

Approved: March 13, 1996
date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on March 11, 1996 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Burke, Downey, Gooch, Harris, Jordan, Petty, Reynolds, Steffes and Vidricksen.

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:

Jeannine A. Wyatt, Director of Human Resources, Brewster Place, Topeka
Jeffrey A. Chanay, General Counsel, Kansas Association of Homes and Services
for the Aging, Inc.
Hal W. Smith, President, Research Information Services, Topeka
Patti Bossert, Owner, Key Staffing Systems, Topeka
Kyle Smith, Deputy Attorney General, Kansas Bureau of Investigation
A. J. Kotich, Legal Counsel, Department of Human Resources

Others attending: See attached list

SB 738 - Employer access to criminal history information

Jeannine A. Wyatt, Director of Human Resources, Brewster Place Retirement Community, Topeka, appeared in support of SB 738. Ms. Wyatt stated she has been in the field of Human Resource Management for more than twelve years and during that time has sought information pertaining to criminal histories of job applicants who were being considered for hiring. Inquiries have been made to the Kansas Bureau of Investigation (KBI) for criminal background investigations of those prospective employees. This process is followed due to protect residents and employees from possible risk and danger. Recently, it came to their attention that in requesting these investigations they were violating the law due to an Attorney General opinion dated July 23, 1979. Ms. Wyatt stated SB 738 will permit employers to obtain criminal background information of job applicants when a release is signed, without being guilty of a class A misdemeanor. Attachment 1

Jeffrey A. Chanay, General Counsel, Kansas Association of Homes and Services for the Aging, Inc.(KAHSA), appeared in support of SB 738. Mr. Chanay stated KAHSA members employ more than 12,000 Kansans and in some instances, the local nursing home is the largest employer in the community. Mr. Chanay stated SB 738 contains four principal provisions: (a) Allows an employer to access an applicant's criminal record, but does not mandate a background check; (b) Allows the Director of the KBI to charge a reasonable fee for the criminal history record report, thereby making SB 738 self-funding; (c) Provides immunity to the KBI Director from any claims or causes of action arising from the release of information to an employer; (d) Protects the employer's interests, but does not permit general discrimination against job applicants with a criminal record if the crime or crimes committed do not correlate to a trust or safety concern. Attachment 2

Hal W. Smith, President, Research Information Services, appeared in support of SB 738. Mr. Smith stated his business is a company that provides criminal background checks for employers nationwide. Mr. Smith advised he follows the same practice as the Fair Credit Act which provides for only researching a person's history back 10 years. Mr. Smith stated the only employees whose history is checked are those who have signed a release. Mr. Smith stated passing SB 738 will assist businesses in Kansas in obtaining the best employees. Attachment 3

Patti Bossert, Owner, Key Staffing Systems, appeared in support of SB 738. Ms. Bossert stated inasmuch as businesses have the liability for hiring decisions, it is only logical they should have access to all information that helps make such decisions. Juvenile history is not included in the record. Attachment 4.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on March 11, 1996.

Kyle Smith, Assistant Attorney General, Kansas Bureau of Investigation, appeared and stated SB 738 will not affect present procedures in any manner. Mr. Smith stated there is a difference in information available to the public and that is conviction data vs. non-conviction data. The conviction data would be available to all persons who submit a release for information properly executed. The non-conviction data would not be available to anyone. Mr. Smith stated there is Federal Legislation Title 7 of Anti-discrimination act which addresses certain hiring practices.

Senator Steffes moved, seconded by Senator Harris, that **SB 738** be recommended favorable for passage and authorized editorial amendments prepared by the Revisor of Statutes. The recorded vote was in favor of the motion.

Substitute HB 2660 Increasing the caps on applicant fees which may be charged by private employment agencies

A. J. Kotich, Legal Counsel, Department Human Resources responded to questions on SubHB 2660.

Senator Reynolds moved, seconded by Senator Steffes, that **SubHB 2660** be amended by substituting the original language deregulating private employment agencies and inserting **SB 330, the licensing of security officers and companies**, and be recommended favorable for passage as amended. The Chair ruled the motion failed due to a lack of a majority of the Committee voting in favor of the motion. The recorded vote was: Aye - 6; Nay - 2; Pass - 2; member not present - 3.

