

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR.

The meeting was called to order by Chairman Al Lane at 9:07 a.m. on February 15, 1996 in Room 526-S of the Capitol.

All members were present except: Rep. Gary Merritt - excused

Committee staff present: Jerry Donaldson, Legislative Research Department  
Bob Nugent, Revisor of Statutes  
Bev Adams, Committee Secretary

Conferees appearing before the committee: Bob Corkins, KCCI, KS Council on Privatization  
Scott A. Stone, Executive Director, KAPE  
Rep. Dale Swenson  
Dr. Jack Zaun, Weber, Palmer & Macy  
Kyle Smith, Asst. Attorney General, KBI  
Wendy McFarland, ACLU

Others attending: See attached list

A motion was made by Rep. Beggs to approve the minutes of 2/6, 2/7, 2/8, and 2/9. It was seconded by Rep. Becker. The motion carried and the minutes were approved as written.

Continued hearing on:

**SB 102 - Establish Kansas Performance Review Board**

Bob Corkins, Kansas Chamber of Commerce and Industry, is on the privatization council. KCCI's membership has a longstanding interest in the privatization of government functions. The bill is fashioned after the State of Michigan's privatization efforts. There are two changes they would like to see made to the bill: 1) An outcomes-based test by which to judge the Review Board and 2) the reinstatement of rulemaking authority for the new Performance Review Board. (see Attachment 1) Mr. Corkins finished his testimony by answering questions from the committee.

Scott A. Stone, Executive Director and Chief Counsel of Kansas Association of Public Employees (KAPE), appeared before the committee not as a proponent or opponent. They agree with much of what the bill would do. Kansas public employees desire government to be efficient and effective, but as taxpayers, they also demand that their money be spent both wisely and efficiently. In his written testimony he listed amendments that KAPE feel are necessary to the bill. (see Attachment 2)

Written testimony from Jamie Clover Adams, Kansas Grain and Feed Association and Kansas Fertilizer and Chemical Association, was passed out to the committee. These associations are proponents of the bill. (see Attachment 3)

No others were available to testify for or against **SB 102**, and Chairman Lane closed the hearing on the bill.

A sub-committee consisting of Rep. Grant as Chairperson, Rep. Pauls, and Rep. Beggs, was appointed to further study **SB 102** and bring a report back to the committee.

Hearing on:

**HB 2847 - Drug Testing**

Rep. Dale Swenson, sponsor of the bill, explained his reasons for introducing the bill. He introduced the bill because of the changes in the rules and regulations of the Department of Health and Environment (KDHE) about the minimum standards for laboratories in Kansas to perform drug testing for purposes of employment. The revisions in the rules and regulation proposed by the KDHE includes many changes such as elimination of the second test on urine samples testing positive for drugs. (see Attachment 4)

Jack W. Zaun of Doctors Weber, Palmer and Macy, appeared as a proponent of the bill. They feel that the passage of the bill is absolutely necessary in order to protect employees, prospective employees and companies needing drug testing to be performed. He also proposed some amendments to improve the

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR, Room 526-S  
Statehouse, at 9:07 a.m. on February 15, 1996.

effectiveness of the bill. (see Attachment 5) He concluded his testimony by answering questions from the committee.

Kyle Smith, Assistant Attorney General at the Kansas Bureau of Investigation (KBI), appeared before the committee to ask for an amendment to exempt the KBI forensic laboratories from the bill. (see Attachment 6)

Wendy McFarland, American Civil Liberties Union (ACLU), appeared as a proponent of the bill. They believe the bill is important because without it, the rights of employees in this state would be seriously undermined by increases in false positive results, eroded confidentiality and lack of security which they believe could result from the proposals from the KDHE. (see Attachment 7) She will return tomorrow to answer questions from the committee.

The hearing on **HB 2847** will be continued tomorrow, February 16, 1996.

The meeting was adjourned at 9:59 a.m.

The next meeting is scheduled for February 16, 1996.

# HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE GUEST LIST

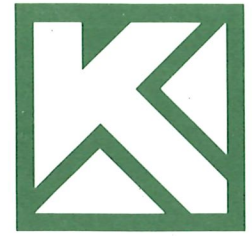
DATE February 15, 1996

NAME	REPRESENTING
Stanley P. Suther	Sr. Lab Scientist KDHE - RHEL
Roger Carlson	KDHE - Laboratory
Dr. Tim Ronkin	OSBORN LABORATORIES
Dr. Jack Zaud	WPM LABORATORIES
Chris Rains	WPM Laboratories
Jenny Wentz	Sec. of State
Amy Hendrickson	Dept. of Admin.
Jean Barber	Family Sub. Assn. of KS
Scott Stone	KAPE
Wayne Marchel	AFL-CIO
LARRY C. MANN	KBI
Dwain Worley	KBT
Lynne Melt	KLRD
Barb Hinton	Post Audit
Bob Clawson	SRS
Kyle Smith	KBI
Jim DeHoff	AFL-CIO
Rich Guthrie	Health Midwest
Jim Cappelle	Intern



# LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry



835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732  
SB 102

February 14, 1996

## KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Business, Commerce and Labor

by  
Bob Corkins  
Director of Taxation

Honorable Chair and Members of the Committee:

My name is Bob Corkins, director of taxation for the Kansas Chamber of Commerce and Industry. It is a privilege to speak in support of SB 102 to convey our membership's longstanding interest in the privatization of government functions. In 1994, KCCI supported SCR 1626 which established the Kansas Council on Privatization and I, personally, provided staff support to that group whose recommendations are now before this committee.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The heart of the Council's work is represented by SB 102. It is not the "hit list" of targeted state program reductions which much of the public anticipated. An end product of that sort would

*House Business, Commerce  
& Labor Committee  
2/15/96  
Attachment 1*

It has been equally inappropriate and impossible for the Council to pursue. From the start of our research, all information indicated that the solution (i.e. the way to achieve optimum state privatization) would be a process rather than a neatly packaged product.

SB 102 is the process which KCCI and the Privatization Council believes will best address the interests of state efficiency. It is patterned largely after the state of Michigan's privatization efforts. However, the glaring weakness of Michigan's method is that it is conducted purely through executive branch authority. If Governor Engler leaves office, there is a high risk that his privatization initiatives will leave as well. Consequently, SB 102 attempts to better institutionalize that process in Kansas.

There are a couple of other ways in which we believe this plan improves upon Michigan's: SB 102 would create a more autonomous new entity. The Kansas Performance Review Board (KPRB) would technically be an administrative branch subdivision. This is necessary in order to assure compliance from those state agencies which are being investigated. While the Legislative Division of Post Audit is engaged in activity similar to that planned for KPRB, Post Audit is controlled entirely by the legislature. The Kansas Department of Administration is another possible actor for performing PERM analyses (Privatize, Eliminate, Retain or Modify), but direct and undue influence by the Governor is the risk with this option. The intent of this bill is to minimize political motives which may dictate what state service is to be reviewed and when. Although KPRB would be an executive entity, its staff would conduct their work only at the direction of the new board's members.

KPRB would serve an ombudsman function. Michigan depends upon each of its state agencies to identify which of their services are good candidates for privatization. Michigan officials candidly admitted this as a weakness in their process. Over 80% of the ideas submitted by Michigan agencies have resulted in recommendations to either modify the programs in question or to do nothing. Accordingly, recommendations to either privatize or eliminate the analyzed services

much less common. Michigan's experience verifies that state agencies will display an inherent if not unconscious, bias to suggest ideas that will not disturb the status quo. Under SB 102, the ideas for submitting particular state functions to a PERM analysis would come from a variety of sources...including the private sector. Legislators, the Governor, and any other public employee would also be free to suggest projects for KPRB to undertake. The final selection of PERM projects and their relative priority would be decided by KPRB itself.

The suggested creation of this new entity baffles many people at first blush. A common reaction is "you want to *reduce* bureaucracy by *increasing* bureaucracy?" The question is both obvious and meaningful. Important reasons for proposing this approach have already been stated. While all PERM analyses could be performed by the private sector -- and we certainly will demand that KPRB operate itself in the most efficient and frugal manner possible -- the odds of getting the cooperation of targeted agencies would be slight. That concern is crucial to the success of future privatization because the agencies are the gatekeepers of all the data necessary to make accurate decisions.

