Approved: March 10, 1995
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on February 7, 1995 in Room 313-S-of the Capitol.

All members were present.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
David Ryan, Administrative Procedure Advisory Committee
William Rein, Kansas Department of Health & Environment
Camille Nohe, Attorney General's Office
Rebecca Rice, Citizen
Pat Johnson, Board of Nursing
Tom Stiles, Kansas Water Department
Constance Owen, Kansas Division of Water Rights

Others attending: See attached list

Hearings on **HB 2180** - amendments to the administrative procedure act and judicial review act, were opened.

David Ryan, Administrative Procedure Advisory Committee, appeared before the committee as a proponent of the bill. He commented that this bill makes adjustments to the Administrative Procedure Act. This proposed bill would provide a simple 30 day computation for seeking judicial review of an order. (Attachment 1)

William Rein, Kansas Department of Health & Environment, appeared before the committee in support of the bill except for New Section 1 dealing with interlocutory judicial review before final agency action. (Attachment 2)

Camille Nohe, Attorney General's Office, appeared before the committee with suggested amendments. (Attachment 3)

Hearings on **HB 2180** were closed.

Hearings on **HB 2213** - creating an office of administrative hearings within the department of administration, were opened.

Rebecca Rice, appearing on her own behalf, appeared before the committee as the sponsor of the proposed bill. This bill would eliminate major problems with administrative hearings; it would eliminate the "kangaroo court" by making the hearing administrators employees of Department of Administration; would allow decisions to be appealed directly to the district court & would eliminate duplicate levels of review within an agency before allowing the continuation to district court.(Attachment 4)

David Ryan, Administrative Procedure Advisory Committee, told the committee that the concept of a administrative hearing panel is badly needed. The Supreme Court has criticized agencies using agency lawyers for hearing lawyers. There is a lot of institutional bias built into the process. The Committee came to the conclusion that this is a serious issue that needs to be addressed. He suggested that the Judiciary Committee recommend that the Administrative Procedure Advisory Committee of the Judicial Council review the proposed bill and report back with their suggestions.

William Rein, Kansas Department of Health & Environment, appeared before the committee as an opponent of the bill. He stated that this law would mean that administrative law judges would issue final orders instead of agency heads who would no longer have the authority to make final interpretations of laws and regulations in individual enforcement actions. (Attachment 5)

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S-Statehouse, at 3:30 p.m. on February 7, 1995.

Pat Johnson, Board of Nursing, appeared before the committee as an opponent of the bill. She commented that they have some concerns with regards to the increased cost to the agency, availability of presiding officers when needed and consistency. (Attachment 6)

Tom Stiles, Kansas Water Department, appeared before the committee as a concerned party. He stated that the Department has a concern with the possible conflict between this bill and the Water Transfer Act. Section 3(a) would liberally imply that the Water Transfer Act would be exempt from the bill but suggested that an amendment be made that would make it clear that they would be exempt. (Attachment 7)

Constance Owen, Kansas Division of Water Rights, appeared before the committee with the same concerns as the Kansas Water Department. (Attachment 8)

Kansas Department of Transportation, Kansas State Board of Technical Professions & Kansas Human Rights Commission did not appear before the committee but requested that their testimony be included in the committee minutes. (Attachments 9, 10 & 11)

The next meeting is scheduled for February 8, 1995.

HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: FEBRUARY 7, 1995

NAME	REPRESENTING
Whitney Damron	Pete McGill & Associates
Chris Stanfield	KDHE
Kirk W. Lowry	KTLA
Caroline Ong	Securities Commissioner
Bob Totten	Ks Contractors Association
Carol Foreman	SRS
John Badger	SRS
Amy Howell	Intern
[illegible]	Intern
David Shufelt	Div of Workers Comp
Jon Newman	KS Governmental Consulting
Arthur W. Solis	self
Mandy Stafford	Healing Arts
Larry Buening	Bd of Healing Arts
[illegible]	Dept. of Administration
[illegible]	KDHE
Joseph Kroll	KDHE
Elaine Frisbie	Div. of the Budget
Jean Duncan	Real Estate Commission

Gene Yockers — KAREC

Bill Watts — KDOT

Jack Glaves — APA Committee member

Brandon Myers — KHRC

HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: 7 FEB 1995

NAME	REPRESENTING
John W. Smith	KDOR - DMV
Kenneth M. Wilke	Dept. of Agriculture
Constance C. Owen	Div. of Water Resources
Thomas Stiles	Kansas Water Office
Camille Nohe	Attorney General
Pat Johnson	Board of Nursing
Mark S. Braun	KSBN / Atty. Gen.
Barbara McPherson	Board of Nursing
Janet Jacobs	Board of Nursing
Dorothy Zeck	Board of Nursing
Paul Shelby	OJA
Trudy Aron	Am Inst of Architects
Marvin R. Webb	Webb & associates
Betty Wright	KDHE
George Barbee	Barbee & Assoc's
Don Doesken	KDHR - Legal
Scott Stone	KAPE
Stacey Empson	Hein, Ebert & Weir
[illegible]	Private Citizen

Robert J. McVickers — KDHE AAS

Bill [illegible] — KDHE

Judicial Council Testimony
on
1995 HB 2180
House Judiciary Committee
February 7, 1995

House Bill 2180 contains the recommendations of the Administrative Procedure Advisory Committee of the Judicial Council. The Administrative Procedure Advisory Committee was principally responsible for the drafting of the Kansas administrative procedure act (KAPA; K.S.A. 77-501 et seq.) and the act for judicial review and civil enforcement of agency actions (KJRA; K.S.A. 77-601 et seq.). Both acts were adopted by the legislature in 1984. The Judicial Council authorized the advisory committee to develop recommendations to address any problems or ambiguities that have arisen during the 10 years of experience with the acts.

Foremost among the recommendations of the advisory committee are those relating to the opinions in United Steelworkers of America v. Kansas Comm'n on Civil Rights, 17 Kan.App. 2d 863, rev'd 253 Kan. 327 (1993) and State Bank Commissioner v. Emery, 19 Kan.App. 2d 1063 (1994). The committee's recommendations in this area are contained in the amendments to K.S.A. 77-612 and 613 in sections 9 and 10 of the bill. The amendments are intended to make clear the time allowed for seeking judicial review of a state agency order.

Generally, when a person receives a final order from a state agency the person is not required to ask the agency to reconsider the order before seeking judicial review of the order. There are exceptions to this rule for orders of the Human Rights Commission, the Corporation Commission and the Board of Tax Appeals. A person must seek reconsideration of orders of these agencies before seeking judicial review. For those agencies where reconsideration is mandatory, the time for seeking judicial review is clear. The 30 days for seeking judicial review is measured from the agency action on the mandatory petition for reconsideration. However, where seeking reconsideration is permissive, as it is with most agencies, the computation of the time for seeking judicial review is not so simple. In such situations, once the order is served, the 30 days to seek judicial review begins to run. However, if a party then seeks reconsideration, which the party has the option to do, the 30 days stops running during the pendency of the request for reconsideration. The remainder of the 30 days resumes running once the agency has acted on the petition for reconsideration.

