impersonation of another practitioner. The provisions of this subsection relating to an assumed name shall not apply to licensees practicing under a professional corporation or other legal entity duly authorized to provide such professional services in the state of Kansas.

~~(k)~~ *(i)* The licensee has the inability to practice the branch of the healing arts for which the licensee is licensed with reasonable skill and safety to patients by reason of illness, alcoholism, excessive

PNW
3-8-91
Attm. # 1-3

PNW
3-8-91
attm # 1-3

use of drugs, controlled substances, chemical or any other type of material or as a result of any mental or physical condition. In determining whether or not such inability exists, the board, upon reasonable suspicion of such inability, shall have authority to compel a licensee to submit to mental or physical examination or drug screen by such persons as the board may designate. To determine whether reasonable suspicion of such inability exists, the investigative information shall be presented to ~~a review committee established pursuant to K.S.A. 65-2840c and amendments thereto~~ *the board as a whole or to a person or entity approved by the board* and the determination shall be made by a majority vote of the ~~review committee~~ *board as a whole or the person or entity approved by the board*. Information submitted to the ~~review committee and its~~ *board as a whole or the person or entity approved by the board and all* reports, findings and other records shall be confidential and not subject to discovery by or release to any person or entity. The licensee shall submit to the board a release of information authorizing the board to obtain a report of such examination or drug screen. A person affected by this subsection shall be offered, at reasonable intervals, an opportunity to demonstrate that such person can resume the competent practice of the healing arts with reasonable skill and safety to patients. For the purpose of this subsection, every person licensed to practice the healing arts and who shall accept the privilege to practice the healing arts in this state by so practicing or by the making and filing of an annual renewal to practice the healing arts in this state shall be deemed to have consented to submit to a mental or physical examination or a drug screen when directed in writing by the board and further to have waived all objections to the admissibility of the testimony, drug screen or examination report of the person conducting such examination or drug screen at any proceeding or hearing before the board on the ground that such testimony or examination or drug screen report constitutes a privileged communication. In any proceeding by the board pursuant to the provisions of this subsection, the record of such board proceedings involving the mental and physical examination or drug screen shall not be used in any other administrative or judicial proceeding.

~~(l)~~ *(j)* The licensee has had a license to practice the healing arts revoked, suspended or limited, has been censured or has had other disciplinary action taken, or an application for a license denied, by the proper licensing authority of another state, territory, District of Columbia, or other country, a certified copy of the record of the action of the other jurisdiction being conclusive evidence thereof.

~~(m)~~ *(k)* The licensee has violated any lawful rule and regulation

Board of Healing Arts Recommendation

See next two page 4s for alternate versions.

PH&W
3-8-91
attm #7-4

PH&W
3-8-91
attm #7-4

use of drugs, controlled substances, chemical or any other type of material or as a result of any mental or physical condition. In determining whether or not such inability exists, the board, upon reasonable suspicion of such inability, shall have authority to compel a licensee to submit to mental or physical examination or drug screen by such persons as the board may designate. To determine whether reasonable suspicion of such inability exists, the investigative information shall be presented to ~~a review committee established pursuant to K.S.A. 65-2840e and amendments thereto~~ *the board as a whole or to a person or entity approved by the board* and the determination shall be made by a majority vote of the ~~review committee~~ *board as a whole, or the person or entity approved by the board*. Information submitted to the ~~review committee and its~~ *board as a whole or the person or entity approved by the board and all* reports, findings and other records shall be confidential and not subject to discovery by or release to any person or entity. The licensee shall submit to the board a release of information authorizing the board to obtain a report of such examination or drug screen. A person affected by this subsection shall be offered, at reasonable intervals, an opportunity to demonstrate that such person can resume the competent practice of the healing arts with reasonable skill and safety to patients. For the purpose of this subsection, every person licensed to practice the healing arts and who shall accept the privilege to practice the healing arts in this state by so practicing or by the making and filing of an annual renewal to practice the healing arts in this state shall be deemed to have consented to submit to a mental or physical examination or a drug screen when directed in writing by the board and further to have waived all objections to the admissibility of the testimony, drug screen or examination report of the person conducting such examination or drug screen at any proceeding or hearing before the board on the ground that such testimony or examination or drug screen report constitutes a privileged communication. In any proceeding by the board pursuant to the provisions of this subsection, the record of such board proceedings involving the mental and physical examination or drug screen shall not be used in any other administrative or judicial proceeding.