Upon motion by Senator Burke, seconded by Senator Gooch, the Minutes of the March 8, 1996 meeting were unanimously approved.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for March 12, 1996.

TESTIMONY

PRESENTED TO: KANSAS SENATE COMMITTEE ON WAYS AND MEANS

PRESENTED BY: JEANNINE A. WYATT
DIRECTOR OF HUMAN RESOURCES
BREWSTER PLACE RETIREMENT COMMUNITY
TOPEKA, KANSAS

DATE: MARCH 11, 1996

REFERENCE: SENATE BILL 738

I have been employed in the field of Human Resources Management for more than twelve years and specifically have been in the area of healthcare Human Resources Management since 1988. During those years I have sought information pertaining to criminal histories of job applicants who were either in the final stages of selection or who had already been hired into the organization. Beginning in 1988 when I began to work in the healthcare arena I started to utilize the Kansas Bureau of Investigation for criminal background investigations. At \$10.00 per investigation I felt it was some of the best money I spent for my organization in order to protect patients, residents, and staff from negligent hiring practices. The small amounts I spent over time for such investigations could not compare to what the organization would be required to pay if it became the target of negligent hiring litigation. And now I have just become aware of the fact I have been doing something illegal all these years based on K.S.A 22-4710 and an Attorney General's opinion dated July 23, 1979.

I am employed as Director of Human Resources in a premier retirement community with a continuum of care in Topeka, Kansas. Our census is composed of 360 elderly citizens. Many of those elderly are frail and vulnerable. They and their families trust those who have been hired by the facility to take care of them...to treat them with respect and dignity. They trust those people with their personal safety and the safety and protection of their possessions and valuables.

We also employ approximately 161 staff members. These staff members come to work each day expecting to work in a safe and secure environment. They do not think about the possibility of being attacked, injured, or harmed with a weapon on the job by another staff member.

A very realistic fear among Human Resources professionals is the issue of negligent hiring. Human Resources professionals know negligent hiring can bring problems into the workplace and to the organization which could include safety risks and related issues, potential injuries and bodily harm, and potentially extraordinary litigation which could even shut down a business. Human Resources professionals; therefore, are accustomed to doing as much as they possibly can to protect everyone from the problems associated with negligent hiring. In addition to conducting a quality reference check with former employers an employer should also have the ability to conduct a criminal history investigation in order to protect their organizations and those they serve and are responsible for from additional claims of negligent hiring. In my estimation the employer who attempts to do everything possible to prevent negligent hiring and workplace violence has shown due diligence. I firmly believe criminal history information should be allowed to be collected from criminal justice agencies including

*Senate Commerce Committee
March 11, 1996
Attachment 1 thru 2*

government agencies or subdivisions that are authorized by law to exercise the power of arrest, detention, prosecution, etc. Criminal justice agencies as defined to me by my business's legal counsel include the Kansas Bureau of Investigation, Kansas Sentencing Commission, Kansas Parole Board, police departments, the attorney general, and the courts.

Legal counsel for Brewster Place recently reviewed with me K.S.A. 22-4710. This statute specifically provides:

Unlawful for employers to require certain acts; penalties (a) it is unlawful for any employer or prospective employer to require a person to inspect or challenge any criminal history record information related to that person for the purpose of obtaining a copy of the persons record in order to qualify for employment.

(b) any person violating the provision of this section shall be deemed guilty of a class A misdemeanor."

Evidently according to this statute I as well as many Kansas employers are guilty of committing a class A misdemeanor because we conduct criminal history investigations through the Kansas Bureau of Investigation and other criminal justice agencies. Evidently these criminal justice agencies have also been guilty of providing such information to employers.

I thoroughly understand that convictions of a crime cannot be an automatic bar to employment, unless such a policy is justified by valid business necessity. I work within an environment which is the actual home of 360 elderly people. The staff hired at Brewster Place regularly go in and out of our residents' homes on a daily basis whether it is in an independent setting or longterm care setting. I feel responsible for assuring the personal safety of our residents and their possessions and valuables.