Section 10 of HB 2180 amends 77-613 to provide a simple, 30-day computation for seeking judicial review of an order. If reconsideration is mandatory or if it is requested (where permissive), the 30 days runs from the agency order on reconsideration. If reconsideration is not mandatory and is not requested, the 30 days runs from service of the order. Section 9 amends K.S.A. 77-612 to explicitly state that reconsideration is not a prerequisite for seeking judicial review unless a statute so states (as is the case for orders of the Human Rights Commission, the Corporation Commission and the Board of Tax Appeals).

House Judiciary
2-07-95
Attachment 1

New section 1 and the amendments to subsections (g) and (i) of 77-526 and 77-549 (section 8) are aimed at agency delay. K.S.A. 77-526 and 549 direct agencies to render orders within certain time periods following a hearing. These times may be extended by the agency for good cause. The amendments would require the agency to set forth such good cause in writing prior to expiration of the original time period for rendering an order. K.S.A. 77-622 of KJRA gives the court authority to provide appropriate relief in cases of agency delay. However, standing to obtain such relief is arguably unclear. New section 1 is intended to be a clear statement of standing to seek judicial relief for persons aggrieved by agency delay.

Section 2 adds a new subsection (g) to K.S.A. 77-514. The new subsection would allow agencies headed by multimember boards to designate one or more board members to hear a matter and render a final order. The advisory committee was informed that it is not uncommon in a number of the smaller agencies headed by multimember boards for some of the board members to perform investigatory functions. The view was expressed that a separation of functions should be maintained and board members who are involved in the investigation should not be involved in deciding the matter, either directly at a hearing or in reviewing an order rendered at a hearing. Conforming amendments to K.S.A. 77-526 and 77-529(d) are contained in sections 5 and 7 of the bill and include a requirement in 77-526(c) that the final order must state if the presiding officer has been designated in accordance with 77-514(g).

Section 3 amends K.S.A. 77-519 to recognize that the motions available in a hearing under KAPA include motions to dismiss and motions for summary judgment.

Section 4 amends K.S.A. 77-522 to allow subpoenas in hearings under KAPA to be served by certified mail. This is currently allowed in civil actions under the civil code.

A number of amendments in the bill require an agency to identify in its order the agency officer who should receive service of a petition for judicial review. These amendments are made in 77-526(c) (section 5, page 3, lines 7-10), 77-527(j) (section 6, page 5, lines 3-6), 77-529(c) (section 7, page 5, lines 30-32) and 77-613(e) (section 10, page 7, lines 24-27). Under Claus v. Kansas Dept. of Revenue, 16 Kan.App. 2d 12 (1991), service of a petition for judicial review on the appropriate person within the agency is jurisdictional. The heading at the top of the order notifying Claus of the suspension of his driver's license indicated the order was issued by "Kansas Department of Revenue, Division of Vehicles - Driver Control Bureau . . ." Claus served his petition for judicial review on "Kansas Department of Revenue, Division of Vehicles - Driver Control Bureau." Service should have been on the Secretary of Revenue, the agency head. Consequently, Claus' petition was dismissed. The previously mentioned amendments require the agency order to identify the appropriate person for service of the petition for judicial review. In addition, section 12 amends 77-615 to allow service on the agency head, any person designated by the agency head, any agency officer designated to receive service in an order or on the agency officer who signs an order. Service on any of such persons would be sufficient to meet the jurisdictional requirement.

Another amendment relating to service on the agency is contained in section 11 [K.S.A. 77-614(c)]. The agency or another party may file an answer in a judicial review proceeding. The amendment would measure the answer time from service on the agency or notice to the party rather than from the filing of the petition.

Section 7 amends subsection (b) of K.S.A. 77-529 concerning petitions for the agency to reconsider its order. The provision that a petition for reconsideration is "deemed denied" if the agency does not act within 20 days is deleted. The "deemed denial" provision was intended to benefit parties appearing before an agency. The theory behind the provision is to prevent an agency from sitting on a petition for reconsideration indefinitely by allowing the party to proceed to seek judicial review if the agency has not acted within 20 days. However, experience indicates the provision works to the detriment of parties. The provision triggers the running of the time for seeking judicial review from a nonevent. In many cases, parties may anticipate further action from the agency and by the time they realize such action is not forthcoming, the time for seeking judicial review may have run. The advisory committee recommends deletion of the "deemed denial" provision and the addition of a requirement that the agency act on a petition for reconsideration within 30 days. If the agency does not act, new section 1 specifically references 77-529 and provides a path for seeking judicial relief.

Currently, 77-529(b) requires the agency to deny the petition for reconsideration, grant the petition and change the order or grant the petition and set the matter for further proceedings. As amended by the bill, the agency would also have the option of giving notice that the petition has been scheduled for further consideration, without granting or denying the petition. This amendment was requested by attorneys for the board of healing arts who noted the administrative problems of large multimember boards that meet infrequently in granting or denying the petition within 30 days.

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(Revised 01/95)

State of Kansas

Bill Graves Governor

Department of Health and Environment

James J. O'Connell, Secretary

Testimony Presented To

House Judiciary Committee

by

The Kansas Department of Health and Environment

House Bill 2180

House Bill 2180 would amend the Kansas Administrative Procedure Act, KSA 77-501, et seq., in three primary ways. Some minor amendments are also proposed.

Proposed Amendments

In New Section 1, the bill would allow private appellants (usually members of a regulated community) to seek interlocutory judicial review when an agency did not meet the time limitations for issuing initial and final orders pursuant to KSA 77-526, 77-529, and 77-549. Currently, an agency has thirty days to issue written orders after the conclusion of a hearing unless the parties have consented to a longer period of time or the presiding officer has found good cause to make such an extension.

Section 3 would amend KSA 77-519 to specifically authorize motions to dismiss and motions for summary judgment.

Section 4 would amend KSA 77-522(b) so that administrative subpoenas may be served by certified mail in addition to personal service.

In addition to the above major amendments, Section 5 would amend KSA 77-526 by requiring final orders and initial orders to specifically identify an agency officer who may receive service of a petition for judicial review. Moreover, the same section would require agency heads and presiding officers to find good cause for extending the time for issuing final and initial orders prior to the expiration of thirty days. Finally, Section 10 would amend KSA 77-613 by giving appellants thirty days after service of an order rendered upon reconsideration, or denying a request for reconsideration, to seek judicial review.