~~(l)~~ *(j)* The licensee has had a license to practice the healing arts revoked, suspended or limited, has been censured or has had other disciplinary action taken, or an application for a license denied, by the proper licensing authority of another state, territory, District of Columbia, or other country, a certified copy of the record of the action of the other jurisdiction being conclusive evidence thereof.

~~(m)~~ *(k)* The licensee has violated any lawful rule and regulation

PX/W 3-8-91 attach #7-5

Kansas Medical Society

the officers of the board selected in accordance with K.S.A. 65-2818 and amendments thereto

officers of the board. The board may delegate authority to determine that reasonable suspicion of such inability exists to an impaired provider committee under contract with the board pursuant to K.S.A. 1990 Supp. 65-4924 and amendments thereto. Any determination of reasonable suspicion of inability made by an impaired provider committee must be reviewed and approved by the executive director of the board before a mental or physical examination or drug screen may be required of a licensee.

, the officers of the board or an impaired provider committee

Passed

line 10 - delete "a person"

line 12 - delete "a person" "or entity approved by board" + (.) after word "whole".

line 14 - strike "a person"

PX/W 3-8-91 attach #7-5

Kansas Association Osteopathic Medicine

use of drugs, controlled substances, chemical or any other type of material or as a result of any mental or physical condition. In determining whether or not such inability exists, the board, upon reasonable suspicion of such inability, shall have authority to compel a licensee to submit to mental or physical examination or drug screen by such persons as the board may designate. To determine whether reasonable suspicion of such inability exists, the investigative information shall be presented to ~~a review committee established pursuant to K.S.A. 65-2840e and amendments thereto~~ *the board as a whole or to a person or entity approved by the board* and the determination shall be made by a majority vote of the ~~review committee~~ *board as a whole or the person or entity approved by the board*. Information submitted to the ~~review committee and its~~ *board as a whole or the person or entity approved by the board and all* reports, findings and other records shall be confidential and not subject to discovery by or release to any person or entity. The licensee shall submit to the board a release of information authorizing the board to obtain a report of such examination or drug screen. A person affected by this subsection shall be offered, at reasonable intervals, an opportunity to demonstrate that such person can resume the competent practice of the healing arts with reasonable skill and safety to patients. For the purpose of this subsection, every person licensed to practice the healing arts and who shall accept the privilege to practice the healing arts in this state by so practicing or by the making and filing of an annual renewal to practice the healing arts in this state shall be deemed to have consented to submit to a mental or physical examination or a drug screen when directed in writing by the board and further to have waived all objections to the admissibility of the testimony, drug screen or examination report of the person conducting such examination or drug screen at any proceeding or hearing before the board on the ground that such testimony or examination or drug screen report constitutes a privileged communication. In any proceeding by the board pursuant to the provisions of this subsection, the record of such board proceedings involving the mental and physical examination or drug screen shall not be used in any other administrative or judicial proceeding.

~~(l)~~ *(j)* The licensee has had a license to practice the healing arts revoked, suspended or limited, has been censured or has had other disciplinary action taken, or an application for a license denied, by the proper licensing authority of another state, territory, District of Columbia, or other country, a certified copy of the record of the action of the other jurisdiction being conclusive evidence thereof.

~~(m)~~ *(k)* The licensee has violated any lawful rule and regulation

To determine whether reasonable suspicion of such inability exists, any existing investigative information shall be presented to the board as a whole, to a person or entity approved by the board or to the impaired provider committee representing the profession of the provider being investigated. In the course of determining whether or not there is a reasonable suspicion of such inability, either the board as a whole, a person or entity approved by the board or the impaired provider committee representing the profession of the provider being investigated, shall have authority to compel a licensee to submit to mental or physical examination or drug screen by such persons as may be designated by the board, by a person or entity approved by the board or by the impaired provider committee representing the profession of the provider being investigated. Information submitted to the board as a whole, the person or entity approved by the board or the impaired provider committee representing the profession of the provider being investigated,

PNW
3-8-91
attm. #7-6

promulgated by the board or violated any lawful order or directive of the board previously entered by the board.