Consequently, SB 102 does have a state fiscal note. The Privatization Council's estimate is \$250,000 to \$500,000 depending upon the workload which the legislature wants KPRB to assume. Based upon the calculation of Council members, and later affirmed by specific cost estimates from Michigan, the Council expects an average PERM analysis to have a fully allocated cost of about \$25,000 per project. That would allow KPRB to undertake an average of 10 projects per year. Please note that the "fully allocated cost" of a project would include reimbursement to the targeted agencies for their work in responding to questionnaires and producing the pertinent data. The Council envisions a modest KPRB staff of three or four employees, with independent contract consultants hired as needed for complex projects and as permitted by the legislative appropriation.

KCCI may diverge from the wishes of the Privatization Council in the following regard: KCCI contends that the new Performance Review Board should justify its legislative appropriation by

ing at least a **ten-fold return on investment at the end of three years** or be subject to automatic abolishment. In other words, if this new entity were to receive \$500,000 for three years without resulting in a cumulative savings of at least \$15 million in state spending, we believe it should be abolished.

This is one of two differences we have with the current version of SB 102. The Senate Commerce Committee was sympathetic to an outcomes-based test by which to judge the Review Board. However, they preferred the current language in Section 6 of the bill which requires simply a cost/benefit review by Kansas Inc. KCCI recommends the more objective and stringent test I mentioned above.

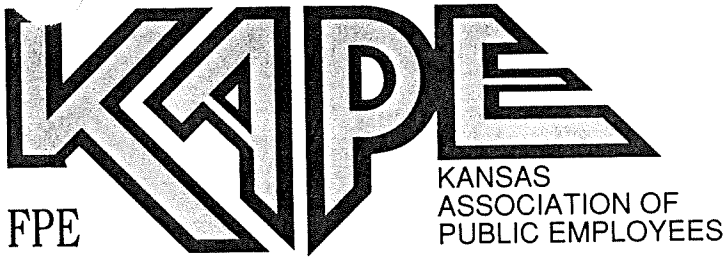
The second change we suggest to SB 102 is the reinstatement of rulemaking authority for the new Performance Review Board. The accounting standards and cost allocation rules that the Review Board will employ in doing PERM analyses are far too important to set as mere "guidelines" (see Section 4). Without enforceable regulations agencies may manipulate data, either deliberately or inadvertently, so as to inject bias into the evaluation process.

There is another bill, SB 101, which was requested by the Privatization Council and which is currently held in the House Appropriations Committee. KCCI supports the proposal in SB 101 to require the state Budget Division to perform a privatization review for all new state programs in excess of \$1 million. This proposal is relevant to the cost of the Review Board in SB 102 because this is how Michigan attempts to control the cost of its PERM analyses. If new programs are submitted for bids from the private sector, then Michigan has no need to conduct a full-blown PERM analysis of the new program in question. In effect, a state agency requesting authorization for the new program would have to bid against the private sector in order to win the contract. This eliminates the need to review service delivery options *after* the decision has already been made to perform the service in-house.



We believe these two bills will provide the state game plan for privatization which has been sorely lacking in Kansas. Greater privatization will save the state money and improve agency efficiency. It will also open tremendous opportunities for small businesses (who are particularly interested in this initiative) to apply their market-driven advantages for the benefit of the whole state.

KCCI therefore urges your favorable action upon SB 102. Thank you for your time and consideration.



1300 South Topeka Avenue Topeka, Kansas 66612 913-235-0262 Fax 913-235-3920

TESTIMONY OF SCOTT A. STONE  
Executive Director and Chief Counsel,  
Kansas Association of Public Employees (KAPE)

Before the Senate Business, Commerce and Labor Committee.

February 14, 1996, 9:00 a.m.  
State Capitol, Room 526-S

Public employee opinion on Senate Bill 102.

My name is Scott A. Stone and I am the Executive Director and Chief Counsel for the Kansas Association of Public Employees (KAPE). Members of the committee, I appreciate the opportunity to appear before you today to discuss Senate Bill 102. The legislature, just like the employees KAPE represents, desire efficient and effective state government. Senate Bill 102, as currently written, does not accomplish the goal of insuring governmental accountability throughout the privatization process. It only proposes to identify programs that should be privatized. KAPE will actively support the bill if certain protections for the taxpayers of this state are included.

Kansas public employees desire government to be efficient and effective. They take pride in their jobs whether we are talking about those who remove snow, work with mentally ill citizens or protect us from crime. Public employees are also taxpayers. As taxpayers, they, just like the rest of us demand that their money be spent both wisely and efficiently.

*House Business, Commerce & Labor*  
*2/15/96*  
*Attachment 2*



As state governments all over the country experiment with plans to privatize, downsize and become more like successful private sector businesses, taxpayers must be assured that their hard-earned tax dollars are being spent efficiently and effectively by government. Privatization is not always successful and the private sector has discovered that downsizing brings its own set of problems to efficiency. I am not here today to propose union legislation or state employee legislation. I am here to propose amendments to Senate Bill 102 that will help guarantee governmental accountability to the taxpayers.

To date, in Kansas, a large share of the budget is already privatized. That is, at least one billion in tax dollars are paid to private sector businesses. There are currently absolutely no laws governing such expenditures. There are no assurances that cost savings will even be a consideration, that competitive bidding will occur, or that conflicts of interest will be identified or reported.

With huge segments of state government under consideration for privatization in this and future years, assurances of accountability and efficiency are just good public policy. Senate Bill 102 is the perfect vehicle for such legislation. Senate Bill 102 was passed as amended by the Senate and sent to the House last year. The bill calls for a Performance Review Board to review state operations for privatization.

KAPE proposes, on behalf of Kansas taxpayers, the following general amendments to Senate Bill 102:

1. A critical addition to the proposed Review Board's duties should be to ensure governmental accountability in the bidding and awarding of contracts to the private sector

for the performance of public services. In order to achieve that goal, the following criteria must be considerations:

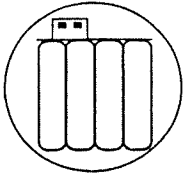
- (a) Bidding procedures, which are open and competitive, must be utilized before awarding of any state contract to private business;
- (b) No contract for services for privatized programs shall be let without there being a demonstrated savings of at least ONE CENT to Kansas taxpayers. Accepted cost accounting principles must be the deciding factor in determining if a demonstrated savings does exist;
- (c) Any proposal to privatize a public service must contain a plan for the reemployment or retirement assistance for those Kansas workers displaced by privatization;
- (d) Bidders for state contracts must submit a statement of all substantial interests. Conflicts of interest must be avoided to further the public perception of accountable state government; and
- (e) The economic impact of privatization on local communities must be calculated, communicated to local officials, and should be a consideration in the award of state contracts for public services.

2. The board should also be responsible for the ongoing review and tracking of the performance of the vendors who are awarded state contracts for public services. The board should be authorized to adopt binding rules and regulations in accordance with K.S.A. 77-415. Those rules and regulations should allow sanctions against contractors who fail to fulfill their contractual obligations.

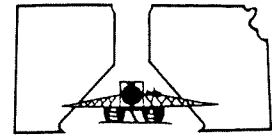
KAPE will always support legislation that strives for more governmental accountability to taxpayers.

I would like to thank the members of this committee for their time and consideration on this matter. I will gladly stand for any questions the committee-persons may have.

Thank you.