Discussion

Overall, KDHE supports the amendments proposed in House Bill 2180, with the possible exception of New Section 1. The problem with that section from the agency' perspective is that it does not indicate what actions a court may take upon exercising interlocutory review of an agency's failure to meet statutory periods of time in issuing initial or final orders. The requirement for exhausting administrative remedies prior to seeking judicial review has been clearly established by both statute, KSA 77-612, and case law, W.S. Dickey Clay Mgf. Co. v. Kansas Corp. Comm'n, 241 Kan 744, 740 P 2d 585 (1987). Moreover, the statutory time periods have been viewed by Kansas courts as directory and not mandatory so that a failure to meet those periods does not deprive an agency of jurisdiction. Expert Environmental Control, Inc. v. Walker, 13 Kan App 2d 56, 761 P 2d 320 (1988). Whether New Section 1 is intended to change these precedents, and the sanctions which courts may apply when finding that an agency has failed to meet its statutory period of time, is unclear. It would be

House Judiciary
2-07-95
Attachment 2

Administrative Appeals Section
Mills Building, 109 SW 9th Street, Suite 400D, Topeka, Kansas 66612 -1215

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extremely helpful to clarify what actions a court is expected to take upon receiving an interlocutory appeal. Since administrative agencies are created by the Legislature to deal with often complex areas of regulation, depriving an agency of jurisdiction might defeat that intent, and early access to the courts might create an unnecessary judicial burden.

Since creation of a separate Administrative Appeals Section within KDHE on July 1, 1993, most initial orders have been issued within thirty days. When a longer period of time was needed for some reason, presiding officers have attempted to issue written orders explaining the need for additional time.

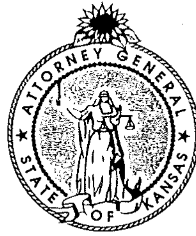
Specific authorization for presiding officers to rule on motions to dismiss and motions for summary judgment is a welcome clarification. (However, presiding officers within KDHE have always interpreted KSA 77-519 to authorize such rulings under current language.) Moreover, the authority of parties to serve subpoenas by mail is also a good amendment, since administrative proceedings are designed to be as economical as possible. Finally, authorizing parties to request judicial review thirty days after service of a reconsideration order, or after receiving an order denying reconsideration, should prevent the unintentional waiver of judicial review where the agency head did not act on the petition within thirty days of receiving it.

Summary and Recommendations

KDHE supports passage of House Bill 2180 with the exception of New Section 1 dealing with interlocutory judicial review before final agency action. As stated earlier in this testimony, it would help to clarify what action the court is expected to take once an interlocutory appeal is filed. Unless jurisdiction is removed, or the agency's lateness is extreme, early access to the courts might create an unnecessary judicial burden. Moreover, an agency's authority to decide issues, before judicial review, has been an important aspect of administrative law. This is because agencies were initially created to provide the technical knowledge and expertise necessary for the proper regulation of complex areas of modern society. Access to the courts should usually occur after the agency has made its final decision.

Testimony presented by:

William C. Rein, JD
Director and Chief Presiding Officer
Administrative Appeals Section
Kansas Department of Health and Environment
February 7, 1995



State of Kansas

Office of the Attorney General

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February 7, 1995
Before the Committee on Judiciary
Re: House Bill No. 2180

Testimony by Camille Nohe, Assistant Attorney General
on behalf of Attorney General Carla J. Stovall

As general counsel to a number of state professional licensing agencies, I have become aware of a problematic area relating to the issuance of orders in disciplinary proceedings.

Generally a professional licensening board is composed of five to thirteen members. The "agency head" as that term in used in the administrative procedures act is the full board. Often a disciplinary proceeding for alleged violation of laws pertaining to the profession are heard by a panel comprised of three members of the board. In this event, under the current administrative procedures act, such a panel issues an initial order, K.S.A. 77-526(b), which is subject to review by the agency head which may then issue a final order. However, under this typical scenario, the agency head includes the panel which issued the initial order. That panel is then placed in the position of either (1) participating in reviewing its own order

House Judiciary
2-07-95
Attachment 3

and thus defeating the point of review, or (2) recusing itself, leaving the agency head (the full board) in the position of not being available to exercise review. In addition, typically one or more board members have been involved in the investigation of the case and probably should not be involved in adjudication of the case.

Section 2(g) of House bill No. 2180, coupled with Section 5(a) and (b) and Section 7(d), would resolve these dilemmas by permitting a panel comprised of board members to hear a case and issue a final order instead of an initial order.

The Attorney General urges your support of these amendment.

TESTIMONY PRESENTED TO THE
HOUSE JUDICIARY COMMITTEE
re: HB 2213

February 7, 1995

by Rebecca S. Rice

Mr. Chairman and members of the committee. My name is Rebecca Rice and I appear before you today as a proponent to HB 2213. It is important to note I am not representing any particular organization and appear before you today as a private citizen, not as a lobbyist for any particular special interest.

Before I begin explaining the purpose of asking this committee to consider the concept of a central hearing panel, I need to address a minor controversy which has apparently arisen concerning licensing boards. As you may recall, when this committee agreed to introduce the legislation, it was not the intent of the committee to include any agency which operated with an independent, appointed board or with separately trained ALJs implementing specific programs pursuant to legislative creation such as the ALJs in the division of workers compensation.

The reason for not including agencies which maintain an independent, appointed commission or board, is because the commission or board - not an employee - typically hears the appeal. Additionally, those boards have specific groups of individuals which they regulate. If those individual groups had desired to include their particular board in this legislation because of problems experienced, they would be here today supporting this legislation. Conversely, the cabinet level agencies included in this legislation implement policies which affect the general citizenry who are so often bewildered at the government maze to which they are subjected.

Although it was intended that all such "independent board" agencies including licensing boards and the division of workers compensation would not be included, apparently the legislation needs further clarification. I respectfully request the committee amend the legislation to clarify that agencies operated by an independent, appointed board are not subject to this legislation. I have discussed this clarification with the Revisor's Office and suggested a possible solution is to insert language which applies the legislation to cabinet level agencies only. However, I am not a Revisor, so a better solution or definition can probably be written.

Such amendment might also solve the problem encountered with the language which specifies the legislation does not apply to the KCC, Insurance Department and BOTA. Apparently, other agencies **not subject** to KAPA as presented here also want to be listed. To solve this problem, I would suggest the new language on page 2, lines 34-35 be replaced with language stating cabinet level agencies shall be required to use DOA administrative law judges (ALJs). I would prefer not to begin a "laundry list" of agencies which will not be affected. My experience is that laundry lists can become problematic. The language on page 2, lines 15-16 would also have to be adjusted to eliminate the reference to the KCC and the Insurance Department and limit the transfer of ALJs from cabinet level agencies. I do not know how the BOTA is handled under the KAPA so it may have to continue to be specifically exempted. Additionally, no part of the legislation was to affect the Division of Workers Compensation.

