

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Senator Lana Oleen at 11:05 a.m. on January 23, 1996 in Room 254-E of the Capitol.

Members present were: Senator Oleen, Chair
Senator Tillotson, Vice Chair
Senator Jones, Ranking Minority Member
Senator Gooch
Senator Jordan
Senator Papay
Senator Praeger
Senator Ramirez
Senator Vidricksen
Senator Walker

Members excused: Senator Hensley

Committee staff present: Mary Galligan, Legislative Research Department
Mary Torrence, Revisor of Statutes
Nancy Wolff, Committee Secretary

Conferees Appearing Before the Committee:

Barb Hinton, Legislative Post Audit
Rick Riggs, Legislative Post Audit
Robert E. North, State Attorney for the Department of Administration
Scott A. Stone, Executive Director and Chief Counsel, Kansas Association of Public Employees (KAPE)

A hearing was held on **SB474**, the Kansas whistleblowers Act, employees of state and local governments and certain public contractors, communications with auditors.

Senator Oleen asked Senator Vidricksen to present a brief background on the history of the bill as he was one of the primary supporters of the legislation at its inception. He said that in 1983 he was appointed as chairman of the Special Interim Committee on Efficiency in Government and when the hearing were scheduled, he stated that he made a public statement that he wanted state employees to come before the committee to present any information that would help the committee in the study. The following week, three of the agencies put a memorandum out to their employees that they were not to appear before the committee without the approval of their supervisors and they had to present written testimony of what they were going to say before the committee. This tactic on the part of the State agencies, created an atmosphere wherein State employees were not comfortable appearing before the committee and the Senator received numerous telephone calls from state employees stating that they would like to appear before the committee but were afraid to do so. He, in turn, set special office hours to enable state employees to meet with him, one on one. Many mornings he would have ten or twelve people stop by to talk with him. He favors Whistleblower legislation.

At this point, the Kansas Association of Public Employees representative brought him the Tennessee legislation relative to whistleblowers and at approximately the same time, several people within the Department of Human Resources were fired from their jobs because he had been given information by them and he had used that information in the hearings. A lawsuit was subsequently filed in Federal District Court in 1984 and the State was sued for \$750,000. The lawsuit continued for several years and he was called to testify against the State on four different occasions. Following these court appearances, Senator Vidricksen met with then-Governor Mike Hayden to let him know that the State was going to lose the lawsuit. The suit was settled out of court. The Special Interim Committee on Efficiency in Government recommended to the State that a whistleblower bill be formulated but it was opposed by the Department of Administration and the Governor and nothing was accomplished at that time. The following year, a whistleblower bill was passed that was very limited in scope.

Senator Oleen called the committee's attention to the Fiscal Note that was prepared by the Department of the Budget (Attachment 1) which shows no fiscal impact by this legislation.

Barb Hinton, Legislative Post Audit appeared as a proponent on **SB474** (Attachment 2). Her testimony reflects the three changes proposed by the bill as well as the amendments proposed by the Secretary of

Administration. She also presented a table that reflects the weaknesses of Kansas' whistleblower law compared to other states.

Senator Praeger requested clarification on whether a nursing home which provides services to the state under Medicaid would be covered by the legislation. Ms. Hinton was unable to provide an answer at that time, but but stated that her office would research the question and get back with Senator Praeger.

Senator Oleen requested a clarification from Legislative Post Audit on employees protected. Rick Riggs of Legislative Post Audit stated that the language in the bill pretty much reflects the current law. The language would cover any federal, state or local government employee. He said that he would research the language and respond relative to the language utilized in the New Hampshire bill.

Senator Vidricksen stated that initially there was a companion bill to the Whistleblower bill when it was initially presented that would have provided a 1-800- number to allow telephone input from state employees. This legislation did not pass and was never resubmitted in future sessions. Senator Oleen requested input from staff as to what 1-800 numbers are currently being utilized within the state system.

Robert E. North, State Attorney for the Department of Administration appeared as a proponent to the legislation as long as certain amendments are included. His testimony (Attachment 3) reflects those amendments and a balloon of the bill is also attached.