**Kansas Grain & Feed Association  
Kansas Fertilizer & Chemical Association**



Statement of the  
Kansas Grain and Feed Ass'n.  
and the  
Kansas Fertilizer and Chemical Ass'n.

to the

House Business, Commerce and  
Labor Committee

Regarding S.B. 102

Rep. Al Lane, Chair

*House Business, Commerce  
& Labor Committee  
2/15/96*



**KGFA & KFCA advocate public policies that advance a sound economic climate for agribusiness to grow and prosper so they may continue their integral role in providing Kansans and the world with the safest, most abundant supply of food and fiber.**

*Attachment 3*

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**The Kansas Grain and Feed Association .....**

**..... a voluntary state organization founded in 1896 providing governmental representation, educational opportunities and a wide variety of other services to the vast and indispensable grain and feed marketing system. The 1200 members of the KGFA include country elevators, subterminal and terminal elevators, feed manufacturers, grain merchandisers and allied industries such as railroads, grain exchanges, equipment manufacturers and insurance firms.**

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**The Kansas Fertilizer and Chemical Association.....**

**..... a voluntary professional association for those involved in the plant nutrient and crop protection industry. KFCA represents our nearly 500 members interests in legislative matters at all levels of government, as well as providing educational opportunities and business services. The industry is committed to professional development and business viability for the plant nutrient and crop protection retail industry.**

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Mr. Chairman and members of the Committee, I am Jamie Clover Adams appearing today on behalf of both the Kansas Grain and Feed Association (KGFA) and the Kansas Fertilizer and Chemical Association (KFCA). While the two agribusiness associations share staff, they have distinct memberships, separate boards of directors and association programs. KGFA's 1200 members include country elevators -- both independent and cooperative -- subterminal and terminal elevators, feed manufacturers, grain merchandisers and others who serve the industry. KFCA's nearly 500 members are primarily plant nutrient and crop protection retail dealers, but also include manufacturer's representatives, distribution firms, and equipment manufacturers. We appreciate this opportunity to appear in support of S.B. 102 as amended.

Both KGFA and KFCA have long standing policy supporting the creation of a review board as outlined in S.B. 102. Both association's Policy Handbooks outline member concerns about government competition with the private sector. Further both Association's philosophy on the role of government -- government should be involved where the market fails -- fits within the PERM concept.

The Kansas Performance Review Board (KPRB) will enable policymakers to focus on privatization opportunities and programs where government competes with the private sector. It will provide an opportunity to systematically and objectively gather the facts and evaluate state government services and programs. The KPRB will also serve an important function as a buffer against entrenched interests who have a stake in the continued existence of a program or way of doing business. With a focus on privatization opportunities and government competition in all areas, these interests will not be able to deflect criticism by pointing to another group or activity. Analysis by the KPRB also provides a somewhat unintended benefit -- a performance review of government programs. In many areas of state government today, tax dollars are spent but we never have a clear measure of what taxpayers are getting for their investment. A KPRB review may answer this question.

KFCA members have experienced government competition firsthand. The Noxious Weed Law requires counties to subsidize the cost of weed control chemicals to landowners. This state law also mandates that counties sell



agricultural chemicals directly to landowners to eradicate and control noxious weeds. These chemical sales are in direct competition with local dealers. The Noxious Weed Law was written in 1937, when only Sodium Chloriate was available as a ground sterilant for field bindweed. This was before there was an established distribution network for agricultural chemicals, in fact, before chemical weed control was heard of. The basic premise of the sale of chemicals by the counties has not changed since and has not taken into consideration the evolution of an industry filled with sophisticated chemicals and sophisticated application professionals. Association members do not object to the subsidization of weed control chemicals but do object to county government competing with private business.

The Association has attempted to bring this issue to the Legislature on several occasions only to have the debate move away from the central issue of government competition with private business and disintegrate into name calling and turf battles. An entity such as the KPRB could objectively examine the facts and make a clear and concise recommendation to the Legislature based on those facts. In this vein, **KFCA asks that the definition of governmental function found on page 3, line 37-40 be amended to include not only agencies of state government but state statues as well.**

The grain industry may also offer an opportunity for privatization. The January 20, 1995 Kansas Council on Privatization report lists (page 47) the Kansas Grain Inspection Department (KGID) as a possible candidate for privatization. KGFA believes that privatization of the grain inspection functions of KGID may be necessary if increased pressure to provide quality service at a reasonable price cannot be addressed under the current state run system. However, this is a complex issue that touches the very heart of the industry and directly impacts the orderly sale and movement of grain. Conservatively speaking, more than 1 billion bushels of grain are raised in Kansas each year at a value of approximately \$3.25 billion. Consequently, any move to privatize this function should be carefully analyzed and considered. The Board established in S.B. 102 can accomplish this task.

Some may question the wisdom of S.B. 102 given the recent revelations regarding the weights and measures program at the Kansas Department of Agriculture (KDA). KGFA and KFCA have been intimately involved in the many facets of this issue since early last fall. It is our belief that the bulk of the problems were caused by the lack of oversight and enforcement of the law, as well as virtually no consideration of program and system design to insure device accuracy. Concerns were allegedly raised by KDA employees in early 1990. Had the Board established in S.B. 102 been in place in 1986 when this program was first privatized, it is likely that these problems could have been nipped in the bud or at least lessened. The analysis of the program before privatization would have addressed monitoring, system design, enforcement, etc. Further, lines 37-39 on page 2 of S.B. 102 give employees the opportunity to ask for a review of a program that has been privatized. It could have been an avenue for weights and measures employees to bring their concerns to light or at least their union could have requested an analysis of the issue.

Another concern raised by some opponents is that S.B. 102 is too costly given the "doing more with less" philosophy advocated by the Graves administration and the citizens of Kansas. KGFA and KFCA would argue that it is money well spent to insure government services are delivered in the most cost-effective manner possible and that the state continue to consider the impact of government services on jobs or taxes when government competes with private industry.

In order to provide government services more efficiently, improve delivery and eliminate government competition, the state must undertake a comprehensive review of state programs. Without this central focus, only limited progress will be made in a hodgepodge manner. KGFA and KFCA support the formation of the KPRB to promote efficiency and improved delivery of state services, as well as to curtail government competition with private business. I thank you for this opportunity to express our views and would stand for any questions.

State of Kansas

Bill Graves



Governor

Department of Health and Environment

James J. O'Connell, Secretary

14 February 1996

The Honorable Dale Swenson  
House of Representatives  
State House - Room 174 W  
Topeka KS 66612

Dear Representative Swenson:

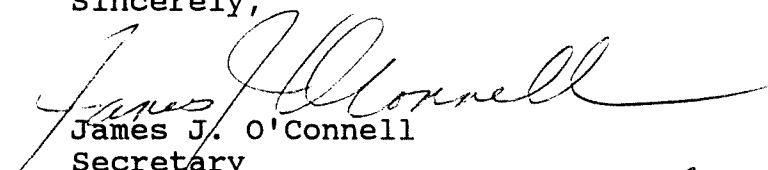
This letter is in follow up to our discussion regarding proposed revisions to regulations related to testing for drugs of abuse. As you know, a public hearing was held on these revisions on January 11, 1996.

At bottom, the revised regulations will essentially adopt and incorporate federal standards, in the main CLIA '88 requirements, instead of the existing more stringent requirements. In consideration of concerns expressed about the appropriateness of using screening tests as a basis for employment related decisions, KDHE intends to add language which will qualify screening test results under the regulation as insufficient for employment related actions without a confirming test being completed.

With respect to requirements for training experience and other standards, the regulations will generally adopt the CLIA '88 standards which are widely accepted for clinical laboratory purposes.

Please let me know if you need further information.

Sincerely,

  
James J. O'Connell  
Secretary

JJO:mac

*House Business, Commerce  
& Labor Committee*

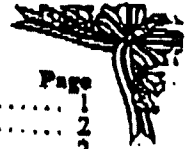
*2/15/96*

*Attachment 4*



# 1995 "WRAP" UP

*Kansas Health and Environmental Laboratory  
Laboratory Improvement Section  
Medical Laboratory Program Office*



	Page
<b>In This Issue:</b>	
KDHE Notice of Hearing on Proposed Administrative Regulations .....	1
Quality Assurance in the Physician Office Laboratory - Standing Orders .....	2
How and Where is US DOT Urine Drug Testing Done? .....	3
Transfusion Services in Hospitals .....	4
CLIA Clips .....	5
Upcoming Education Opportunities .....	5
Problems with Proficiency Testing in 1995 Reporting .....	5
KSCLS/CLMA Annual Meeting .....	5
Recalled Strips!!! .....	6
Flow Chart for Drugs of Abuse Testing Under Current Regulations .....	6
How the Proposed Regulations Will Change Current Requirements .....	7
Give Yourself the Gift of Health .....	7
Proposed Revisions to Kansas Regulations .....	8
Attachment: Standing Order Form .....	9



## **KDHE NOTICE OF HEARING ON PROPOSED ADMINISTRATIVE REGULATIONS** *Extracted from the November 2, 1995, Kansas Register*

### **LEGISLATIVE** *forum*



A public hearing will be conducted at 1:00 P.M. Thursday, January 11, 1996 at the Forbes Field Air Passenger terminal conference room in Topeka. This meeting

will consider the adoption of proposed changes in existing rules and regulations.