With that problem addressed, I would like to present a condensed view of the administrative process I experienced at SRS. I thought it would be easier to explain by using a condensed history which has been

attached to this testimony. Hopefully, this boxed history demonstrates the myriad of problems currently existing in the administration of the KAPA by the large agencies. The statements expressed in the attached chart are an accurate but simplified explanation of my one experience with the KAPA.

I believe I am correct in stating that this legislation, which creates a central hearing panel, is patterned with certain variations after the "model law" adopted by the National Conference of Commissioners on Uniform State Laws. As I testified earlier, this is not a new, radical concept but has been adopted - in some form - by 17-18 states.

The legislation eliminates three major problems which I encountered with SRS:

1. Elimination of the "kangaroo court" situation by making the ALJs employees of the DOA rather than employees of the Secretary upon whose policies they are ruling.

2. Elimination of the veto power over the ALJ's decision by both a state appeals committee and the Secretary whose policies were being reviewed by the ALJ. It allows the ALJ's decision to be appealed directly to district court.

3. Elimination of the duplicate levels of review within the agency. Such reform also dissolves the prerogative of the agency to determine how long the appeal will be kept within the agency before allowing continuation to district court.

By addressing these three problems, I anticipate the following outcomes from a central panel system:

- Public perception of an unfair system would be lessened. (It can probably never be eliminated.)

- The perception that the agency hearing officer and the agency attorney/representative engage in *ex parte* discussions due to shared employment would be eliminated.

- The cost of appeals for both the agency and the citizen would be reduced.

- Uniform rules and regulations for the affected agencies would eliminate much of the confusion which presently exists for practitioners. (Each agency apparently has its own rules for appeals.)

- The agencies will be more receptive to compromise solutions.

- Centralized records, including the number and type of appeals, would be helpful to the legislature, the Governor and the agency secretary to determine the ability of the agency to implement policies as directed in a fair and "logical" manner. This would be further enhanced by the ability to track the number of agency decisions upheld at the district court and whether the decisions were upheld on technicalities or on substance.

- The legislature could better understand the correlation between appeals of agency policies, the soundness of those policies, and the various agency budgets including the cost of the agencies' legal departments.

One of the elements which Chairman O'Neal and I discussed was an expansion of the ALJ's authority to include limited sanctions for discovery purposes. This language was apparently not included in the legislation and may not be desirable at this point. However, there does seem to be an advantage for the agency to not cooperate during discovery when the only recourse for the citizen is to further prolong the appeal (and the cost) by seeking relief from district court as to discovery before proceeding with the hearings in front of the agency employees.

As I have discussed with many members of this committee, I am anticipating strong opposition to this legislation by various agencies. Some opposition will be public, some will occur behind closed doors. I have probably underestimated the strength of the covert opposition. In response to some of the opposition, I would note some individuals and entities will fight change at any cost. The status quo is "safe" regardless of whether it works well. I would ask you to discount those who oppose the legislation simply because they are familiar and comfortable with the present structure. Additionally, the public did request, in the last election, that elected officials confront government bureaucracy which, in effect, can promote inefficiency and lack of oversight and can encourage heavy handed tactics which remain hidden to the light of disclosure.

Mr. Chairman and members of the committee, I respectfully request you adopt this legislation with appropriate amendments and allow for the debate to continue on the House floor. I appreciate your time and patience in listening to my theory of how to improve the KAPA and increase the public's confidence in the objectivity and fairness of its government.

1991

An error caused by EDS in the administration of the Medicaid Spenddown program was discovered in 1991. The error, due to defective programming of EDS's computer, resulted in failure of EDS to notify Medicaid providers of recipients' status. The system failure resulted, ultimately, in a payment error of $167,378 involving 493 providers.

1992

SRS notified EDS in Sept. '92 it would withhold the $167,378. from the next contract payment. Such amount was withheld on 11/9/92.

Sometime between 11/9/92 and 2/26/93, EDS sought permission from SRS to withhold the $167,378 from the relevant Medicaid providers. Permission was granted.

1993

A "Recoupment Action Plan" was developed by SRS & EDS (2/26/93). Form letters dated 6/1/93 notified Medicaid providers of an overpayment and that such amount would be withheld in the future; Providers should contact EDS within 15 days "if they had any questions".

Abrams Pharmacy, a Medicaid provider, was notified they had been overpaid $1855.18. Abrams objected by letter on 6/8/93 and requested an administrative review.

Slaybaugh Drug, a Medicaid provider, was notified they had been overpaid $677.04 and such amount was owed. Slaybaugh objected by letter on 6/16/93 and requested an administrative review. Slaybaugh was subsequently notified by EDS that a further review of the records revealed an amount owed of only 86.74. Slaybaugh proceeded with the appeal.

Abrams received a preliminary hearing with SRS and EDS employees who ruled the action by SRS/EDS proper. It is my understanding these employees were present when the decisions were made as to how to proceed with the recoupments. (These hearings were, apparently, held erratically in subsequent appeals.) Abrams then further appealed this initial ruling.

A hearing for Slaybaugh was held 9/15/93 by ALJ Gaschler. A decision dated 10/6/93 **overturned** the agency action stating that SRS had been made whole and no overpayment of Medicaid funds existed.

A hearing for Abrams was held 10/23/93 by ALJ Gaschler. The agency action was **upheld** by ALJ Gaschler in a decision dated 12/3/93 stating agency rules and regulations required a refund of any overpayments regardless of any other considerations including which party caused the error.

No decision by a SRS employed ALJ was returned in favor of the Medicaid provider in any subsequent decisions following Slaybaugh.

1994

SRS requested a "Review"of the Slaybaugh decision on 10/14/93. The Respondent's supporting brief was filed with the State Appeals Committee on 11/5/93. The Appellant brief was filed 12/6/93. The decision, by the Committee, overturning the decision of the ALJ **was not filed until 2/24/94** - 80 days after the appellant brief was filed.
(I contacted Sandra Sharon-Wages at SRS requesting information on the status of the decision. She told me the problem could be that a ruling contrary to the Secretary's wishes may have been reached by the committee. Because the decision required her signature, she could send back a decision until that decision reflected her policy. When questioned as to whether I could see the "preliminary" decisions, she informed me the unsigned decisions are not subject to the open records act and no information could be obtained unless one of the committee members chose to tell me what was going on.)

Abrams requested a Review by the State Appeals Committee on 12/17/93. A different appeals committee than in Slaybaugh overturned ALJ Gaschler's 2nd opinion and ruled **in favor** of Abrams in a decision dated 1/31/94 stating EDS' use of state powers to recoup money owed is improper.