Also appearing as a proponent of **SB474** was Scott A. Stone, Executive Director and Chief Counsel of Kansas Association of Public Employees (KAPE), (Attachment 4).

Senator Oleen asked Barb Hinton to report on a case where an individual was terminated and a situation arose wherein the employee received wrong information and lost the right to administrative remedies. Ms. Hinton gave a brief overview of the situation and stated that the individual would like to see some sort of amendment to the Whistleblower Act that would protect former State employees. The options presented to this employee were the possible extension of the eligibility period or the scope of administrative remedies available through the Civil Service Board, as well as a state-subsidized attorney for following-up on such cases.

There being no other conferees, the hearing was concluded.

Senator Oleen requested action by the committee on the confirmation of Craig Robinson and Jim Cates for the State Lottery Commission. The hearing for Craig Robinson was held on January 17 and by consensus, the committee waived a hearing on Jim Cates as he was considered last year for his initial appointment to the Commission.

Senator Praeger moved that the recommendation of the committee be favorable on Craig Robinson as a member of the Lottery Commission and Senator Papay seconded the motion. The motion carried.

Senator Praeger made a motion that the committee recommend the confirmation of Jim Cates to membership on the Lottery Commission and Senator Papay seconded the motion. The motion carried.

Senator Oleen then requested approval of the committee minutes for January 11, January 16, and January 17. Senator Gooch made a motion to approve all three sets and Senator Tillotson seconded the motion. The motion carried.

There being no other business, the meeting was adjourned at 11:55 a.m.

FEDERAL & STATE AFFAIRS COMMITTEE
GUEST LIST

DATE: 1-23-96

NAME	REPRESENTING
Rick Riggs	LEGIS. POST AUDIT
Barb Hinton	" " "
Sandy Strand	Ks Advocates for Better Care
Jenn Taylor	Citizian
Amy Hendrickson	Dept of Admin.
Bob North	DoA - Legal
SCOTT STONE	KAPE
Amy Tragan	Sen. Moran
Alan Steppat	PETE MCGILL & Assoc.

JAN 23 1996



DIVISION OF THE BUDGET
Room 152-E
State Capitol Building
Topeka, Kansas 66612-1504
(913) 296-2436
FAX (913) 296-0231

Bill Graves
Governor

Gloria M. Timmer
Director

January 22, 1996

The Honorable Lana Oleen, Chairperson
Senate Committee on Federal and State Affairs
Statehouse, Room 136-N
Topeka, Kansas 66612

Dear Senator Oleen:

SUBJECT: Fiscal Note for SB 474 by Legislative Post Audit Committee

In accordance with KSA 75-3715a, the following fiscal note concerning SB 474 is respectfully submitted to your committee.

SB 474 makes a number of changes to the Kansas Whistle Blower Act:

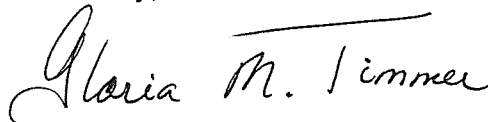
1. Current law covers discussions of agency operations only with members of the Legislature. The bill would extend this protection to discussions with Legislative Post Audit and other auditors.
2. Current law protects only state employees. The bill extends protection to local government employees and private employees contracting with the state.
3. Current law requires classified employees who believe they are victims of retaliation to seek relief from the Civil Service Board, whereas unclassified employees must go to court. The bill would allow both classified and unclassified employees to go to the Civil Service Board.
4. For local government employees and private contractor employees, the bill would allow the employer, not just the employee, to recover litigation costs if the employer is on the prevailing side of an issue.

*Attachment
Exhibit 1
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The Honorable Lana Oleen, Chairperson
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There would be no fiscal effect from the passage of SB 474.

Sincerely,

A handwritten signature in cursive script that reads "Gloria M. Timmer". The signature is written in black ink and includes a horizontal line above the "M" in "Timmer".