These regulations are proposed for adoption on a permanent basis. A short summary of the content follows. The proposed text of KAR 28-33-12 and KAR 28-34-11 can be obtained in two formats. One format contains only the new text and the other format contains both the old and the new text.

Kar 28-33-1 revokes the KAR in entirety. The 1994 Legislature removed the authority of KDHE to regulate tests for syphilis because that authority is duplicated in the 43 CFR Part 493, as in effect on October 1, 1994 [CLIA'88].

KAR 28-33-11 revokes the KAR in entirety. The 1994 Legislature removed the authority of KDHE to regulate tests for human immunodeficiency viruses [HIV] because that authority is duplicated in the 43 CFR Part 493.

KAR 28-33-12 prescribes the minimum standards for laboratories in the state of Kansas to perform drugs of abuse testing. This simplifies and aligns state regulations to those of 43 CFR Part 493.

KAR 28-34-11 modifies, clarifies and aligns personnel qualifications, proficiency testing in the state hospital regulations with those of the federal regulations 43 CFR Part 493. Such an alignment simplifies operations and reduces regulatory cost for hospitals and their laboratories in Kansas.

There is no measurable increased economic impact on any agency, state, county or local units of government, by these regulations. In fact, the regulations might decrease costs due by the elimination of duplicative requirements between state and federal requirements included in the regulations. These regulations simplify the regulation of laboratory testing in the state.

This 60-day notice of the public hearing shall constitute a public comment period for the purpose of considering adoption of proposed changes in existing rule and regulations. (Note: there will be approximately 30 days left to the comment period by the time this mailing reaches you.) All interested parties may submit written comments to Stanley P. Sutton, Chief, Laboratory Improvement Program, ~~Kansas~~ Health and Environmental Laboratory, Building 740, Forbes Field, Topeka, Kansas, 66620-0001.

All parties will be given a reasonable opportunity to present their views orally on the adoption of the revised regulation during the hearing. It may be necessary to request each participant to limit an oral presentation to five minutes.

Any individual with a disability may request accommodation in order to participate in the public hearing and may request the proposed regulations and fiscal impact statements in an accessible format. Requests for accommodation to participate in the hearing should be made at least five working days in advance of the hearing by contacting: Stanley P. Sutton at (913) 296-1640.

James J. O'Connell, Secretary

4-2

## 1996 PROFESSIONAL MEETINGS

### KSCLSVCLMA IN LAWRENCE KS. AT THE HOLIDAY INN, APRIL 10, 11 & 12. TOUCHING TOMORROW TODAY

There will be exciting entertainment, educational workshops, intriguing case studies, Physician Office Laboratory lectures, general and managerial topics, and updates on legislation. Registration information and preliminary schedules will be coming to you soon.

Support professional organizations. It is a way to keep current and have a voice in the direction you think our profession should take. [Information is enclosed for you to post in your facility]

KMT SPRING MEETING will be held at the Southwest Medical Center, Conf. Room 2, Liberal, Kansas on April 27, 1996. The focus will be on Microbiology and Parasitology, Therapeutic Drug levels Peak and Trough and Medical records: Special coding for Medicare Billing. Contact: Richard Nordak, 316-624-1651

KMT FALL MEETING will be held September 28, 1996 in Kansas City, Kansas. Blood Bank issues have been projected as the focus of that meeting. The contact person is Joana Gauwitz, 913-432-7208.

### Recalled strips!!!!!!

The following type of information should alert all laboratorians to the importance of Quality Control in the Waived tests. Any time a lot is bad, strips have been stored incorrectly, instruments are damaged, dirty or contaminated, the controls will tell us. Any compromise in test accuracy and therefore in the quality of patient care must be avoided by using Good Laboratory Practice Techniques.

Blood glucose strips made by a California company are dangerously inaccurate and facilities that are using them should discard them. The strips which are used with the Glucometer 3 and One Touch brand meters, were made by Diagnostic Solutions Inc. Government and Company Officials agree that the strips produced in 1993 and 1994 are defective. The defective Lots begin with numbers: 30, 31, 41 & 43. The strips were distributed under the following brand names;

Quick Check ONE	Quick check 3
Relief Plus	Value-Rite
Family Pharmacy	MK Medical
Perry Health Care	Brooks
Top Care	Full Value
Health Mart	Brite Life
Loags	Giant Eagle
Qualitest	Good Neighbor

Customers who wish to have their defective strips replaced free of charge may contact Diagnostic Solutions at 1-800-446-4374

## FLOW CHART FOR DRUGS OF ABUSE TESTING UNDER THE CURRENT REGULATIONS

By Stanley Simon, Chief Laboratory Improvement Section, KHEL

Complying with state and federal regulations in the area of drug testing can be very confusing. We have created the following decision flow chart to assist laboratorians in choosing the correct laboratory for the "NIDA five". Compliance is simplified by asking the following questions before the specimen or sample is taken.

- A: WHO is using the test result(s)?
- B: WHAT is the status of the subject being tested?
- C: WHAT test was ordered?
- D: WHY or HOW will the result of the test be used?  
A, B, C and D determine
- E: WHERE is the test to be performed?

A: Users of drug tests could be:

1. Physicians
2. Kansas Department of Corrections
3. The subject being tested
4. An employer or potential employer
5. Kansas Department of Revenue (issuing commercial drivers licenses)
6. Interstate Commerce Commission / Federal Department of Transportation

B: The status of the test subject could be:

1. Medical patient being diagnosed or treated
2. A convicted criminal
3. Kansas citizen
4. A commercial motor vehicle operator license holder or applicant
5. A company employee
6. A potential job applicant
7. Member of Armed Forces or Federal Employee

C: The test ordered could be:

1. Amphetamine
2. Benzoyl ecgonine (cocaine metabolite)
3. Opiate
4. Phencyclidine
5. THC



D: The results of the test could be used for:

1. Treatment and diagnosis in a physicians office
2. Loss of privileges by inmate in a penal facility
3. Revocation of parole
4. Enrollment in a employee assistance program
5. Discharge from employment that does not require a commercial drivers license
6. Employment denial for a position that does not require a commercial drivers license
7. Revocation of a commercial drivers license

4-3

10-12-95

Kansas Department of Health and Environment  
Amended Permanent Regulations

28-33-12. General Provisions (a) Definitions.

(1) "Department" means the department of health and environment.

(2) "Division" means the division of laboratories and research of the Kansas department of health and environment.

(3) "Laboratory director" means the person responsible for the professional, administrative, organizational and educational duties of a laboratory.

(4) "Test for controlled substance" means a procedure used to evaluate a specimen for compounds identified in schedule schedules I and II of the Kansas Uniform Controlled Substances Act, K.S.A. 65-4105 and 65-4107 and amendments thereto. These tests shall not include testing performed in a recreational facility solely for the purpose of internal management of a facility.

Dec 20 95 11:48 AM 003 P.04

TEL: 913-296-1641

KHFL

pages 29908-29931, Feb 15, 1994 &  
Federal Register 49 CFR Part 40

**Most cases:**

Today with the KAR currently in effect, E.4—a KIDHE approved laboratory with chain of custody is required or E.5—a Substance Abuse and Mental Health Services Administration (SAMSA formerly NIDA) Laboratory with chain of custody is also permitted.

If proposed regulations take effect (about March 1996) then E.2—a CLIA laboratory with KIDHE approval is required or E.5—a Substance Abuse and Mental Health Services Administration (SAMSA formerly NIDA) Laboratory with chain of custody is also permitted.