SRS filed a Motion for Reconsideration of the Abrams decision with the Secretary on 2/14/94. Secretary Whiteman reversed the State Appeals Committee on 2/24/94 stating the Committee improperly focused on the contractual relationship between EDS and SRS.

Note: Following 1st adjournment of the 1994 Legislature, an amendment was added to the Omnibus appropriations bill directing SRS to require EDS to return the recouped money to the providers. As it was not correctly drafted as a "proviso", the Governor, receiving counsel, vetoed the amendment stating it set a bad precedent!

Abrams and Slaybaugh filed a Notice of Judicial Appeal in Shawnee County District Court on 3/23/94. The cases were joined together by the court due to the identical nature of the issues of fact and law. This same request at the agency level had been denied.

Following a preliminary hearing, briefs filed by both parties, and oral arguments, the court **overturned the agency action** on 10/7/94 despite the heavy burden of proof placed upon Abrams and Slaybaugh.

1995

SRS filed a Motion to Alter or Amend on 11/2/94. The court ruled SRS had presented no new evidence nor corrections of manifest errors of law but was attempting to re-litigate old issues. A final order was entered **1/27/95**. We will not know whether SRS intends to appeal the district court decision to the Court of Appeals until 30 days has passed.

State of Kansas

Bill Graves Governor

Department of Health and Environment
James J. O'Connell, Secretary

Testimony Presented To

House Judiciary Committee

by

The Kansas Department of Health and Environment

House Bill 2213

Background

House Bill 2213 would create a state-wide Office of Administrative Hearings within the Department of Administration. Passage of this bill would have major implications for KDHE and all other agencies responsible for taking enforcement actions with respect to private individuals and businesses. In essence, HB 2213 would require most state agencies, including KDHE, to use administrative law judges within the Department of Administration for all enforcement actions. Moreover, administrative law judges would issue **final orders** instead of initial orders as is the case currently under the Kansas Administrative Procedure Act. **This means that agency heads would no longer have the authority to make final interpretations of laws and regulations in individual enforcement actions.**

Discussion

It has been a long-standing principle of administrative law that agencies may make final adjudications involving individual private parties even though those same agencies were responsible for proposing that adverse actions be taken in the first place. In other words, the courts have not found it a violation of fundamental due process for an agency to investigate, prosecute, and adjudicate alleged misconduct on the part of private individuals and businesses as long as the parties are afforded a fair hearing before an impartial finder of fact. Pork Motel, Corp. v. Kansas Dept. of Health & Environment, 234 Kan. 374, 673 P 2d 1126 (1983). Practically speaking, this has traditionally meant that individuals serving as hearing officers could not be involved in the investigation or prosecution of individual enforcement actions.

Under the Kansas Administrative Procedure Act, any person serving as a presiding officer is subject to disqualification for administrative bias, prejudice or interest. KSA 77-514(b). Moreover, presiding officers are prohibited from communicating, either directly or indirectly, with any party or person having an interest in the outcome of individual proceedings unless all parties are given an opportunity to participate in the discussion. KSA 77-525. Both of these provisions are designed to assure that presiding officers, although they may be employees of the agency before whom a proceeding is pending, are completely separated from the program staff and attorneys responsible for agency enforcement actions.

On July 1, 1993, KDHE established a separate and distinct Administrative Appeals Section with three attorney presiding officers to better assure that private parties are afforded impartial hearings. The mere fact that presiding officers are employees of the agency is enough to convince some that they can never receive a fair hearing until the matter is removed to court. For that reason, the Administrative Appeals Section has encouraged the establishment of a separate office in the Mills Building, and the furnishing of a distinct hearing room not otherwise occupied by program staff or the agency's legal division.

House Judiciary
2-07-95
Attachment 5

Administrative Appeals Section
Mills Building, 109 SW 9th Street, Suite 400D, Topeka, Kansas 66612 -1215

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The enactment of HB 2213 would probably further the goal of impartiality in administrative proceedings which fundamental due process seeks to attain. Private litigants and their attorneys would be assured that individual agencies were in no position to influence presiding officers through budgetary decisions, the assignment of supervision, or general agency policies. However, complete separation of final enforcement orders from the agency responsible for promulgating regulations and prosecuting violations would significantly affect another fundamental principle of administrative law. Courts have traditionally held that there is substantial discretion in an agency head to interpret the laws and regulations which he or she is responsible for enforcing. This has been true since agencies are created to provide the level of specialization and expertise necessary to properly regulate complex areas of modern society.

Under existing provisions of the Kansas Administrative Procedure Act, the evidentiary "fair hearing" is usually held before a presiding officer appointed by the agency head who is responsible for issuing an **initial order**. That order is reviewable by the Secretary upon appeal by any party or upon the Secretary's own motion. In that manner, the agency head is always assured of making the final interpretation of the laws and regulations he or she is responsible for enforcing. With passage of HB 2213, the final decision in individual cases would be made by presiding officers. (HB 2213, Section 7) This is a significant change in administrative law and its implications for agencies with enforcement responsibilities are fundamental and far-reaching.

In addition to the agency's primary concern with Section 7, the agency also has some other concerns which the committee might want to consider.

If a state-wide Office of Administrative Hearings is created, it might be important to assure that all full-time hearing officers are assigned to the classified service, including the director. Every effort should be made to assure that hearing officers are protected from removal for issues involving the merits of their decisions, instead of their abilities.

In addition, centralizing the administrative hearings function in a single agency may significantly dilute the specialized knowledge which hearing officers have developed while concentrating on specific enforcement programs. The ability to issue well-reasoned decisions, in what are often complex regulatory programs, is dependent on the hearing officer's knowledge of both the substantive law involved and overall agency operations. While the director of a state-wide administrative hearings office could maintain the specialization of hearing officers transferred from other agencies, it seems important to address that concern before implementing legislation is actually enacted.

Finally, the fiscal impact of this legislation is also of concern to the Secretary. Agency appeals units have a number of well-trained and extremely effective support staff whose talents and abilities might be lost in creating a centralized unit. The issue of support staff, as well as the costs for agencies required to use administrative law judges from the state-wide Office of Administrative Hearings, are extremely important considerations for everyone involved.

Summary and Recommendations

If enacted, HB 2213 would have a significant, if not unprecedented, impact on agency enforcement actions. While the agency would be responsible for promulgating regulations, conducting investigations, filing complaints, and prosecuting alleged violations of regulatory requirements, final interpretation of those regulations in individual cases would be made by presiding officers assigned to the Department of Administration. In effect, all enforcement actions would be litigated in what might be referred to as true "administrative courts," even before removal to a civil court for judicial review.

