

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Carmody at 3:30 p.m. on January 29, 1998 in Room 313--S of the Capitol.

All members were present except: Representative Kline (excused)
Representative Powell (excused)
Representative Mayans (excused)
Representative Ruff (excused)
Representative Adkins (excused)
Representative Wilk (excused)

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes
Jan Brasher, Committee Secretary

Conferees appearing before the committee:

Professor David Ryan, Chair of Judicial Council Administrative Procedure Advisory Committee.
Dan Stanley, Secretary, Department of Administration
Art Griggs, Chief Attorney, Department of Administration
Tim Madden, Chief Counsel, Department of Corrections (offer an amendment)
Philip Harness, Workers Compensation Division, Kansas Department of Human Resources.
Gary Mitchell, Secretary, Kansas Department of Health and Environment
Glenda Cafer, General Counsel, Kansas Corporation Commission
James E. Martin, KTLA
Mary Jane Stattelmann, Kansas Department of Agriculture
Others attending: See attached list

The Chair called the meeting to order.

HB 2604 **Requiring all state agencies who conduct hearings under the administrative procedure act to use administrative law judges from the office of administrative hearings if not conducted by the agency head.**

Randy Hearrell, Judicial Council, introduced Professor Ryan to testify before the committee.

Professor David Ryan, Chair of the Judicial Council Administrative Procedure Advisory Committee testified in support of **HB 2604**. The conferee provided information about the current procedure that state agencies use. The conferee stated that the recommendation is to have a central hearing office independent of the various state agencies. The conferee discussed arguments against the implementation of a central hearing office. The conferee stated that those opposed will use the argument of additional cost. The conferee stated that the advisory panel is very experienced and the general concept will be relatively cost neutral. Fears of increased costs are conjectural. The conferee urged the Committee not to reject or narrow this measure based on allocations of unproven costs. The conferee stated that after hearings with all the different departments, it was realized that there is an integrated cost structure and that it was difficult to isolate the hearing costs. The conferee stated that there may be some additional cost in developing that process. The conferee referred to page 3 of his handout summarizing briefly what the JCAPAC had originally recommended, which was an incremental process involving four agencies. The conferee stated that we have recommended that it be done incrementally so the cost can be factored into the budget process by the legislature.

The conferee stated that currently hearing officers are not all independent of the agencies they serve. The conferee stated that there may be an obvious lack of neutrality, or at least the appearance of bias. The conferee stated that parties dealing with the state will have a greater sense of fairness if the hearing officer is independent. The conferee stated that the Judicial Council's intent is that the independent hearing officer may have the flexibility to structure the appropriate kind of hearing. . (Attachment 1)

The Committee members and conferee discussed the necessity of specialized knowledge by those conducting the hearing. Issues concerning cost effectiveness of centralizing the hearing process was discussed. Discussion ensued regarding what hearings are under KAPA and the perception of bias by the public when the hearing officer is a member of the agency.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON Judiciary, Room 313-S Statehouse, at 3:30 p.m. on January 29, 1998.

Art Griggs, Office of Administration, testified in support of **HB 2604** with the addition of amendments that address issues of concern to the Department of Administration. The conferee discussed the transference of SRS's administrative hearings to the Department of Administration. The conferee stated that **HB 2604** expands the Office of Administrative Hearings and makes a number of amendments to K.S.A. 75-37,121 that are also contained in **SB 405**, as amended by the Senate Committee. The conferee stated that the Department of Administration supports the changes in testimony regarding **SB 405**. The conferee discussed implementation issues. The conferee stated that given the number and complexity of implementation issues associated with **HB 2604**, any expansion of the duties of the Office of Administrative Hearings should be carried out only in smaller, manageable stages.

The conferee proposed amendments to **HB 2604** that would; limit expansion, require reporting to the legislature, clarify that presiding officer maybe provided for both KAPA and non-KAPA hearings, establish fees, and provide technical changes relating to transfer of staff positions. (Attachment2)

The committee members discussed the scope and intent of the changes in **HB 2604** and the Department of Administration's proposed amendments.