**\*Only known exceptions**

Physicians treating and diagnosing patients in their offices are regulated by E.1 or E.3. A Substance Abuse and Mental Health Services Administration (SAMSA formerly NIDA) Laboratory with chain of custody is also permitted.

Kansas Department of Corrections holding persons in custody and controlling privileges in a penal facility are regulated by E.3, or E.5.

Military, federal transportation employees and commercial vehicle operators or applicants are regulated by E.5, only.

**HOW THE PROPOSED REGULATIONS WILL CHANGE THE CURRENT REQUIREMENTS.**

- Laboratories submitting proof of current CLIA certification for toxicology will automatically be granted Kansas approval. No inspection, in addition to the CLIA inspection, will be required. Laboratories unable to obtain CLIA certification, because all tests performed by the lab are exempt from CLIA regulations (forensic, pre-employment, etc), may apply for Kansas approval. An on-site inspection using the current CLIA regulations will be required for these facilities.
- SAMSA laboratories submitting proof of approval or conditional approval by SAMSA will automatically be granted Kansas approval. No inspection will be required.

are the same those for CLIA. A BS program general supervisor with 6 years experience would no longer be required.

- On site supervision would be required only for: high school graduates performing high complexity tests, if the individual performing tests was hired after April 24, 1995.
- While physician office laboratories would continue to be exempt from the Kansas regulations, the labs would be required to comply with CLIA regulations if the tests were performed for diagnosis and treatment.



**GIVE YOURSELF THE GIFT OF HEALTH**

*From the Cancer Control Program*

It is estimated that 4,800 deaths will result from cervical cancer in 1995. The mortality rate is more than twice as high for black women as for white women. Cancer of the uterine cervix is one of the more common occurring cancers in women. An estimated 15,800 invasive and 65,00 carcinoma in situ cases will be diagnosed in 1995. In Kansas in 1992, there were 255 deaths related to cervical cancer. Regular use of the Pap test to screen for cervical cancer could reduce the risk of death as much as 75%.

As part of the national program to reduce mortality from cancer, the Kansas Breast and Cervical Cancer Initiative (KBCCI), through the Bureau of Chronic Disease and Health Promotion received funds from the Centers for Disease Control and Prevention (CDC) to provide quality screening services by skilled health care providers throughout Kansas. Through this initiative, program providers will offer eligible women free breast and cervical cancer screening tests.

4-4

~~... performed in facilities operated by the Kansas  
social and rehabilitation services for the care, custody and  
control of juveniles.~~

(b) (1) "screening test" means a sensitive, rapid test  
designed to eliminate true negative specimens from further  
consideration.

~~(c) "Positive screening test" means a screening test that  
exceeds the threshold value for the test method employed.~~

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**APPROVED**  
ATTORNEY GENERAL

by JLS 10/19/55 A.G.

**E. The test can or must be performed in:**

1. Physicians' office, on the physician's own patients
2. CLIA laboratory with KDHE approval
3. Department of Corrections urine screening lab  
Refer to: KSA 65-1, 107, KAR 28-33-12 (1996), and 42 CFR Part 493
4. A KDHE approved laboratory with chain of custody  
Refer to: KAR 28-33-12 (1991)
5. A Substance Abuse and Mental Health Services Administration (SAMSA formerly NIDA) Laboratory with chain of custody  
Refer to: *Federal Register* Thurs June 9, 1994, pages 29908-29931, Feb 15, 1994 & *Federal Register* 49 CFR Part 40

**Most cases\*:**

Today with the KAR currently in effect, E.4—a KDHE approved laboratory with chain of custody is required or E.5—a Substance Abuse and Mental Health Services Administration (SAMSA formerly NIDA) Laboratory with chain of custody is also permitted.

IF proposed regulations take effect (about March 1996) then E.2—a CLIA laboratory with KDHE approval is required or E.5—a Substance Abuse and Mental Health Services Administration (SAMSA formerly NIDA) Laboratory with chain of custody is also permitted.

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**HOW THE PROPOSED REGULATIONS WILL CHANGE THE CURRENT REQUIREMENTS.**

- Laboratories submitting proof of current CLIA certification for toxicology will automatically be granted Kansas approval. No inspection, in addition to the CLIA inspection, will be required. Laboratories unable to obtain CLIA certification, because all tests performed by the lab are exempt from CLIA regulations (forensic, pre-employment, etc), may apply for Kansas approval. An on-site inspection using the current CLIA regulations will be required for these facilities.
- SAMSA laboratories submitting proof of approval or conditional approval by SAMSA will automatically be granted Kansas approval. No inspection will be required.

• Laboratories must perform controls in accordance with CLIA regulations. Controls materials no longer must be "at or near the cutoff". For example, the internal procedural controls utilized by systems such as TRIAGE, would be considered acceptable.

• Confirmation of positive tests will no longer be required by the Kansas drugs of abuse regulations.

• Chain of custody will no longer be required by the Kansas drugs of abuse regulations.

• The education and training requirements for personnel are the same as those for CLIA. A BS degreed general supervisor with 6 years experience would no longer be required.

• On site supervision would be required only for: high school graduates performing high complexity tests, if the individual performing tests was hired after April 24, 1995.

• While physician office laboratories would continue to be exempt from the Kansas regulations, the labs would be required to comply with CLIA regulations if the tests were performed for diagnosis and treatment.



**GIVE YOURSELF THE GIFT OF HEALTH**

*From the Cancer Control Program*

It is estimated that 4,800 deaths will result from cervical cancer in 1995. The mortality rate is more than twice as high for black women as for white women. Cancer of the uterine cervix is one of the more common occurring cancers in women. An estimated 15,800 invasive and 65,00 carcinoma in situ cases will be diagnosed in 1995. In Kansas in 1992, there were 255 deaths related to cervical cancer. Regular use of the Pap test to screen for cervical cancer could reduce the risk of death as much as 75%.

As part of the national program to reduce mortality from cancer, the Kansas Breast and Cervical Cancer Initiative (KECCI), through the Bureau of Chronic Disease and Health Promotion received funds from the Centers for Disease Control and Prevention (CDC) to provide quality screening services by skilled health care providers throughout Kansas. Through this initiative, program providers will offer eligible women free breast and cervical cancer screening tests.

4-6



Kansas Department of Health and Environment

K.A.R. 28-33-12

Page 2

~~(7) "Threshold" means a set level of defined drug or metabolite concentration; a number at or above this level indicates a positive result and a number below indicates a negative result.~~

~~(8) "Detection limits" means the minimal concentration of a drug or metabolite that can be observed by the test method employed.~~

~~(9) "Confirmatory test" means a gas chromatography/mass spectrometry analytical procedure used to specifically identify the presence of a drug or drug metabolite. Quantitative confirmation results at the threshold levels defined in the federal register, VOL 52, No 69, April 11, 1988, are adopted by reference.~~

(b) Approval procedure. Each laboratory seeking approval of the department to perform tests for controlled substances as defined in ~~schedule~~ schedules I and II of the Kansas uniform controlled substance substances act, K.S.A. 65-4105, 65-4107 and amendments thereto shall:

(1) submit on a completed application on standard forms furnished by the division;

~~(2) successfully meet the criteria of inspection and;~~ submit a copy of the most recently completed on-site evaluation report by a federal agency if available;

~~(3) successfully participate in an approved proficiency testing program;~~ submit documentation describing all analytical methods used; and

~~(4) submit documentation identifying the approved laboratory used to confirm the positive screening tests;~~ if not done on-site.

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**APPROVED**  
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By QLE 10/19/95 Atty.