The Secretary of KDHE has serious concerns with HB 2213 since it would substantially change the agency's traditional discretion to interpret and apply the laws and regulations which it is responsible for enforcing. Moreover, the Secretary believes that the agency's creation of a separate and distinct Administrative Appeals Section establishes the proper balance between providing impartial evidentiary hearings on one hand, and deferring to the agency's expertise in regulating often complex health and environmental areas on the other.

Testimony presented by: William C. Rein, JD
Director and Chief Presiding Officer
Administrative Appeals Section
Kansas Department of Health and Environment
February 7, 1995

Kansas State Board of Nursing

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Patsy L. Johnson, R.N., M.N.
Executive Administrator
913-296-5752

To: The Honorable Representative Michael O'Neal, Chairperson
and Members of the Judiciary Committee

From: Patsy L. Johnson, M.N., R.N., A.R.N.P.
Executive Administrator
Kansas State Board of Nursing

Date: February 7, 1995

Re: HB 2213

Thank you for allowing me to testify on HB 2213 for the Board of Nursing. As presently written, the Board of Nursing is in opposition of HB 2213. The Board has three concerns with one central office for administrative hearings. Those concerns are:

1. Increased cost to agency,
2. Availability of presiding officers when needed,
3. Consistency of same presiding officer for Board of Nursing hearings.

Because of these reasons, the Board of Nursing offers an amendment to exempt the Board from the provision of using the office of administrative hearing for providing hearing officers. In Section 3, (page 2, line 35), the Board of Nursing asks for the addition of "board of nursing." There may be other fee funded agencies who also want to be exempted. In that case "fee fund agencies" could be substituted for "board of nursing."

Thank you. I am available for questions.

House Judiciary
2-07-95
Attachment 6

Janette Pucci, R.N., M.S.N.
Education Specialist
296-3782

Patricia McKillip, R.N., Ph.D.
Education Specialist
296-3782

1 sas administrative procedure act, the model rules of procedure, and other
2 provisions of law, to govern administrative law judges;
3 (4) to establish standards and procedures for the evaluation, training,
4 promotion and discipline of administrative law judges; and
5 (5) to facilitate the performance of the responsibilities conferred
6 upon the office by the Kansas administrative procedure act.
7 (f) The director may:
8 (1) Maintain a staff of reporters and other personnel; and
9 (2) implement the provisions of this section and rules and regulations
10 adopted under its authority.
11 (g) The department of administration shall adopt rules and regula-
12 tions to establish fees to charge a state agency for the cost of using an
13 administrative law judge.
14 (h) Effective July 1, 1995, any attorney employed at that time as a
15 full-time hearing officer by any state agency, except the state corporation
16 commission, commissioner of insurance or director of taxation, shall be
17 transferred to the department of administration. Such personnel shall
18 retain all rights under the state personnel system and retirement benefits
19 under the laws of this state, and such person's services shall be deemed
20 to have been continuous.
21 New Sec. 2. (a) There is hereby created a state advisory council for
22 administrative hearings. The advisory council shall consist of seven mem-
23 bers appointed by the governor. All members of the council shall serve
24 at the pleasure of the governor. Members of the council shall not receive
25 compensation or expense allowances for serving on the council.
26 (b) The council shall meet on call of the secretary of administration.
27 (c) The advisory council shall advise the secretary of administration
28 and the director of the office of administrative hearings on policy matters
29 affecting the office of administrative hearings and on rules and regulations
30 adopted by the director.
31 Sec. 3. K.S.A. 77-514 is hereby amended to read as follows: 77-514.
32 (a) ~~The agency head or one or more other persons designated by the~~
33 ~~agency head may be the presiding officer.~~ *Except as otherwise provided*
34 *by law, state agencies, except the corporation commission, insurance com-*
35 *missioner and director of taxation, shall be required to use an adminis-*
36 *trative law judge assigned by the office of administrative hearing as a*
37 *presiding officer.*
38 (b) Any person serving or designated to serve alone or with others as
39 presiding officer is subject to disqualification for administrative bias, prej-
40 udice or interest.
41 (c) Any party may petition for the disqualification of a person
42 promptly after receipt of notice indicating that the person will preside or
43 promptly upon discovering facts establishing grounds for disqualification,

board of nursing or (fee fund agencies)

2-9

HOUSE JUDICIARY COMMITTEE
FEBRUARY 7, 1995
TESTIMONY BY
THOMAS STILES, KANSAS WATER OFFICE
REGARDING HB 2213

Chairman O'Neal and Members of the Committee:

I am Thomas C. Stiles, Assistant Director of the Kansas Water Office. I appear before you as a quasi-neutral party regarding this bill. The Water Office, as the state water planning agency, really has no dealings with KAPA in its ongoing mission. We do have, however, one area of responsibility which invokes KAPA proceedings and stands as the reason for my testimony today. Under K.S.A. 82a-1501, et seq., the Director of the Water Office in conjunction with the Chief Engineer of the Division of Water Resources and the Secretary of the Department of Health and Environment oversees the Water Transfer Act. This act, substantially reworked by the 1993 Legislature, is the means of determining whether the movement of large quantities of water over long distances from their originating source is to the state's beneficial interest while protecting the welfare of the area where the water was taken.

These three agency heads comprise a hearing panel which makes the final determination on the disposition of an application to transfer water. The panel also selects a hearing officer to conduct the appropriate hearings to ascertain the beneficial and detrimental impacts of such transfers. This hearing officer compiles the hearing record and establishes findings of fact related to nine factors of consideration outlined in the act. The hearing officer, as presiding officer under KAPA, issues the initial order for review by the hearing panel.

To date, there has been one water transfer proceeding since the act was established in 1983. That transfer involved Water District No. 1 of Johnson County's desire to divert water from the Missouri River. This relatively innocuous proceeding turned into a procedural quagmire and spurred the Kansas Water Authority to work with the 1993 Legislature to amend the Water Transfer Act into a more workable protocol for dealing with the complex issues of water resources. A major part of

the act's overhaul was to meld its procedures into KAPA, particularly the time line of conducting the proceedings.

The bill you have before you threatens to unravel the work done two years ago by the Legislature. In particular there are three areas of conflict between this bill and the Water Transfer Act.

1. **Establishment of the Administrative Law Judge as presiding officer removes the use of a hearing officer selected by the water transfer hearing panel to conduct the determination on the benefits and impacts of moving water across regions**. The Water Transfer Act states that such a hearing officer shall be an independent person knowledgeable in water law, water issues and hearing procedures. In this fashion, the hearing officer is akin to the special master assigned by the U.S. Supreme Court to preside over interstate water disputes, eg; *Kansas v. Colorado.* The use of administrative law judges under this bill does not coincide with this expected requirement. While it is possible that an administrative law judge, employed by the proposed Office of Administrative Hearings, may possess the necessary expertise expected by the Water Transfer Act, the infrequent nature of invoking the act makes employing such an individual an inefficient expenditure of state resources.