~~(n)~~ *(l)* The licensee has failed to report or reveal the knowledge required to be reported or revealed under K.S.A. 65-28,122 and amendments thereto.

~~(o)~~ *(m)* The licensee, if licensed to practice medicine and surgery, has failed to inform a patient suffering from any form of abnormality of the breast tissue for which surgery is a recommended form of treatment, of alternative methods of treatment specified in the standardized summary supplied by the board. The standardized summary shall be given to each patient specified herein as soon as practicable and medically indicated following diagnosis, and this shall constitute compliance with the requirements of this subsection. The board shall develop and distribute to persons licensed to practice medicine and surgery a standardized summary of the alternative methods of treatment known to the board at the time of distribution of the standardized summary, including surgical, radiological or chemotherapeutic treatments or combinations of treatments and the risks associated with each of these methods. Nothing in this subsection shall be construed or operate to empower or authorize the board to restrict in any manner the right of a person licensed to practice medicine and surgery to recommend a method of treatment or to restrict in any manner a patient's right to select a method of treatment. The standardized summary shall not be construed as a recommendation by the board of any method of treatment. The preceding sentence or words having the same meaning shall be printed as a part of the standardized summary. The provisions of this subsection shall not be effective until the standardized written summary provided for in this subsection is developed and printed and made available by the board to persons licensed by the board to practice medicine and surgery.

~~(p)~~ *(n)* The licensee has cheated on or attempted to subvert the validity of the examination for a license.

~~(q)~~ *(o)* The licensee has been found to be mentally ill, disabled, not guilty by reason of insanity or incompetent to stand trial by a court of competent jurisdiction.

~~(r)~~ *(p)* The licensee has prescribed, sold, administered, distributed or given a controlled substance to any person for other than medically accepted or lawful purposes.

~~(s)~~ *(q)* The licensee has violated a federal law or regulation relating to controlled substances.

~~(t)~~ *(r)* The licensee has failed to furnish the board, or its investigators or representatives, any information legally requested by the

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3-8-91
Attm. #7-1

BNYW
3-8-91
attm # 7-7

board.

~~(u)~~ *(s)* Sanctions or disciplinary actions have been taken against the licensee by a peer review committee, health care facility, a governmental agency or department or a professional association or society for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

~~(v)~~ *(t)* The licensee has failed to report to the board any adverse action taken against the licensee by another state or licensing jurisdiction, a peer review body, a health care facility, a professional association or society, a governmental agency, by a law enforcement agency or a court for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

~~(w)~~ *(u)* The licensee has surrendered a license or authorization to practice the healing arts in another state or jurisdiction, has surrendered the authority to utilize controlled substances issued by any state or federal agency, has agreed to a limitation to or restriction of privileges at any medical care facility or has surrendered the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

~~(x)~~ *(v)* The licensee has failed to report to the board surrender of the licensee's license or authorization to practice the healing arts in another state or jurisdiction or surrender of the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

~~(y)~~ *(w)* The licensee has an adverse judgment, award or settlement against the licensee resulting from a medical liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

~~(z)~~ *(x)* The licensee has failed to report to the board any adverse judgment, settlement or award against the licensee resulting from a medical malpractice liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

~~(aa)~~ *(y)* The licensee has failed to maintain a policy of professional liability insurance as required by K.S.A. 40-3402 or 40-3403a and amendments thereto.

~~(bb)~~ *(z)* The licensee has failed to pay the annual premium surcharge as required by K.S.A. 40-3404 and amendments thereto.

~~(cc)~~ *(aa)* The licensee has knowingly submitted any misleading

Passed 3-8-91 Attm #7-8

Passed 3-8-91 attm #7-8

deceptive, untrue or fraudulent representation on a claim form, bill or statement.

~~(dd)~~ *(bb)* The licensee as the responsible physician for a physician's assistant has failed to adequately direct and supervise the physician's assistant in accordance with K.S.A. 65-2896 to 65-2897a, inclusive, and amendments thereto, or rules and regulations adopted under such statutes.