Kansas Department of Health and Environment

K.A.R. 28-33-12  
Page 3

(c) Upon receipt of a laboratory's application for approval, the laboratory shall be inspected by a representative of the division. ~~The laboratory shall be evaluated to determine compliance with following criteria: 42 CFR Part 493 as in effect on October 1, 1994, which is hereby adopted by reference. Laboratories which submit proof of certification or approval by a federal, state or independent agency having standards that meet or exceed the requirements of 42 CFR Part 493 as in effect on October 1, 1994, shall be exempt from initial inspection.~~

~~(1) Screening test methods for controlled substances shall only include gas chromatography, thin layer chromatography, or immunoassay. Screening test methods shall screen individually for the following five classes of drugs: marijuana metabolites, cocaine metabolites, opiates, phenylidines, and amphetamines.~~

~~(2) Each test procedure, shall be performed in accordance with a written test protocol. The protocol shall be approved by the laboratory director. The protocol shall require that blank specimens containing no drug and specimens fortified with known analyte concentrations are included with each batch of specimens screened. At least one fortified control must be at or near the threshold cut-off. Procedures shall insure that carry-over between specimens does not occur. Detection limits for each test method shall be defined.~~

~~(3) A laboratory quality assurance program shall be developed and shall contain the following components:~~

~~(A) requirements for sample collection which adhere to the~~

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ATTORNEY GENERAL

BY QTB 10/19/95

DEPT. OF ADMINISTRATIVE SERVICES  
OCT 1 1995  
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4-8

Kansas Department of Health and Environment

K.A.R. 28-33-12  
Page 4

~~division's criteria for sample collection or a signed statement that the specimen was properly collected according to these criteria if collection is at a location other than the laboratory performing the test;~~

\* ~~(B) identification and chain of custody procedures for specimens;~~

\* ~~(C) procedures for assuring the security of the testing area;~~

\* ~~(D) confirmation procedures for all positive screening tests unless evidenced by documentation that:~~

~~(i) testing is performed for medical purposes on a hospital inpatient or patient currently undergoing treatment in a hospital emergency room;~~

~~(ii) testing is performed on a specimen from an individual currently under treatment for substance abuse; or~~

~~(iii) testing is performed for a correctional facility solely for the purpose of internal management of persons as defined in regulations promulgated by the Secretary of Corrections;~~

~~(E) stated policies that only confirmed positives will be reported as positive;~~

~~(F) procedures for an internal quality control program that monitors the accuracy and precision of laboratory performance on a daily basis;~~

~~(G) procedures for an instrument maintenance program;~~

~~(H) provision for retention of all confirmed positive specimens for at least one year;~~

~~(I) policies requiring disposal of <sup>10604</sup> OGI medical wastes in~~

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by JKL 10/19/95

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4-9

Kansas Department of Health and Environment

K.A.R. 28-33-12  
Page 5

~~accordance with K.A.R. 28-33-37, and~~

~~(3) documentation of adherence to the foregoing policies and procedures.~~

~~(4) Equipment required by the test procedure shall meet the manufacturer's specifications.~~

~~(5) Reagents, controls and any other required materials for the procedure being performed shall be available and shall be stored according to the manufacturer's specifications.~~

~~(6) Sufficient work space shall be provided to safely perform the tests.~~

~~(4) During the inspection, one or more persons may be required to demonstrate performance of the procedure under consideration.~~

~~(c) (d) Follow-up Inspections of approved laboratories may be conducted by the division at any time. Routine biennial inspections will be conducted in all approved laboratories within the state which do not submit documentation of certification or approval by a federal, state, or independent agency having standards that meet or exceed the requirements of 42 CFR Part 493, as in effect on October 1, 1994.~~

~~(f) All laboratory personnel shall meet the following verified standards and credentials:~~

~~(1) Each laboratory director shall:~~

~~(A) Be a physician with additional training in pharmacology, toxicology, clinical pathology or forensic pathology, or~~

~~(B) hold an earned doctoral degree from an accredited~~

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ATTORNEY GENERAL

by JTB 10/19/95

4-10

Kansas Department of Health and Environment

K.A.R. 28-33-12  
Page 6

~~institution in a chemical or biological science with at least two years of laboratory experience in analytical toxicology.~~

~~(2) If the laboratory director does not directly supervise the analysts, a supervisor shall do so. The supervisor shall have at least a bachelors degree in chemistry, biological sciences or medical technology and shall have at least six years of experience in chemistry or analytic toxicology.~~

~~(3) The laboratory director shall assure that each analyst has been adequately trained in each test procedure being performed. Documentation of the training shall be maintained and available at the time of inspection.~~

~~(4) Records of each test result shall be maintained for at least two years.~~

~~(h) Proficiency program. Each laboratory shall subscribe to and participate in an approved external proficiency testing program for substance abuse drugs as defined by 42 CFR 405.1010(e), as in effect on October 1, 1994, which is hereby adopted by reference. A list of approved programs shall be available from the division.~~

~~(1) Each laboratory seeking approval shall have successfully participated in one challenge of proficiency tests before approval is granted.~~

~~(2) The results of each laboratory's performance in the proficiency program shall be sent directly from the approved program to the division.~~

~~(3) Unsatisfactory performance in an approved external proficiency program, as determined by the division, or failure to~~

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4-11

Kansas Department of Health and Environment

K.A.R. 28-33-12

Page 7

~~participate shall constitute reason for denying or revoking approval. Criteria for acceptable performance in a proficiency program shall be available from the division.~~

~~(1)(a)~~ Laboratories located both outside and inside of the state of Kansas shall be added to the approved list providing that the laboratory is certified or approved by a federal, state, or independent agency having equivalent or more stringent standards and meets that meet or exceed all the requirements of the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" on pages 29916 through page 29931 of the federal register vol. 59 No. 110 reissued June 9, 1994, which is hereby adopted by reference denoted herein.

(f) The laboratories shall submit the following documentation for evaluation by the department:

- (1) Report of the most recently completed on-site evaluation;
- (2) ~~Proficiency test results from the most recently completed proficiency challenge;~~

~~(3) Personnel qualifications;~~

(4) All analytical methods utilized;

(5)(1) Standards on which current certification is based; and

(6)(4) Any other documentation as deemed necessary by the department.

~~(7)(g)~~ List of approved laboratories. A current list of approved laboratories shall be maintained by the department. Laboratories shall be approved ~~annually~~ biennially.

~~(8)(h)~~ Removal from approved list.

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ATTORNEY GENERAL

*OKS 10/19/95*

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APPROVED BY [unclear]

4-12

Kansas Department of Health and Environment

K.A.R. 28-33-12  
Page 8

(1) A laboratory shall be removed from the approved list after voluntarily terminating or after notice and an opportunity for a hearing. All orders of termination shall become final 15 days after service unless an appeal is ~~filled~~ filed in writing. All appeals shall be conducted according to ~~Chap. 77, Art. 5, Kansas statutes annotated~~ the Kansas administrative procedure act, K.S.A. 77-501 et seq. and amendments thereto.

(2) Notification of removal of a laboratory from the approved list shall be made by certified mail. (Authorized by K.S.A. 1994 Supp. 65-1,107; and implementing K.S.A. 1988 1994 Supp. 65-1,107 and K.S.A. 1994 Supp. 65-1,108; effective Oct. 2, 1989; amended p-  
\_\_\_\_\_.)

DEPT. OF ADMINISTRATIVE

OCT 1 1995

APPROVED BY SD

**APPROVED**  
ATTORNEY GENERAL

*[Signature]* 10/19/95  
Asst.

4-13



D O C T O R S   W E B E R ,   P A L M E R   &   M A C Y

CHARTERED

**TESTIMONY IN SUPPORT OF HB 2847  
FEBRUARY 14, 1996**

RESPONSE BY: DRS. WEBER, PALMER & MACY, CHARTERED  
338 N. FRONT ST.  
SALINA, KS 67401  
913-823-7201

SPOKESMAN: JACK W. ZAUN PH.D

1. Drs. Weber, Palmer and Macy would like to thank this committee for the opportunity to speak in support of the proposed legislation submitted by representative Swenson. We would also like to thank representative Swenson for the invitation.

We feel that HB 2847 is absolutely necessary for passage in order to protect employees, prospective employees and companies needing drug testing to be performed.

2. Representative Swenson has sponsored this bill in order to counter the administrative changes to KAR 28-33-12 submitted by the Kansas Department of Health and Environment as amended permanent regulations on October 1, 1995 and approved by the Kansas Attorney General on October 19, 1995.