2. **The Administrative Law Judge issuing a final order, effectively removes the expertise of the hearing panel from making final determination on the public interest in transferring water**. The concept of the hearing panel under the Water Transfer Act was to create a balanced, comprehensive state review system for the movement of water across regions. The panel comprises the state expertise in water rights, hydrology, reservoir operations, water conservation, water quality, water demand projections, ground water and instream flows. The use of the administrative law judge diminishes the utility of that expertise.

3. **The costs of carrying out a water transfer hearing is transferred from the parties involved in the transfer to the state agencies charged with overseeing the Water Transfer Act under this**

bill. The Water Transfer Act allows the hearing officer to equitably assess the costs of the hearing among the applicant and other intervening parties throughout the proceedings. The net cost to the state should be nil except for the expense of state agency personnel preparing, presenting or analyzing testimony. Under this bill, the Department of Administration shall establish fees to charge the state agencies for the cost of using an administrative law judge. Thus, there will be a fiscal impact to the state during the proceedings on water transfers.

As a whole, our agency cannot comment on the appropriateness of HB 2213. However, the conflict between this bill and the Water Transfer Act is of great concern to us. We can read Section 3(a) of the bill liberally to imply that the Water Transfer Act is exempt from this bill since it is *otherwise provided by law*. However, it would relieve us greatly if the committee amended the bill at this point to specifically exempt the Water Transfer Act from the provisions of HB 2213.

Thank you for your time and consideration.

Testimony before
the House Committee on the Judiciary
February 7, 1995
RE: HOUSE BILL 2213
by
Constance C. Owen, Assistant Legal Counsel,
Division of Water Resources
Kansas State Department of Agriculture

Thank you, Chairman O'Neal and members of the committee for the opportunity to appear before you today. I have been asked by David Pope, the Chief Engineer of the Division of Water Resources, to appear on his behalf, in his capacity as chairman of the water transfer hearing panel. Mr. Pope is in Western Kansas on official business.

The Chief Engineer opposes certain provisions of HB 2213 in its current form. Specifically, the Chief Engineer's concern is whether the particular procedures of the Water Transfer Act are intended to be exempt from this bill. It appears that this exemption is intended, but the Chief Engineer wishes to request clarification on this matter.

This bill, which establishes a common pool of administrative law judges to hear cases under the Kansas Administrative Procedure Act, may affect the duties of the Chief Engineer in two ways. One way is in his capacity as administrator of water rights under the Water Appropriation Act. That role is not being addressed here today. Mr. Pope may wish to provide additional written testimony in that regard in the future.

I appear before you today to pass along Mr. Pope's comments in his other capacity, that of chairman of the water transfer hearing panel.

Please allow me to provide a little background on the Water Transfer Act, K.S.A. 82a-1501, et seq. That Act establishes a specific procedure for evaluating requests to transport water in quantities of at least 2000 acre-feet a distance of more than 35 miles from the original source of supply. This procedure is in addition to the requirements of the Water Appropriation Act, K.S.A. 82a-701, et seq. The Water Transfer Act, as amended in 1993, designates a three-member water transfer hearing panel, consisting of the Chief Engineer as chairman, the director of the Kansas Water Office and the Secretary of the Kansas Department of Health and Environment (or the Secretary of KDHE may appoint the director of KDHE's division of environment to serve in his or her place).

The water transfer panel is required to select a hearing officer to conduct a hearing in accordance with the Kansas Administrative Procedure Act. The Water Transfer Act mandates that the hearing officer be "an independent person knowledgeable in water law, water issues, and hearing procedures." K.S.A. 82a-1501a(c). These guidelines narrow the field for eligible hearing officers, while leaving the three panel members the discretion to select a non-biased person with the necessary expertise for the particular water transfer request to be considered. Subject to the panel's approval, the hearing officer may hire staff and contract for services as necessary to carry out his duties.

The act further states that the hearing officer's decision shall be reviewed by the water transfer hearing panel, whose decision shall be final. The

panel's decision is subject to judicial review in district court. These proceedings are to be conducted in accordance with the Kansas Administrative Procedure Act except as modified by the Water Transfer Act.

This set of statutes prescribes a unique process, requiring specialized knowledge at the hearing level, and at the review level. As some of you may recall, the legislature made very careful and deliberate decisions regarding the specific procedures required for gaining approval for transferring water under this Act.

Because the Water Transfer Act sets up such unique and specific procedures, it appears that HB 2213 would not affect this Act. In HB 2213, Section 3 states,

> "<u>Except as otherwise provided by law</u>, state agencies, except the corporation commission, insurance commissioner and director of taxation, shall be required to use an administrative law judge assigned by the office of administrative hearing as a presiding officer. (Emphasis added.)"

The beginning phrase appears to exempt the Water Transfer Act from the operation of this bill. As chairman of the water transfer hearing panel, Mr. Pope respectfully requests that this exemption be made clear.

This clarification could be accomplished by making the following insertions in the section quoted above (line 35, Section 3):

> "Except as otherwise provided by law, state agencies, except the corporation commission, insurance commissioner ~~and~~, director of

taxation, and water transfer hearing panel, shall be required to use an administrative law judge assigned by the office of administrative hearing as a presiding officer. (Emphasis added.)"

I would be happy to answer any questions you may have. Thank you for your time and consideration.

STATE OF KANSAS

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E. Dean Carlson
Secretary of Transportation

Bill Graves
Governor of Kansas

REGARDING HOUSE BILL 2213

TESTIMONY FOR THE

HOUSE JUDICIARY COMMITTEE

February 7, 1995

Mr. Chairman and Committee Members:

The following is being provided by the Kansas Department of Transportation to document our concern regarding House Bill 2213.

The proposed legislation establishes an office of administrative hearings within the Department of Administration and an advisory council to support the associated functions. The proposed legislation further consolidates the hearing officer staffing of most agencies within the newly established office and requires agencies, other than some exclusions, to use Administrative Law Judges assigned from the office for a fee not yet determined.

Although the KDOT has no full-time hearing officers, there are apparently four ongoing hearing processes within the agency that would fall under the purview of the proposed legislation. Contractor Appeal Hearings, Contract Compliance Show Cause Hearings, Salvage Storage Certificate of Compliance Revocation Hearing, and Relocation Assistance Hearings would be conducted within the office of administrative hearings under this proposal. There are approximately 15 "show cause" hearings per year which by federal law must be held 30 days after completion of compliance reviews. These hearings are conducted by two agency employees. Neither of these two employees are attorneys and none are employed to provide full time support of the hearing process. The establishment of scheduling authority within the office of administrative hearings can cause potential delays placing the agency out of compliance with federal law, if there are any scheduling problems. In addition, fees would be charged to the agency increasing the cost above current procedures. The number of Contractor Appeal Hearings cannot be actually quantified because current agency policy allows settlement of contractor disputes at the lowest possible management level. The current procedure allows for Contractor Appeals to progressively move up the management levels ultimately ending with the Secretary of Transportation who, by policy, can either hear the appeal himself, appoint a panel, or hire an administrative judge. No appeals have gone to the Secretary in the past three years. The agency and the Highway Contractors have worked extremely hard to bring working relationships to their current, very positive level. This is reflected by the ability of both parties to informally resolve issues at the lowest possible levels in the most expeditious and timely manner.