It simply does not make sense to me to hire someone into a longterm healthcare unit when they have been convicted of drug crimes and they will have ready access to drugs. It does not make sense to hire someone who has been convicted of child abuse crimes when they will be with frail elders who for some are vulnerable and "child like" due to the progression of aging and forms of dementias. It does not make sense to hire someone who has been convicted of theft who will be going into our residents' homes to perform housekeeping services, dietary services, maintenance services, home health services, etc. In my mind I have performed a very poor job of hiring if I bring such individuals into the homes of our residents.

And what about our staff? I must also consider workplace safety and do everything possible to prevent workplace violence. What happens if an angry staff member pulls a weapon on a co-worker injuring or even killing them? What if later we find the staff member had a history of violent crime? Where does that leave the employer with the issue of negligent hiring? Workplace violence truly becomes an issue under OSHA and impacts Workers' Compensation programs.

I am sure you know someone who receives services through a retirement community or longterm healthcare. Won't you please help me protect these people as well as the staff who work in these facilities? I urge the committee to vote in favor of amendments to K.S.A. 22-4710 which would allow employers if they wish to conduct criminal history background investigations through the Kansas Bureau of Investigation and other criminal justice agencies.

KAHSA

KANSAS ASSOCIATION OF
HOMES AND SERVICES FOR THE AGING

MEMORANDUM

To: Senate Commerce Committee
From: Jeffrey A. Chanay, General Counsel
Kansas Association of Homes and Services for the Aging, Inc.
Date: March 11, 1996
Subject: Senate Bill 738

Madam Chairman and Members of the Committee:

My name is Jeff Chanay, and I appear today as General Counsel for the Kansas Association of Homes and Services for the Aging, Inc. (KAHSA), and in favor of Senate Bill 738.

The Kansas Association of Homes and Services for the Aging represents over 150 not-for-profit retirement, nursing, and community service providers throughout Kansas. KAHSA members provide diverse services to elderly Kansas citizens in a variety of settings, and provide more than 9,600 nursing facility beds, 3,900 senior duplexes and apartments, and a wide range of community services such as assisted living/personal care, home health care, congregate meals, and adult and intergenerational day care. KAHSA members employ more than 12,000 Kansans, and in many Kansas towns, the local nursing home is the largest employer in the community. As a representative of many Kansas employers, KAHSA supports the goals and public policy of Senate Bill 738.

In Attorney General Opinion 79-161, then Attorney General Robert Stephan opined that K.S.A. 22-4710 prohibits an employer from obtaining or using a release from a job applicant to view the criminal history record information of the job applicant. A copy of Attorney General Opinion 79-161 is attached. Senate Bill 738 is intended to modify K.S.A. 22-4710 to permit employers to use such a release to check the criminal background of job applicants.

Senate Bill 738 contains four principal provisions. Subsection (c) permits an employer to require a job applicant to sign a release allowing the employer to access the applicant's criminal history record information. This provision allows an employer to access an applicant's criminal record, but does not mandate a background check.

Senate Commerce Committee
March 11, 1996

Attachment 2 thru 2-5

Subsection (d) allows the Director of the Kansas Bureau of Investigation to charge a reasonable fee for the preparation of a criminal history record report. Thus, SB 738 is self-funding and revenue neutral.

Subsection (e) provides immunity to the KBI Director from any claims or causes of action arising from the release of information to an employer provided pursuant to a release signed by an applicant. Thus, SB 738 creates no liability for any agent of the state.

Subsection (f) declares that no employer shall be liable for any employment decision based upon knowledge of an applicant or employee's criminal record provided the information that led to the employment decision reasonably bears upon the applicant or employee's trustworthiness, or the safety or well-being of the employer's employees or customers. This provision is narrowly tailored to protect the employer's interests, but does not permit general discrimination against job applicants with a criminal record if the crime or crimes committed do not correlate to a trust or safety concern.

In sum, Senate Bill 738 makes employee criminal record prescreening a valid and proper public policy for the State of Kansas. Employer, employees, customers, and taxpayers are all benefited if employers can avoid employment decisions that may lead to financial loss or that may imperil the safety of others.

Thank you for your attention to these comments. On behalf of KAHSa, I would request that Senate Bill 738 be recommended favorably by the Commerce Committee for passage.