3. The effect of the administrative changes by KDHE is to remove all regulations for employment based drug testing. The changes effectively defer to the Clinical Laboratory Improvement Act of 1988/1968 for oversight.

4. CLIA regulations are written to specifically exempt any employment based drug testing unless used for medical diagnosis or treatment. The only case where an employee being drug tested would be medically

*House Business, Commerce  
& Labor Committee  
2/15/96*



relevant is a return-to-duty test ordered by a Substance Abuse Professional during a course of treatment for drug usage.

All other employment drug testing is exempted from regulation by CLIA/HHS and subsequently not regulated by KDHE under the revised regulations.

5. The major positive effects of HB 2847 are as follows:
  - A. The BILL provides that employment base drug testing be done in a laboratory that meets standards for testing that are very similar to those in the previous regulations.
  - B. The BILL exempts hospital emergency rooms and hospital-in-patients from complying with the regulations where the tests are for medical purposes. Other exemptions include Department of Corrections facilities, KBI and drug treatment facilities.
  - C. The BILL requires out-of-state laboratories to meet the same standards for testing as in state laboratories and requires those facilities to provide documentation of their compliance and certification.
  - D. The BILL protects a prospective employee's opportunity for employment or a current employee's job to not be jeopardized due to a false positive screen.

There are numerous over-the-counter non-prescription medications that cause currently used screening tests to be read as positive. If not submitted for confirmation, the results would be interpreted as positive. These false positives would result in many people being identified as using methamphetamine, amphetamine, PCP and morphine (heroin) and many losing or being denied a job.

Screening-only tests do not allow legally prescribed medication to be identified. Many prescription medication can also cause a urine sample to be reported as a false positive.

- E. The BILL protects employers from lawsuits when employee's are wrongly terminated due to a false positive drug screen or when prospective employee's are denied employment for the same reason.
  - F. The BILL helps protects employers and employees by having a testing laboratory performing drug testing staffed with professionally trained employees and having a Director trained and knowledgeable about the toxicology of drugs and methods for their measurement.
6. Suggestions for improvements to the HB 2847.
- A. Exempt laboratories from KDHE inspections when certified by the National Laboratory Certification Program as a SAMHSA lab or when certified by the College of American Pathology's Forensic Urine Drug Testing program and the laboratory provides evidence of current certification.  
  
This would reduce the number of inspections needed.
  - B. Confirmations of the screening test must be performed using Gas Chromatography/Mass Spectrometry (GC/MS).  
  
GC/MS is the nationally accepted method for confirmations of nearly all drugs of abuse. If a result is challenged in court, the GC/MS result is highly defensible.
  - C. Results of screening and confirmations of urine samples must be held strictly confidential. Procedures to assure confidentiality must be addressed in the Standard Operating Procedures of the laboratory.

Drs Weber, Palmer and Macy would like to thank you for this opportunity to respond regarding this matter. We would like to assure you we are available to help in any manner regarding these issues.



LARRY WELCH  
DIRECTOR

KANSAS BUREAU OF INVESTIGATION  
DIVISION OF THE OFFICE OF ATTORNEY GENERAL  
STATE OF KANSAS



CARLA J. STOVALL  
ATTORNEY GENERAL

TESTIMONY  
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL  
KANSAS BUREAU OF INVESTIGATION  
BEFORE THE HOUSE, BUSINESS, COMMERCE & LABOR COMMITTEE  
IN OPPOSITION TO HOUSE BILL 2847  
FEBRUARY 15, 1996

Chairman Lane and Members of the Committee:

I appear today on behalf of the Kansas Bureau of Investigation (KBI) and its Director Larry Welch with some concerns regarding House Bill 2847.

As currently drafted, the procedures and requirements set out in HB 2847 testing controlled substances in schedules I & II of the Uniform Controlled Substances Act, would apply to forensic laboratories such as those operated by the KBI, and the requirements in the bill are frequently either inadequate or unnecessary for use by forensic labs in the presentation of evidence in court.

If the intent was to regulate private hospital labs that are doing drug testing of employees and not forensic labs, then we would suggest this be clarified by the balloon amendment attached to this testimony, including forensic laboratories in the exception contained in new Section 1(a)(4). However, if the intent was to have the Department of Health and Environment regulate the KBI lab, we would stringently oppose this legislation.

Current law, in particular K.S.A. 65-1,107, provides for Health and Environment to establish rules and regulations on the procedures, qualification standards and testing of equipment utilized to test for controlled substances. This has been an excellent relationship as under cross-examination we can point to Health and Environment an independent, non-criminal justice agency as setting the standards and ensuring quality results.

However, HB 2847 as drafted would require the KBI laboratory to seek approval from the Department of Health and Environment and meet criteria which are occasionally not relevant and

*House Business, Commerce  
& Labor Committee*

1620 TYLER TOPEKA, KANSAS 66612  
(913) 296-8200 FAX: 296-6781

*2/15/96*

*Attachment 6*

frequently inadequate to meet the heavy burden faced by a forensic laboratory in testing evidence that is going to be subject to cross-examination in court. For instance, confirmatory tests are defined as utilizing gas chromatography and mass spectrometry, but as certain drugs are best identified using other technology such as infra red spectra photography, LCMS or CEMS. The statute would require us to utilize inferior technology, which frankly, won't cut it in the courtroom.

Long before the O.J. Simpson trial demonstrated it, forensic scientists are subject to the most rigorous cross-examination and second guessing imaginable by both defense attorneys and their hired experts. This bill as drafted does not improve on our science or our procedures, but would, in fact, impair it.

Other problems with the bill would include: the coverage of only schedule I and II, the requirement for daily quality control programs since our lab normally does not operate on Saturdays and Sundays; and provision for retention of all confirmed positive specimens for at least one year when normally the controlled substances are required in court for admission as evidence within weeks. Subsection (f)1 requires each laboratory director to be either a physician, with additional training in pharmacology, toxicology, clinical pathology or forensic pathology, or a Ph.D. in chemical or biological science, with two years laboratory experience in analytical toxicology. I suppose it would be nice to be able to hire personnel with such criteria, but such qualifications are practically not necessary and fiscally impossible.

I am not qualified to discuss all the scientific problems with this bill as it applies to the KBI laboratory. If the Committee wishes to get into specifics, I have with me Dwain Worley from our chemistry section and Larry Mann from our toxicology section to handle the scientific questions.

The basic concern of the KBI is that this legislation should not apply to forensic laboratories. The KBI has no position as to applicability to other types of laboratories. We would request that the balloon be adopted as an amendment to this bill, or else the bill be reported out unfavorably. Thanks for your time and consideration. We would be happy to answer questions.

## HOUSE BILL No. 2847

By Representative Swenson

2-5

9 AN ACT concerning drug testing; relating to certain rules and regulations  
10 of the department of health and environment pertaining thereto;  
11 amending K.S.A. 1995 Supp. 65-1,107 and repealing the existing  
12 section.

13  
14 *Be it enacted by the Legislature of the State of Kansas:*

15 New Section 1. (a) As used in this act:

16 (1) "Department" means the department of health and environment.

17 (2) "Division" means the division of laboratories and research of the  
18 department of health and environment.

19 (3) "Laboratory director" means the person responsible for the pro-  
20 fessional, administrative, organizational and educational duties of a lab-  
21 oratory.

22 (4) "Test for controlled substance" means a procedure to evaluate a  
23 specimen for compounds identified in schedules I and II of the uniform  
24 controlled substance act, K.S.A. 65-4105 and 65- 4107, and amendments  
25 thereto. These tests shall not include testing performed in a correctional  
26 facility solely for the purpose of internal management of persons in cus-  
27 tody, or testing performed in facilities operated by the department of  
28 social and rehabilitation services for the care, custody and control of ju-  
29 veniles.

30 (5) "Screening test" means a sensitive, rapid test designed to elimi-  
31 nate true negative specimens from further consideration.

32 (6) "Positive screening test" means a screening test that exceeds the  
33 threshold value for the test method employed.

34 (7) "Threshold" means a set level of defined drug or metabolite con-  
35 centration; a number at or above this level indicates a positive result and  
36 a number below indicates a negative result.