Sec. 3. K.S.A. 1990 Supp. 65-2837 is hereby amended to read as follows: 65-2837. As used in K.S.A. 65-2836 and amendments thereto and in this section:

(a) "Professional incompetency" means:

(1) One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board.

(2) Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board.

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice medicine.

(b) "Unprofessional conduct" means:

(1) Solicitation of professional patronage through the use of fraudulent or false advertisements, or profiting by the acts of those representing themselves to be agents of the licensee.

(2) Representing to a patient that a manifestly incurable disease, condition or injury can be permanently cured.

(3) Assisting in the care or treatment of a patient without the consent of the patient, the attending physician or the patient's legal representatives.

(4) The use of any letters, words, or terms, as an affix, on stationery, in advertisements, or otherwise indicating that such person is entitled to practice a branch of the healing arts for which such person is not licensed.

(5) Performing, procuring or aiding and abetting in the performance or procurement of a criminal abortion.

(6) Willful betrayal of confidential information.

(7) Advertising professional superiority or the performance of professional services in a superior manner.

(8) Advertising to guarantee any professional service or to perform any operation painlessly.

(9) Participating in any action as a staff member of a medical care facility which is designed to exclude or which results in the exclusion of any person licensed to practice medicine and surgery from the medical staff of a nonprofit medical care facility licensed in this state

PHW
3-8-91
Attm #7-9

PHW
3-8-91
Attm #7-9

because of the branch of the healing arts practiced by such person or without just cause.

(10) Failure to effectuate the declaration of a qualified patient as provided in subsection (a) of K.S.A. 65-28,107 and amendments thereto.

(11) Prescribing, ordering, dispensing, administering, selling, supplying or giving any amphetamines or sympathomimetic amines, except as authorized by K.S.A. 65-2837a and amendments thereto.

(12) Conduct likely to deceive, defraud or harm the public.

(13) Making a false or misleading statement regarding the licensee's skill or the efficacy or value of the drug, treatment or remedy prescribed by the licensee or at the licensee's direction in the treatment of any disease or other condition of the body or mind.

(14) Aiding or abetting the practice of the healing arts by an unlicensed, incompetent or impaired person.

(15) Allowing another person or organization to use the licensee's license to practice the healing arts.

(16) Commission of any act of sexual abuse, misconduct or exploitation related to the licensee's professional practice.

(17) The use of any false, fraudulent or deceptive statement in any document connected with the practice of the healing arts *including the inaccurate recording, falsifying or altering of a patient or medical care facility record.*

(18) Obtaining any fee by fraud, deceit or misrepresentation.

(19) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations or associations.

(20) Failure to transfer ~~medical~~ *patient* records to another ~~physician~~ *licensee* when requested to do so by the subject patient or by such patient's legally designated representative.

(21) Performing unnecessary tests, examinations or services which have no legitimate medical purpose.

(22) Charging an excessive fee for services rendered.

(23) Prescribing, dispensing, administering, distributing a prescription drug or substance, including a controlled substance, in an excessive, improper or inappropriate manner or quantity or not in the course of the licensee's professional practice.

(24) Repeated failure to practice healing arts with that level of care, skill and treatment which is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances.

Passed ✓

Starting on line 22 - including the intentional falsifying or alteration of a fraudulent alteration of a medical care facility record

Kansas Medical Society

intentional

fraudulent

PN & W
3-8-91
attm # 7-10

(25) Failure to keep written medical records which *accurately* describe the services rendered to the patient, including patient histories, pertinent findings, examination results and test results.

(26) Delegating professional responsibilities to a person when the licensee knows or has reason to know that such person is not qualified by training, experience or licensure to perform them.

(27) Using experimental forms of therapy without proper informed patient consent, without conforming to generally accepted criteria or standard protocols, without keeping detailed legible records or without having periodic analysis of the study and results reviewed by a committee or peers.

(28) Prescribing, dispensing, administering or distributing an anabolic steroid or human growth hormone for other than a valid medical purpose. Bodybuilding, muscle enhancement or increasing muscle bulk or strength through the use of an anabolic steroid or human growth hormone by a person who is in good health is not a valid medical purpose.