Gloria M. Timmer
Director of the Budget

cc: Barb Hinton, Post Audit

474.FN



LEGISLATURE OF KANSAS
LEGISLATIVE DIVISION OF POST AUDIT

SB 474
JAN 10

MERCANTILE BANK TOWER
800 SOUTHWEST JACKSON STREET, SUITE 1200
TOPEKA, KANSAS 66612-2212
TELEPHONE (913) 296-3792
FAX (913) 296-4482

January 18, 1996

Senator Lana Oleen, Chair
Senate Federal and State Affairs Committee
Room 136-N, Statehouse
Topeka, Kansas 66612

Dear Senator Oleen:

As you know, the Legislative Post Audit Committee has introduced legislation (SB 474) that would strengthen the Kansas Whistleblower Law. This letter is to provide you with additional information on the proposed changes.

Background on SB 474:

K.S.A. 1994 Supp. 75-2973 is designed to shield from reprisal any State employee who reports illegal, inefficient, wasteful, or dangerous government action. However, we found that the law, as written, has some significant weaknesses:

- **As it stands, Kansas' whistleblower law covers discussions of agency operations only with members of the Legislature.** The law states that "No supervisor or appointing authority of any state agency shall prohibit any employee of the agency from discussing the operations of the agency, either specifically or generally, with any member of the legislature." But that protection doesn't extend to Legislative Post Audit, which serves as the eyes and ears of legislators in monitoring agency operations.
- **Kansas' whistleblower law protects only State employees.** With the increased emphasis on privatization, more private-sector contractors are becoming involved in helping conduct the State's business. Yet such individuals have no protection if they want to expose problems related to that business.
- **Kansas law is more restrictive, and therefore potentially less effective, than similar laws elsewhere.** As shown on the accompanying table, many states have whistleblower legislation that is much broader in its coverage of employees than is Kansas' law.

Additionally, as part of its deliberations on the bill, the Legislative Post Audit Committee sought input from the Secretary of Administration on the proposed amendments. The Secretary made the following recommendations:

*Attachment
Exhibit 2
Federal and State Affairs
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Senator Lana Oleen
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Page 2

- **Amend the law to treat classified and unclassified State employees the same.** The current law requires that classified employees who think they've been muzzled or retaliated against go to the Civil Service Board for relief, but sends unclassified employees directly to District Court.
- **Change how the law treats attorney fees and court costs.** The current law allows the court to award an employee the costs of litigation, but doesn't extend the same right of recovery to the State. The Department recommended that either the awarding of litigation costs be eliminated, or made a two-way street.
- **Bring local-government employees under the Act, but not private-sector workers.** The Secretary said that extending whistleblower protection to local-government employees is consistent with the public policy that led to the original law. However, she said that bringing private-sector workers under the Act, even those working for firms with a contractual relationship with the State, would be "an unnecessary government intrusion into the private sector."

Finally, the Secretary said that the Department "is not a strong advocate" of amending the law to protect disclosures to Legislative Post Audit as well as to legislators.

The Legislative Post Audit Committee introduced SB 474 to improve the effectiveness of the Kansas whistleblower law, and to help ensure that we can get the full cooperation of the staff of the audited agencies. This bill corrects the weaknesses the Committee identified, and addresses most of the issues raised by the Secretary. If you or your Committee should have any questions about the Legislative Post Audit Committee's proposed amendment, I would be happy to try to answer them. I am available at your convenience.

Sincerely,



Barbara J. Hinton
Legislative Post Auditor

Attachment

cc: Members, Legislative Post Audit Committee
Sheila Frahm, Secretary of Administration
Jim Wilson, Revisor of Statutes Office

Date: January 23, 1996

**TESTIMONY OF ROBERT E. NORTH, STAFF ATTORNEY, DEPARTMENT OF
ADMINISTRATION REGARDING SENATE BILL 474 BEFORE THE SENATE
FEDERAL AND STATE AFFAIRS COMMITTEE**

I am appearing before the Committee today on behalf of the Department of Administration in support of Senate Bill 474. This bill was introduced by the Legislative Post Audit Committee. The Department of Administration has oversight of state-wide personnel issues and provides legal counsel on personnel matters to several state agencies.