37 (8) "Detection limits" mean the minimal concentration of a drug or  
38 metabolite that can be observed by the test method employed.

39 (9) "Confirmatory test" means a gas chromatography/mass spectrom-  
40 etry analytical procedure used to specifically identify the presence of a  
41 drug or drug metabolite. Quantative confirmation results at the threshold  
42 levels defined in the federal register, Vol. 53, No 69, April 11, 1988, shall  
43 be used.

testing performed by the Kansas Bureau of  
Investigation forensic laboratories,

American Civil Liberties Union  
of Kansas and Western Missouri  
706 West 42nd Street, Suite 108  
Kansas City, Missouri 64111  
(816) 756-3113

Wendy McFarland, Lobbyist  
575-5749

TESTIMONY-ON-HB-2847 PRESENTED 2/15/96

GOOD MORNING. MY NAME IS WENDY MCFARLAND AND I REPRESENT THE ACLU OF KANSAS AND WESTERN MISSOURI. THANK YOU FOR THIS OPPORTUNITY TO VOICE OUR SUPPORT FOR HB 2847.

THIS IS NOT THE FIRST TIME I HAVE APPEARED BEFORE A COMMITTEE TO TESTIFY ON THIS SPECIFIC DRUG TESTING ISSUE. ON JAN. 11TH OF THIS YEAR I APPEARED AT A REGULATORY HEARING OF HEALTH AND ENVIRONMENT WHERE A HEARING EXAMINER APPOINTED BY THE SECRETARY OF HEALTH AND ENVIRONMENT LISTENED TO MY ARGUMENTS AS WELL AS THE COMPELLING TESTIMONY OF SEVERAL DISTINGUISHED MEMBERS OF THE KANSAS MEDICAL COMMUNITY WHO ALSO OPPOSED THE CONTEMPLATED CHANGES TO CURRENT REGULATIONS.

THE DEPT. OF H & E WAS NOT REQUIRED TO PROVIDE ANY INFORMATION THAT DAY TO JUSTIFY THEIR PROPOSED CHANGES AND SUBSEQUENT ATTEMPTS BY MYSELF AND A LEGISLATOR TO DETERMINE THEIR INTENT HAVE BEEN MET WITH NO INFORMATION AT ALL. MY PURPOSE IN SAYING THIS IS NOT TO ACCUSE THE AGENCY OF OBSTRUCTING OPEN AND FAIR DISCUSSION BY THEIR NON-COMMITTAL REPLIES, BUT TO QUALIFY AND DEFEND MY OWN TESTIMONY TODAY.

WITHOUT KNOWING WHY THEY ARE ATTEMPTING TO WEAKEN THESE REGULATIONS, I AM NOT ALLOWED TO EFFECTIVELY ARGUE AGAINST THEIR REASONS. THEREFORE I WILL ARGUE AGAINST THE ULTIMATE RAMIFICATIONS.

I WANT TO TAKE THIS OPPORTUNITY TO THANK REP. DALE SWENSON ON BEHALF OF ACLU AS WELL AS EVERY SINGLE GOVERNMENT OR PRIVATE EMPLOYEE WHO FACES THE PROSPECT OF DRUG TESTING IN THE WORKPLACE. HE CARED ENOUGH TO LEAVE THIS BUILDING ONE AFTERNOON DURING THE FIRST HECTIC WEEK OF SESSION AND ATTEND AN IMPORTANT HEARING THAT WENT UNNOTICED BY EVERY OTHER LEGISLATOR AND I WOULD VENTURE TO SAY THAT THE DEPT. OF H & E WOULD HAVE PREFERRED IT TO HAVE GONE UNNOTICED.

WITHOUT HIS WILLINGNESS TO NOT ONLY EDUCATE HIMSELF ON THESE PROPOSED CHANGES BUT THEN TO PUT CONSIDERABLE TIME INTO SIMPLY DOING WHAT HE THOUGHT WAS RIGHT, THIS POTENTIALLY HARMFUL CHANGE IN CURRENT REGULATION MAY HAVE BECOME POLICY WITHOUT ANY OBJECTIONS BEING RAISED. REP. SWENSON YOU ARE TO BE COMMENDED FOR CARING ENOUGH ABOUT THE EMPLOYEES IN THE STATE OF KANSAS TO INTRODUCE THIS BILL WHICH, IF ENACTED, WILL NOT ONLY STOP THESE CHANGES FROM TAKING PLACE BUT WILL ALSO IMPROVE AND STRENGTHEN THE REGULATIONS WE CURRENTLY HOLD LABORATORIES ACCOUNTABLE TO.

\*REFER TO TESTIMONY DELIVERED 1/11/96 - ATTACHED

IN CONCLUSION, THE ACLU ASKS YOU TO SUPPORT HB 2847 BECAUSE WITHOUT IT, THE RIGHTS OF EMPLOYEES IN THIS STATE WOULD BE SERIOUSLY UNDERMINED BY INCREASE IN FALSE POSITIVE RESULTS, ERODED CONFIDENTIALITY AND LACK OF SECURITY WHICH WE BELIEVE SHOULD RESULT FROM THESE PROPOSALS.

*House Business, Commerce  
& Labor  
2/15/96 Attachment 7*

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TESTIMONY  
Changes in KAR 28-33-12 and KAR 28-34-11  
January 11, 1996

Good afternoon. I represent the American Civil Liberties Union of Kansas and Western Missouri, a private not-for-profit membership organization which advocates for constitutional rights and civil liberties. Thank you for this opportunity to voice our concerns about the revisions to KAR 28-33-12 and KAR 28-34-11 that are before you today.

The ACLU has often testified before the state legislature regarding our opposition to mandatory pre-employment drug testing and random or mandatory post-employment testing. We believe such testing violates Fourth Amendment protections against unwarranted search and seizure, because employees who have shown no evidence of drug- or alcohol-related impairment are required to submit to urinalysis. We find that the very process of testing an individual without reasonable suspicion of drug or alcohol impairment violates their right to privacy, no matter the outcome of the test.

However, constitutional arguments notwithstanding, it is the outcome of the testing that concerns us today, as well as other procedural issues addressed in these revisions. Taken together, we feel these changes would result in the erosion of the few protections now provided to employees in Kansas who are required to submit to urinalysis.

First, false positives can, and do, result in the wrongful termination of employees whose only fault may have been to ingest cough syrup with codeine or a poppy seed bagel, or one of a variety of over-the-counter cold medications which can show up in a drug screen as an amphetamine. Second, the results of testing should remain confidential, but that confidentiality may be breached easily if the results are revealed to unauthorized personnel. Third, there is a likelihood that specimens may be switched or altered unless there are strict safeguards to prevent this. An individual with a drug problem may be able to switch his or her specimen with a "clean" specimen, quite possibly resulting in the termination of the innocent employee.

No drug testing policy will completely and perfectly forestall the occasional occurrence of these three problems. However, the state of Kansas is to be congratulated for implementing the best safeguards possible, prior to the proposed administrative regulations revisions.

The following is a summary of the specific problems in the proposed regulations which are likely to compromise the integrity of employee drug tests:

- a. These changes would revoke the requirement for high quality control (relying on the minimal CLIA standard rather than the more rigorous SAMSA standard)
  - CLIA regulations do not call for controls "at or near the cutoff" in the case of a close call.
  - Internal controls such as those used in hand-held screening tests) would now be acceptable (such as Triage, a test intended for emergency room use only).
  - As a result, the incidence of false positives would increase.
- b. Confirmation by a different, secondary procedure would no longer be required.
  - There is an inevitable high false positive rate in screening methods due to legal, over-the-counter medications as described previously in this testimony.
  - This proposal would allow many false positives to stand without correction.
- c. A secure chain of custody of specimens would no longer be required.
  - This would open the door for the alteration of specimens.
  - The accurate identification of specimens would not be guaranteed.
- d. Only minimal standards would be observed for personnel performing the testing.
  - Advanced training and certification would no longer be required for supervisory positions.
  - On-site supervision would no longer be required for <sup>many</sup> High School graduates performing tests ~~(if they were hired before 4/24/95).~~