(c) "False advertisement" means any advertisement which is false, misleading or deceptive in a material respect. In determining whether any advertisement is misleading, there shall be taken into account not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations made.

(d) "Advertisement" means all representations disseminated in any manner or by any means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of professional services.

(e) "Licensee" for purposes of this section and K.S.A. 65-2836 and amendments thereto shall mean all persons issued a license, permit or special permit pursuant to article 28 of chapter 65 of the Kansas Statutes Annotated.

(f) "License" for purposes of this section and K.S.A. 65-2836 and amendments thereto shall mean any license, permit, special permit or approval authorized by article 28 of chapter 65 of the Kansas Statutes Annotated.

Sec. 4. K.S.A. 65-2842 is hereby amended to read as follows: 65-2842. Whenever the board directs, pursuant to subsection ~~(k)~~ *(i)* of K.S.A. 65-2836 and amendments thereto, that a licensee submit to a mental or physical examination *or drug screen*, the time from the date of the board's directive until the submission to the board of the report of the examination *or drug screen* shall not be included in the computation of the time limit for hearing prescribed by the

Passed 3-8-91 Attm # 7-11

Passed. Stillson Craig Approved

Representative Hackler

PXW 3-8-91 attm # 7-11

or any combination thereof,

, or both,

Also see page 4, lines 5,18,27,29,30,32 and 35 for possible similar changes to above.

ansas administrative procedure act.

Sec. 5. K.S.A. 65-2851a is hereby amended to read as follows: 65-2851a. ~~(a) All administrative proceedings provided for by article 28 of chapter 65 of the Kansas Statutes Annotated and affecting any licensee licensed under that article shall be conducted in accordance with the provisions of the Kansas administrative procedure act.~~

~~(b)~~ Judicial review and civil enforcement of any agency action under article 28 of chapter 65 of the Kansas Statutes Annotated shall be in accordance with the act for judicial review and civil enforcement of agency actions.

Sec. 6. K.S.A. 65-2805, 65-2842 and 65-2851a and K.S.A. 1990 Supp. 65-2809, 65-2836 and 65-2837 are hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.

restore sec 5(a) & bill passed

Passed 3-8-91 Attm't 7-12

Bill Wolff Questions

Sec. 6
Sec. 7 } See attached ..

And by renumbering sections accordingly

And by amending the repealer and title accordingly

Passed 3-8-91 attm't 7-12

Kansas Occupational Therapy Association

P&W
3-8-91
Attm. # 7-13

Sec. 6. K.S.A. 1990 Supp. 65-5408 is hereby amended to read as follows: 65-5408. (a) The board shall waive the examination, education and experience requirements and grant registration to any person who applies for registration on or before July 1, 1987, who pays the application fee and who was certified prior to the effective date of this act as an occupational therapist registered (O.T.R.) or a certified occupational therapy assistant (C.O.T.A.) by the American occupational therapy association (A.O.T.A.) or who has been employed as an occupational therapist for the purpose of providing occupational therapy for at least two years within the three-year period immediately prior to the effective date of this act.

(b) The board may waive the examination, education or experience requirements and grant registration to any applicant who shall present proof of current licensure or registration as an occupational therapist or occupational therapy assistant in another state, the District of Columbia or territory of the United States which requires standards for licensure or registration determined by the board to be equivalent to or exceed the requirements for registration under this act.

(c) At the time of making an application under this section, the applicant shall pay to the board the application fee as required under K.S.A. ~~1986~~ 1990 Supp. 65-5409 and amendments thereto.

(d) The board may issue a temporary registration to an applicant for registration as an occupational

P&W
3-8-91
attm # 7-13

therapist or as an occupational therapy assistant who applies for temporary registration on a form provided by the board, who meets the requirements for registration, except for examination, and who pays to the board the temporary registration fee as required under K.S.A. ~~1986~~ 1990 Supp. 65-5409 and amendments thereto. Such temporary registration ~~shall expire on the date the board acts on the application for registration~~ shall authorize the person so registered to provide patient services within the limits of the temporary registration until the date the results of the examination become available, but no more than one such temporary registration shall be permitted to any one person without the majority approval of the members of the board.