Proposed Amendments to K.S.A. 75-2973

Expansion to local governments

- The proposed amendment to the Kansas Whistleblower Act, K.S.A. 1995 Supp. 75-2973 accomplishes several objectives. It would broaden the coverage of the Act to encompass local government employees. This expansion would be consistent with the good public policy that lead to the promulgation of the original Act and would extend the same protection from retaliatory disciplinary action to local government employees as exists for state employees. While local government employees may have a common-law cause of action for unwarranted disciplinary action, this would insure that those dedicated governmental employees who discuss agency operations with legislators or report violations of state or federal laws or regulations are statutorily protected from retaliatory action.

Attorney's Fees and Costs

- The Department also supports the proposed amendment as it provides that either party to litigation based on the Act may recover its legal fees and costs. This would level the playing field for litigants should a whistleblower case be filed in district court. Currently, subsection (g) allows the court to award the costs of litigation, including reasonable attorney's fees and witness fees only to an employee and does not allow the state and/or taxpayers to recover their costs in defending such an action regardless of the merits of the case. This unilateral exposure to excessive fees and costs significantly enhances the liability of the state or local government when defending a legitimate disciplinary action. Potential exists for the state being subjected to an excessive award of attorney's fees in relationship to the actual damages sustained by the employee. The general rule of law is that each party pays its own attorneys fees and bears its own costs. The proposed amendment to subsection (g) will provide that the "prevailing party" may be awarded its attorneys fees and costs associated with the litigation. This provision is particularly important as experience indicates employees may attempt to use the whistleblower statute as an affirmative action to thwart warranted disciplinary action.

*Attachment
Exhibit 3
Federal and State Affairs
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Additional Suggestions

While the Department believes the proposed amendments discussed above are well-considered and appropriate, the Committee should consider the following suggestions.

Private Sector Employees

- The scope of the Kansas Whistleblower Act should be limited to state and local government employees. The expansion of the Act on page 1, line 18, to cover “public contractors” and their employees should be carefully reviewed. The amendment in its present form would legislate a new statutory cause of action for private sector employees of those employers who contract with the state. This may represent an unwarranted intrusion into the private sector. Most, if not all, of the private employees potentially protected by the amendment already enjoy a common-law cause of action against their employer who retaliates against them for whistleblowing activity.

Unclassified Employees

- The Department initially believed classified and unclassified employees should be treated similarly under the Act. Upon reflection and in view of the critical distinction between classified and unclassified employees, the Department is now in favor of requiring employees in the unclassified service who allege that disciplinary action was taken in violation of the Act to seek mediation through the alternative dispute resolution process. The amendment currently being considered would grant unclassified employees the right to appeal any retaliatory disciplinary action to the Civil Service Board. The Board’s jurisdiction should be limited to hearing issues involving classified employees. Civil service protections should not be extended to employees of the unclassified service who serve at the pleasure of the appointing authority.
- An alternative proposal is that any employee in the unclassified service may request the director of alternative dispute resolution to appoint a mediator to assist the employee and the appointing authority in reaching a mutually acceptable resolution to the matter. The mediator would proceed pursuant to K.S.A. 5-511. This request shall be made in writing within 30 days of the alleged disciplinary action. Allowing a neutral mediator to review the issues and assist the parties in resolving the matter would be more economical and expedient than either the civil service or civil litigation process.

Attached is a balloon draft of the suggestions of the Department of Administration.

We encourage this committee to adopt the proposed amendments because they forward the good public policy which lead to the enactment of the Kansas Whistleblower Act and should result in a more effective and equitable application of the Act.

Thank you for the opportunity to appear before the committee on behalf of Senate bill 474. I will be happy to answer any of your questions.

SENATE BILL No. 474

By Legislative Post Audit Committee

1-17

9 AN ACT relating to certain communications by employees of state agen-
10 cies, local governments and certain public contractors; prohibiting cer-
11 tain acts by supervisors and appointing authorities; providing remedies
12 for violations; amending K.S.A. 1995 Supp. 75-2973 and repealing the
13 existing section.