Tim Madden, Chief Counsel, Department of Corrections, testified as a proponent with concerns with the language in **HB 2604**. The conferee stated that the DOC is concerned that the language referring to the transfer of personnel in the administrative hearings section of all agencies is not sufficient to limit its application to only those agencies and personnel involved in conducting administrative hearings pursuant to the Kansas administrative procedure act. The conferee stated that the DOC believes that **HB 2604** should be amended at section 30 (i) to clarify that only those personnel involved in hearings required by the Kansas administrative procedure act are to be transferred to the office of administrative hearings. (Attachment3)

Phillip Harness, Workers Compensation Division, Kansas Department of Human Resources testified to express opposition to the provisions of **HB 2604** to the extent that they conflict with the Workers Compensation Act. The conferee stated that while the bill does not specifically refer to amending any provision of Article 5 of K.S.A., Chapter 44, Section 30(i) commencing at line 37 of page 34 of the bill, infers that the Division of Workers Compensation may be included as "personnel in the administrative hearings section of all agencies...." The conferee stated that federal funding could be lost if that Department is not in compliance. (Attachment4)

In response to Committee questions, the conferee stated that he will provide written response to answer what are the federal compliance requirements.

Jim Martin, Kansas Trial Lawyers Association, testified as an opponent to **HB 2604**. The conferee stated that the bill does not reference the statute that appoints Workers Compensation judges. The conferee stated that at a meeting of the KTLA Workers Compensation Committee, the group unanimously agreed that the current system should be retained. The conferee stated that technically, KTLA members believe that Workers Compensation judges will be subject to this bill, because the of the word "all" in section 30. (Attachment5)

Discussion by the Committee members and conferee regarding the hearings that fall under KAPA followed. The conferee asked for clarification of whether Workers Compensation hearings would be subject to the provision in this bill. The Committee members discussed with the conferee the Department of Corrections proposal in section 30.

Gary Mitchell, Secretary, Kansas Department of Health and Environment, testified as an opponent of **HB 2604**. The conferee described the procedure KDHE established in 1993 to assure that private parties are afforded impartial hearings and that hearings can be conducted as efficiently as possible. The conferee stated that because of that procedure, it is his department's belief that Administrative Appeals Section of his department is fair and impartial as well as cost efficient. The conferee urged the Committee to go slow in making changes to the current system. (Attachment6)

The Committee members and conferee discussed efficiencies currently gained through concentration in specialized area of law, and value of the presiding officers' expertise of the subject matter.

Vice Chair Representative Presta stated that the hearing on **HB 2604** will be continued on Wednesday, February 4, 1998. The Vice Chair adjourned the meeting at 5:15 p.m.

The next meeting is scheduled for February 2, 1998.

HOUSE JUDICIARY COMMITTEE
GUEST LIST

DATE: 1-29-98

NAME	REPRESENTING
William C. Rein	KDHE
Tim Madden	KDOC
David Ryan	Judicial Council
Glenda Caper	KCC
JOHN LAFAUR	KDOR
Phil Harless	KDHR-Work. Emp.
Carol Foreman	SRS
Mark Brauer	Bo. of Nursing
Beth Engle	SRS
KATH R LANDIS	CHRISTIAN SERVICE COUNCIL ON PUBLICATION FOR KS
Larrie Ann Brown	KS Govt. Consult.
Lynn Crabwa	Budget
Frank Foster	Dist. Leg.
Art Geyer	" "
Mary Jane Stattelman	KS Dept of Ag
James MARTIN	KTLA
Ron Seiber	Dept of Admin
Rick Fleming	Securities Commission
Glenn W. Stahl	

HOUSE JUDICIARY COMMITTEE
GUEST LIST

DATE: 1-29-98

NAME	REPRESENTING
Sally Obermueller	Intern, Rep. Tim Carmonly
Whitney Damron	Kansas Bar Assn.
For Smith	KS Bar Assn.

**JUDICIAL COUNCIL TESTIMONY
ON 1998 HOUSE BILL 2604
SENATE JUDICIARY SUBCOMMITTEE
January 29, 1998**

House Bill 2604 expands the newly authorized office of administrative hearings within the Department of Administration. The office would provide "Presiding Officers" (a/k/a administrative law judges) to conduct administrative hearings of state agencies.

In March 1995, HB 2213 creating a central hearing office passed the House by a vote of 124-0. The House Judiciary Committee requested that the Judicial Council review the subject matter of HB 2213 and report its recommendations to the 1996 Legislature. The Judicial Council assigned the study to its Administrative Procedure Advisory Committee.

The advisory committee and the Judicial Council support the creation of an office of administrative hearings and has proposed the basic structure of what is now HB 2604.

Most, but not all, adjudicative proceedings of state agencies are conducted in accordance with the Kansas Administrative Procedure Act (KAPA). Often, the agency head (secretary, board, commission, etc.) designates someone to serve as presiding officer for an administrative hearing. Typically, such presiding officer is a regular employee of the state agency or a private attorney hired by the agency on a contract basis. Occasionally, the presiding officer is furnished by another state agency, such as the Department of Administration.