KANSAS SUPREME COURT

AUG 3 1979

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ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2211
CONSUMER PROTECTION: 296-
ANTITRUST: 296-5299

July 23, 1979

ATTORNEY GENERAL OPINION NO. 79- 161

Mr. Edwin H. Bideau, III
Neosho County Attorney
123 W. Main
Chanute, Kansas 66720

Re: Criminal Procedure — Criminal History Record Information --
Unlawful for Employers to Require Certain Acts

Synopsis: A person is entitled to inspect his or her own criminal history record information pursuant to K.S.A. 1978 Supp. 22-4709. However, K.S.A. 1978 Supp. 22-4710 forbids an employer from requiring an employee to make such an inspection in order to furnish the employer with a copy of the person's record. Further, an employer may not be authorized by the employee to view the employee's criminal history record information.

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Dear Mr. Bideau:

You have inquired as to whether an employer may obtain a release from a prospective employee, thereby allowing the employer to view the person's criminal history record in light of K.S.A. 1978 Supp. 22-4710(a), which provides:

"It is unlawful for any employer or prospective employer to require a person to inspect or challenge any criminal history record information relating to that person for the purpose of obtaining a copy of the person's record in order to qualify for employment."

Edwin H. Bideau, III
Page Two
July 23, 1979

The Criminal History Record Information Act, K.S.A. 1978 Supp. 22-4701 et seq., is the response of the Kansas Legislature to the federal mandate requiring a state plan for the dissemination and security of criminal records. 28 C.F.R. §20.1 et seq. (1976). The pertinent portion of these federal regulations is found in 28 C.F.R. §20.20 (1976), which provides in part:

"(a) The regulations in this subpart apply to all State and local agencies and individuals collecting, storing, or disseminating criminal history record information processed by manual or automated operations where such collection, storage, or dissemination has been funded in whole or in part with funds made available by the Law Enforcement Assistance Administration. . . ."

In a letter of August 26, 1976, to the Director of the Kansas Bureau of Investigation, the Deputy Administrator of LEAA concluded that the Kansas plan "adequately addresses all requirements of the Regulations and is approved as submitted." Once enacted, K.S.A. 1978 Supp. 22-4701 et seq. became the controlling law in this state regarding criminal history record information. See Attorney General Opinion No. 79-98.

Inspection of one's own record of events is governed by K.S.A. 1978 Supp. 22-4709 which provides in part:

"(a) Subject to the provisions of this act and rules and regulations adopted pursuant thereto, any person may inspect and challenge criminal history record information maintained by a criminal justice agency concerning themselves."

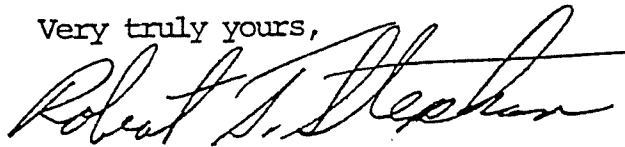
Further, the only person who may be authorized to inspect another's criminal history record is that person's attorney. K.S.A. 1978 Supp. 22-4709(a).

As we interpret K.S.A. 1978 Supp. 22-4710, it prohibits an employer from requiring that an employee inspect and obtain a copy of the employee's own criminal history record information, pursuant to the above quoted provision, "for the purpose of obtaining a copy of the person's record." We construe this statute as preventing an employer from having access to criminal history record information available only to the prospective employee "in order to qualify" that person for employment. Whether or not the employer states openly that a release of criminal history record information is required to qualify for a job or

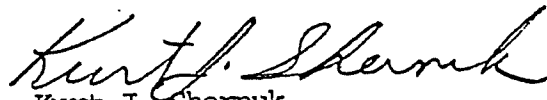
Edwin H. Bideau, III
Page Three
July 23, 1979

merely requests the employee to sign a release for such information, the employee faces a paradox, either waive the privacy afforded by K.S.A. 1978 Supp. 22-4710 or risk the possible loss of a job. We believe that this statute was intended to prohibit the latter situation as well as the former. Therefore, we find K.S.A. 1978 Supp. 22-4710 prohibits an employer from circumventing its provisions through the use of a release from the employee authorizing the employer to view criminal history record information of the job applicant.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Kurt J. Shernuk
Assistant Attorney General