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

15 Section 1. K.S.A. 1995 Supp. 75-2973 is hereby amended to read as
16 follows: 75-2973. (a) No supervisor or appointing authority of any state
17 public agency ~~or public contractor~~ shall prohibit any employee of the
18 public agency ~~or public contractor~~ from discussing the operations of the
19 public agency ~~or public contractor, as the case may be, or other matters~~
20 ~~of public concern~~, either specifically or generally, with any member of the
21 legislature ~~or any auditing agency~~.

22 (b) No supervisor or appointing authority of any state public agency
23 or public contractor shall:

24 (1) Prohibit any employee of the public agency ~~or public contractor~~
25 from reporting any violation of state or federal law or rules and regulations
26 to any person, agency or organization; or

27 (2) require any such employee to give notice to the supervisor or
28 appointing authority prior to making any such report.

29 (c) This section shall not be construed as:

30 (1) Prohibiting a supervisor or appointing authority from requiring
31 that an employee inform the supervisor or appointing authority as to leg-
32 islative ~~or auditing agency~~ requests for information to the public agency
33 ~~or public contractor~~ or the substance of testimony made, or to be made,
34 by the employee to legislators ~~or the auditing agency, as the case may be,~~
35 on behalf of the public agency ~~or public contractor~~;

36 (2) permitting an employee to leave the employee's assigned work
37 areas during normal work hours without following applicable rules and
38 regulations and policies pertaining to leaves, unless the employee is re-
39 quested by a legislator or legislative committee to appear before a legis-
40 lative committee ~~or by an auditing agency to appear at a meeting with~~
41 ~~officials of the auditing agency~~;

42 (3) authorizing an employee to represent the employee's personal
43

1 opinions as the opinions of a state public agency ~~or public contractor~~; or
 2 (4) prohibiting disciplinary action of an employee who discloses in-
 3 formation which: (A) The employee knows to be false or which the em-
 4 ployee discloses with reckless disregard for its truth or falsity, (B) the
 5 employee knows to be exempt from required disclosure under the open
 6 records act or (C) is confidential under any other provision of law.

7 (d) ~~Any officer or employee of a state agency, who is either~~ in the
 8 classified service and has permanent status under the Kansas civil service
 9 act ~~or in the unclassified service under the Kansas civil service act~~, may
 10 appeal to the state civil service board whenever the officer or employee
 11 alleges that disciplinary action was taken against the officer or employee
 12 in violation of this act or in any court of law or administrative hearing.
 13 The appeal shall be filed within 30 days of the alleged disciplinary action.
 14 Procedures governing the appeal shall be in accordance with subsections
 15 (f) and (g) of K.S.A. 75-2949 and amendments thereto and K.S.A. 75-
 16 2929d through 75-2929g and amendments thereto. If the board finds that
 17 disciplinary action taken was unreasonable, the board shall modify or re-
 18 verse the agency's action and order such relief for the employee as the
 19 board considers appropriate. If the board finds a violation of this act, it
 20 may require as a penalty that the violator be suspended on leave without
 21 pay for not more than 30 days or, in cases of willful or repeated violations,
 22 may require that the violator forfeit the violator's position as a state officer
 23 or employee and disqualify the violator for appointment to or employ-
 24 ment as a state officer or employee for a period of not more than two
 25 years. The decision of the board in such cases may be appealed by any
 26 party pursuant to law.

(1)

27 (e) Each state public agency ~~and public contractor~~ shall prominently
 28 post a copy of this act in locations where it can reasonably be expected
 29 to come to the attention of all employees of the public agency ~~or public~~
 30 ~~contractor, as the case may be.~~

31 (f) As used in this section: (1) "Auditing agency" means the legislative
 32 post auditor, any employee of the division of post audit, any firm per-
 33 forming audit services pursuant to a contract with the post auditor, or
 34 any state agency, agency of a local government or federal agency or au-
 35 thority performing auditing or other oversight activities under authority
 36 of any provision of law authorizing such activities;