Sec. 7. K.S.A. 1990 Supp. 65-5508 is hereby amended to read as follows: 65-5508. (a) The board shall waive the examination, education and experience requirements and grant registration to any person who applies for registration on or before July 1, 1987, who pays the application fee and who was registered or certified immediately prior to the effective date of this act as a respiratory therapist or respiratory therapy technician by the national board for respiratory care or who has been employed as a respiratory therapist for the purpose of providing respiratory therapy for at least two years within the three-year period immediately prior to the effective date of this act.

(b) The board may waive the examination, education or experience requirements and grant registration to

Kansas Respiratory Care Society

PNW 3-8-91 Attm. # 7-14

lang struck & add "shall become effect" Same

see pg 4

PNW 3-8-91 Attm # 7-14

any applicant who presents proof of current licensure or registration as a respiratory therapist in another state, the District of Columbia or territory of the United States which requires standards for licensure or registration determined by the board to be equivalent to or exceed the requirements for registration under this act.

(c) At the time of making an application under this section, the applicant shall pay to the board the application fee as required under K.S.A. ~~1986~~ 1990 Supp. 65-5509 and amendments thereto.

(d) The board may issue a special permit to a student enrolled in an approved school of respiratory therapy who applies for such special permit on a form provided by the board and who pays to the board the special permit fee as required under K.S.A. 1986 Supp. 65-5509 and amendments thereto. The special permit shall authorize a student who is enrolled in an approved school of respiratory therapy and who holds such special permit to practice respiratory therapy under the supervision of a registered respiratory therapist. Such special permit shall expire on the date that the student graduates from an approved school of respiratory therapy or otherwise ceases to be enrolled in an approved school of respiratory therapy.

(e) The board may issue a temporary registration to an applicant for registration as a respiratory therapist who applies for temporary registration on a form provided by the board, who meets the requirements for registration or who meets all of the requirements for registration except examination and who

PH&W 3-8-91 Attm #: 7-15

PH&W 3-8-91 attm #7-15

pays to the board the temporary registration fee as required under K.S.A. ~~1986~~ 1990 Supp. 65-5509 and amendments thereto. Such temporary registration shall expire ~~on--the--date that--the--board-acts-on-the-application for-registration~~ one year from the date of issue or on the date that the board approves the application for registration, whichever occurs first. No more than one such temporary registration shall be permitted to any one person, without the majority approval of the members of the board.

P&HCW 3-8-91 Attm 7-16

P&HW 3-8-91 attm 7-16

Session of 1991

HOUSE BILL No. 2529

By Committee on Public Health and Welfare

2-27

AN ACT concerning reporting of abuse, neglect or exploitation of certain residents; amending K.S.A. 1990 Supp. 39-1411 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1990 Supp. 39-1411 is hereby amended to read as follows: 39-1411. (a) The secretary of health and environment shall maintain a register of the reports received and investigated by the department of health and environment under K.S.A. 39-1402 and 39-1403, and amendments to such sections, and the findings, evaluations and actions recommended by the department with respect to such reports. The findings, evaluations and actions shall be subject to such notice and appeals procedures as may be adopted by rules and regulations of the secretary of health and environment, which rules and regulations shall be consistent with any requirements of state or federal law relating thereto. The register shall be available for inspection by personnel of the department of health and environment as specified by the secretary of health and environment and to such other persons as may be required by federal law and designated by the secretary of health and environment by rules and regulations. The secretary of health and environment shall forward a copy of any report of abuse, neglect or exploitation of a resident of an adult care home to the secretary of aging.

(b) The secretary of health and environment shall forward any ~~finding~~ *report* of abuse, neglect or exploitation alleged to be committed by a provider of services licensed, registered or otherwise authorized to provide services in this state to the appropriate state authority which regulates such provider. The appropriate state regulatory authority may consider the finding in any disciplinary action taken with respect to the provider of services under the jurisdiction of such authority. The secretary of health and environment may consider the finding of abuse, neglect or exploitation in any licensing action taken with respect to any adult care home or medical care facility under the jurisdiction of the secretary.