The Salvage Storage Certificate of Compliance Revocation Hearings and Relocation Assistance Hearings are both administered in-house by one full-time employee who also functions

as a Bureau Chief within the Department of Transportation. These two hearing processes together represent approximately eight (8) hearings per year which have been scheduled and completed as required without incident.

The Department of Transportation is very concerned that the proposed legislation will cause additional delays, jeopardize compliance with federal law time requirements, increase the cost of administrative hearing procedures, and negatively affect the existing, positive working relationships established with the Highway Contractors resulting in inefficient operations and increased expenditures.

KANSAS STATE BOARD OF TECHNICAL PROFESSIONS

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STATEMENT TO THE

HOUSE COMMITTEE ON JUDICIARY

THE HONORABLE MIKE O'NEAL, CHAIRMAN

by

THE KANSAS STATE BOARD OF TECHNICAL PROFESSIONS

FEBRUARY 7, 1995

RE: **HOUSE BILL NO. 2213**-AN ACT concerning the administrative procedure act; creating an office of administrative hearings, within the department of administration.

Mr. Chairman and Members of the Committee: Thank you for the opportunity to present written testimony on House Bill 2213 to the committee on behalf of the Kansas State Board of Technical Professions.

The Board of Technical Professions is the state licensing and regulatory agency for architects, professional engineers, land surveyors, and landscape architects. The board consists of thirteen members; three professional engineers, three architects, one dually licensed land surveyor/professional engineer, two land surveyors, one landscape architect, and three public members.

House Bill 2213, which would create an office of administrative hearings, whereby an administrative law judge would conduct any necessary proceedings required by the Kansas administrative procedures act or other provision of law. The Board of Technical Professions opposes the adoption of H.B. 2213, unless the board is exempted.

Presently, the Board of Technical Professions utilizes members of the board to serve as hearing officers. Typically, three members of the board are appointed by the chairperson of the board to serve on a hearing panel. If the scheduled hearing deals with the profession of engineering, then at least one professional engineering member is appointed to serve on a three-member hearing panel. The three-member panel listens to the testimony which is transcribed by a certified shorthand reporter, and questions the witnesses relative to the facts of the case, some of which may be very technical in nature. This current language of the bill would transfer that responsibility to an administrative law judge.

The Board of Technical Professions is concerned that this bill would affect the amount of technical expertise that would occur if the members of the board were involved as the hearing panel. How would the appropriate technical elements of a case be entered into the record? Can an administrative law judge interpret and question the technical elements of architectural and engineering drawings, blueprints, calculations, and specifications? Can an administrative law judge interpret the elements that must be contained in the minimum standards of land surveys? A higher court cannot substitute the judgement of the Board of Technical Professions because its members possess the technical knowledge necessary to serve on the board in safeguarding the life, health, property and welfare of the public.

There would also most likely be in increase in the costs involved by utilizing an administrative law judge, rather than a panel comprised of board members. Therefore, the Board of Technical Professions would oppose this bill unless this board could be exempted in Section 3 of the bill.

Thank you for the opportunity to convey the concerns of the Board of Technical Professions.

YCE HAYES BROWN, Chairperson
ɔPEKA

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LINDA L. AUWARTER
OFFICE MANAGER

February 10, 1995

Honorable Representative Mike Oneal
Chairperson, House Judiciary Committee
Statehouse
Topeka, KS

RE: H.B. ~~2133~~ 2213

Dear Representative Oneal:

This is to memorialize for the record key points of testimony and discussion on the above bill which occurred during the bill's hearing on February 6, 1995 before the House Judiciary Committee, and to set forth some basic concerns of our agency about the bill. We would request that this letter be distributed to members of your committee and become part of the permanent legislative history record and minutes of the Committee's consideration of the bill.

This bill's main proponent who apparently requested its introduction, Becky Rice, made it clear in her conferee testimony that she did not intend that the bill apply to independent boards or commissions of the State of Kansas. You emphasized to the audience after she made her comments, that the legislative intent behind the bill was that it not apply to such independent boards and commissions. The Kansas Human Rights Commission is such an independent commission. (My perusal of the sign-in sheet for the hearing revealed that representatives of many state agencies, boards and commissions were in attendance and were potential conferees wishing to present testimony during the hearing which was becoming rather lengthy by the time you made the comment to the audience, and based upon those statements we chose not to testify at that time, as undoubtedly was also the case with others who might otherwise have wished to make comments to the committee regarding the bill).

Despite the comments at the hearing, the bill seems to have some potential technical flaws which need addressing or amendment to assure the provisions are not misapplied to independent boards and commissions. In particular, but not necessarily exclusively, we are concerned as follows. As professor Ryan emphasized, despite some "except as

otherwise provided by law" phraseology, it is not totally clear that this bill might not be misinterpreted as switching to administrative law judges from the proposed office of administrative hearings the authority to issue final orders in agency adjudicative proceedings and taking that away from boards and commissions who currently hold that authority by virtue of their power to review initial orders of agency hearing examiners, administrative law judges, hearing officers, etc. As Professor Ryan further emphasized, that is a fundamental change in the way administrative law works in this state, and places policy decisions in the hands of ALJs rather than those commission members with technical and other relevant experience and background who are on the commissions and boards. Our commission currently must review initial orders of our ALJ/hearing examiner made pursuant to public hearings on complaints alleging violations of the Kansas Act Agaisnt Discrimination and the Kansas Age Discrimination in Employment Act. I am sure that our Commissioners would not at this point wish to summarily support such a fundamental alteration to their powers and duties. Since this is apparently a possibility from this bill due to technical inadvertence in the way it is written, I would strongly urge that it be amended to be clear. Ms. Rice suggested a "laundry list" of excluded agencies, commissions, etc. be added into the bill or other clarifying amendments be made. To make legislative intent clear, that would seem appropriate and absolutely necessary.

We would urge caution in considering this bill. If adopted as is we would hope that the legislative intent and proponent intent is made crystal clear in the legislative history in case that later need clarification in the courts. However, it would seem the wiser course of action to simply amend clarification into the bill before it goes further.

Respectfully submitted,

Brandon L. Myers
Chief Legal Counsel

BLM/ms
cc: Michael J. Brungardt, Executive Director
Robert Lay, Assistant Director