RTS:TDH:KJS:may

RESEARCH INFORMATION SERVICES
HAL W. SMITH, PRES.
2201 NE MERIDEN ROAD
TOPEKA, KS 66608
(913) 235-6767

March 11, 1996

Dear Senator Salisbury:

RESEARCH INFORMATION SERVICES INC. IS A COMPANY THAT PROVIDES CRIMINAL BACKGROUND CHECKS FOR EMPLOYERS NATIONWIDE. THE REASONS FOR DOING SUCH BACKGROUND CHECKS ARE MANY. PROBABLY THE NUMBER ONE REASON FOR BACKGROUND CHECKS IS THE LIABILITY TO THE COMPANY. ANOTHER, IS PROTECTION OF OTHER EMPLOYEES.

HAD A CRIMINAL BACKGROUND CHECK BEEN OBTAINED WHEN DONALD GIDEON APPLIED FOR A JOB IN SOUTHEAST KANSAS, STEPHANIE SCHMIDT MIGHT BE ALIVE TODAY. AGAIN, THIS IS ANOTHER EXAMPLE WHERE THE CRIMINAL HAS MORE RIGHTS THAN THE EMPLOYER OR THE VICTIM. TIMES HAVE CHANGED AND SO MUST WE. IN THE PAST WE ALWAYS KNEW WHERE THE CRIMINALS WERE -- THEY WERE IN PRISON. THE MANDATES OF WASHINGTON ARE FORCING US TO EITHER BUILD MORE PRISONS

*Senate Commerce Committee
March 11, 1996*

Attachment 3 thru 3-2

OR LET THE PRISONERS GO FREE; THEREFORE, SUCH MANDATES REQUIRE EVERYONE TO LIVE WITH THE RESULTS. WHILE GOVERNMENT WORKS ON GETTING TOUGHER SENTENCING GUIDELINES, LET OUR KANSAS EMPLOYERS HAVE THE FREEDOM TO PROTECT THEIR COMPANIES AND EMPLOYEES BY DOING CRIMINAL BACKGROUND CHECKS WITHOUT REPERCUSSIONS.

amend
PLEASE ~~REPEAL~~ THE OLD STATUTE BY PASSING SENATE BILL 738. AS WE CONTINUE TO PROMOTE NEW BUSINESS TO KANSAS, LET US ALSO PROMOTE THE FACT THAT THE STATE OF KANSAS WILL HELP THESE NEW BUSINESSES IN OBTAINING THE BEST EMPLOYEES POSSIBLE. THIS CAN ONLY BE ACHIEVED BY ALLOWING THEM TO DO WHAT THEY ARE ALREADY DOING IN OTHER STATES, AND THAT IS -- **CRIMINAL BACKGROUND CHECKS.**

SENATE COMMERCE COMMITTEE

Testimony on SB 738

Presented by Patti Bossert

Owner, Key Staffing Systems

March 11, 1996

Madam Chairman, Members of the Committee:

My name is Patti Bossert. I own and operate a temporary and permanent placement agency in Topeka. I would like to express my support for SB 738, which would allow employers to access an applicant's criminal history record.

In my business we hire employees and assign them to work at a client's business. In this situation, we are unable to maintain any direct supervision over the employees. We place a variety of personnel, including bookkeepers and tellers with access to cash, daycare workers, and hospital housekeeping personnel. We currently do background checks on employees who are placed these and other positions. My customers rely on me to send employees who are trustworthy and not a danger to others in the workplace. As an employer, I can be held liable for the actions of my employees on the job. It is very important that employers be allowed to access an applicant's criminal record.

Following is a situation that happened in Topeka. I assigned a temporary to a job site where another agency also had temps assigned. One of the other temps got angry and punched Key's temporary, knocking her to the floor. My worker's compensation insurance paid the medical bills, however, the injured temp sued the other employer for damages. She discovered that the temp who hit her had a previous conviction for Aggravated Battery, and sued the other agency, stating that they endangered the workplace by assigning that temp. If we have the liability for hiring decisions, we must have access to all information that helps us make those decisions. It is difficult enough that employers have no access to crimes that happened when the criminal was under 18 years of age, and yet we are still held liable for those same employees' actions in the workplace.

Thank you for your attention, and I will be happy to answer any questions.

*Senate Commerce Committee
March 11, 1996*

Attachment 4