37 (2) "disciplinary action" means any dismissal, demotion, transfer,
 38 reassignment, suspension, reprimand, warning of possible dismissal or
 39 withholding of work;

40 (3) "local government" means any county, township, city, municipal
 41 university, school district, community college, drainage district and any
 42 other special district, taxing district or political subdivision of Kansas that
 43 is supported by tax funds and includes any board, commission, committee,

(2) Any officer or employee of a state agency who is in the unclassified service may request that the director of dispute resolution appoint a mediator for proceedings pursuant to K.S.A. 1995 Supp. 5-511 and amendments thereto whenever the officer or employee alleges that disciplinary action was taken against the officer or employee in violation of this act. The request shall be made in writing within 30 days of the alleged disciplinary action.

3-4

1 bureau, department, division of agency thereof;

2 (4) "public agency" means any state agency or local government;

3 ~~(5) "public contractor" means any person, partnership, association,~~
4 ~~corporation or other private business entity that has entered into a con-~~
5 ~~tract with a state agency for any supplies, materials, equipment or other~~
6 ~~goods or for performance of any services; "public contractor" does not~~
7 ~~include any public agency; and~~

8 (6) "state agency" and "firm" have the meanings respectively ascribed
9 thereto by K.S.A. 46-1112 and amendments thereto.

5

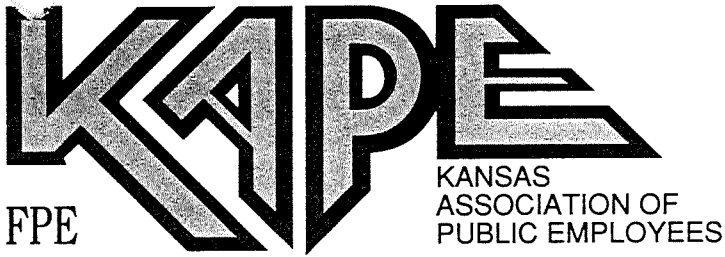
10 (g) Any officer or employee who is in the unclassified service of a
11 local government or public contractor who alleges that disciplinary action
12 has been taken against such officer or employee in violation of this section
13 may bring a civil action for appropriate injunctive relief, or actual dam-
14 ages, or both within 90 days after the occurrence of the alleged violation.
15 A court, in rendering a judgment in an action brought pursuant to this
16 act, shall order, as the court considers appropriate, reinstatement of the
17 officer or employee, the payment of back wages, full reinstatement of
18 fringe benefits and seniority rights, actual damages, or any combination
19 of these remedies. A court may also award such officer or employee the
20 prevailing party in any such civil action all or a portion of the costs of
21 litigation, including reasonable attorney fees and witness fees.

22 (h) This statute shall be known and may be cited as the Kansas whis-
23 tleblower act.

24 Sec. 2. K.S.A. 1995 Supp. 75-2973 is hereby repealed.

25 Sec. 3. This act shall take effect and be in force from and after its
26 publication in the Kansas register.

3-5



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 Committee on Federal and State Affairs.

January 23, 1996, 11:00 a.m.
State Capitol, Room 254-E

Public employee opinion of Senate Bill 474 amending the whistleblower act.

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 the Senate Bill 474. KAPE has been elected by 20,000 state employees to be their representative with various public employers across the state.

KAPE applauds the Senate's attempts to ensure governmental accountability through providing extended rights to employees who identify fraud and waste. SB 474 essentially proposes four changes to the current Kansas Whistleblower's Act:

1. Extend the act's protections to non-state government workers;
2. Added protection for communications to auditing agencies;
3. Extends the act's protections to unclassified state employees; and
4. Either side may be awarded attorney fees if they prevail (currently only the employee may receive fees for prevailing).

*Attachment
Exhibit 4
Federal and State Affairs
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KAPE would like to see the protections further extended to cover communications to law enforcement agencies. Otherwise, we definitely agree with all of the proposed amendments to K.S.A. 75-2973 as proposed in SB 474. It is a step in the right direction and KAPE will always support legislation that strives for more governmental accountability.

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.