[except that the secretary shall not be required to conduct a hearing in cases forwarded to the appropriate state authority under subsection (b)

[finding

[, after notice to the alleged perpetrator and a hearing on such matter if requested by the alleged perpetrator,

PH&W
3-8-91
Attm #8

rules and regulations adopted by the secretary of social and rehabilitation services;

(4) has had a child declared in a court order in this or any other state to be deprived or a child in need of care based on an allegation of physical, mental or emotional abuse or neglect or sexual abuse;

(5) has had parental rights terminated pursuant to the Kansas juvenile code or K.S.A. 38-1581 to 38-1584, inclusive, and amendments thereto or a similar statute of other states;

(6) has signed a diversion agreement pursuant to K.S.A. 22-2906 *et seq.*, and amendments thereto, or pursuant to K.S.A. 38-1635 and amendments thereto involving a charge of child abuse or a sexual offense; or

(7) has an infectious or contagious disease.

(b) No person shall maintain a boarding home for children or maintain a family day care home if such person has been found to be a disabled person in need of a guardian or conservator, or both.

(c) Any person who resides in the home and who has been found to be a disabled person in need of a guardian or conservator, or both, shall be counted in the total number of children allowed in care.

(d) In accordance with the provisions of this subsection (d), the secretary shall have access to any court orders or adjudications of any court of record, any records of such orders or adjudications, criminal history record information in the possession of the Kansas bureau of investigation and any report of investigations as authorized by subsection (e) of K.S.A. 38-1523 and amendments thereto in the possession of the department of social and rehabilitation services or court of this state concerning persons working, regularly volunteering or residing in a boarding home for children or a family day care home. The secretary shall have access to these records for the purpose of determining whether or not the home meets the requirements of K.S.A. 65-516 and 65-519 and amendments thereto.

(e) No boarding home for children or family day care home or their employees shall be liable for civil damages to any person refused employment or discharged from employment by reason of such home's compliance with the provisions of this section if such home acts in good faith to comply with this section.

(f) For the purpose of subsection (a)(3), an act of abuse or neglect shall not be considered to have been validated by the department of social and rehabilitation services unless the alleged perpetrator has: (1) Had an opportunity to be interviewed and present information during the investigation of the alleged act of abuse or neglect; (2) been given notice of the proposed agency finding as a result of the investigation and an opportunity to reply, in writing or in person, regarding the proposed finding; and (3) been given notice of the agency decision and an opportunity to appeal such decision to the secretary and to the courts pursuant to the act for judicial review and civil enforcement of agency actions.

History: L. 1980, ch. 184, § 2; L. 1982, ch. 259, § 2; L. 1983, ch. 140, § 46; L. 1984, ch. 225, § 1; L. 1985, ch. 210, § 1; L. 1987, ch. 233, § 1; L. 1988, ch. 232, § 10; July 1.

Law Review and Bar Journal References:

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Attorney General's Opinions:

Persons prohibited from employment by homes for children; effect of expungement of offense. 84-115.

Persons prohibited from operating maternity hospitals and homes for children; effect of expungement of prior conviction. 85-50.

Persons prohibited from employment in boarding homes for children or family day care homes; effect of certain misdemeanor convictions. 85-154.

Constitutionality of 65-516(a)(3); child abuse validation by the department of social and rehabilitation services. 86-163.

KDHE does not violate due process rights for suspension of day care facility's license because of suspected child abuse by employee. 87-110.

Reporting abuse or neglect; contents; evaluation; statewide register. 89-8.

65-519. Certificate of registration; conditions for; forms; annual renewal; fees. (a) The secretary shall issue a certificate of registration to any person who applies for registration on forms furnished by the secretary, who attests to the safety of the family day care home for the care of children, who submits a fee of $5 payable to the secretary of health and environment, and who certifies that no person described in paragraphs (1), (2), (3), (4), (5) or (6) of subsection (a) of K.S.A. 65-516 and amendments thereto resides, works or volunteers in the family day care home.

(b) The secretary shall furnish each applicant for registration a family day care home safety evaluation form to be completed by the applicant and submitted with the registration application.

(c) The certificate of registration shall be renewed annually in the same manner provided for in this section.

PHHW 3-8-91 attm. #9