If the presiding officer is not the agency head, the presiding officer renders an initial order. An initial order is subject to review by the agency head on the agency head's own motion or upon petition by any party.

The basic concept is that full-time attorney hearing officers from affected agencies would be transferred to the new office of administrative hearings within the Department of Administration. These state agencies would be required to use administrative law judges (ALJs) from the central office to serve as presiding officers for their administrative hearings under KAPA.

The Judicial Council supports the creation of a central office of administrative hearings, and recommends the office of administrative hearings be staffed and funded by transfer of appropriate personnel and associated budget from the affected agencies.

THE ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE

The Administrative Procedure Advisory Committee of the Judicial Council is comprised of state agency lawyers and attorneys who regularly represent private parties before state agencies. The advisory committee was largely responsible for the drafting of the Kansas Administrative Procedure

Act (KAPA; K.S.A. 77-501 et seq.) and the Act for Judicial Review and civil enforcement of agency actions (KJRA; K.S.A. 77-601 et seq.) These acts were adopted by the Legislature in 1984 and have proved to work well, both for the public and state agencies. KAPA and KJRA generally follow the uniform law commissioners 1981 model state administrative procedure act with a number of modifications appropriate for Kansas. The main feature of the model act which was not adopted in 1984 related to an office of administrative hearings. Although a majority of the members of the advisory committee have long favored creation of an office of administrative hearings, this issue was not submitted to the 1984 Legislature due to the concern that debate over a central office might impede adoption of KAPA and KJRA. The proposed bill generally follows the relevant provision in the 1981 model state act.

REASONS FOR CENTRAL OFFICE

The basic purpose of a central office of administrative hearings “. . . is to give ALJs a certain amount of independence from agencies over whose proceedings they preside.” Such independence should promote fairness in the hearing process and a perception of greater fairness on the part of parties in state agency proceedings. A central office should also reduce concerns of improper ex parte contacts.

Over 20 states have adopted some form of a central office of ALJs. Their experience indicates a central office can achieve certain cost efficiencies through sharing of resources and a more even distribution of the workload, which can fluctuate within a given agency. A central office can result in better evaluation of ALJ performance and enhance such performance through such matters as cross-training and peer consultation. There is also the potential that use of independent ALJs will cause agencies to more closely evaluate cases, thus promoting settlement and possibly reducing the number of hearings. A central office would likely promote consistency among agency proceedings and a coherent level of policy on a number of issues in common to state agencies.

AGENCIES AFFECTED

The Judicial Council originally recommended in 1996 that the mandatory use of central office ALJs initially apply at least to SRS, Health and Environment, the Human Rights Commission and the Division of Taxation.

A majority of the members of the advisory committee would prefer broader jurisdiction for the central office of administrative hearings. However, the advisory committee was persuaded that the difficulty in ascertaining the fiscal impact of a central office with broad jurisdiction would decrease the likelihood that a central office would be established.

Initially, the advisory committee contacted virtually every state agency with hearings under KAPA in an attempt to determine such agencies' hearing costs and practices with regard to presiding officers. Ultimately, the advisory committee focused on "cabinet-level" agencies. Of that group, SRS, Health and Environment and the Division of Taxation have hearing officers or administrative law judges who are, for the most part, hearing matters under KAPA full time.

SRS supported the advisory committee recommendation and the last legislature directed SRS hearing officers be moved to the new central hearing office. The Human Rights Commission originally indicated similar support as long as there is no adverse financial effect on the transferred ALJ. The Secretary of Revenue has consistently opposed mandatory inclusion of any of Revenue's divisions under the central office and viewed the current system as preferable.

In addition to SRS and the Human Rights Commission, the Judicial Council originally recommended that Health and Environment and the Division of Taxation be included as agencies for whom the use of a central panel ALJ is mandatory. A central office needs a sufficient caseload to achieve the benefits it offers in terms of management and efficiency. In addition, use of central office ALJs will be an option for other state agencies. With a sufficient caseload, the central office should be able to provide a quality service to other agencies on an optional basis at a reasonable cost.

A number of agencies expressed concern that a central office will result in the loss of agency "expertise." To the extent this concern relates to inability to reflect expertise through policy implementation, it is reduced by the recommended authority of the agency head to review orders rendered by ALJs. To the extent the concern relates to loss of expertise by the hearing officer or ALJ, the personnel transferred to the central office will bring with them the special knowledge of each agency's types of cases, regulations and statutes and a central office offers the opportunity to impart this specialized knowledge to other ALJs through cross-training. In the opinion of the advisory committee, it is not unfair to place some burden on the agency to make known to the ALJ during the hearing process what the agency considers to be relevant matters of agency expertise or policy. Concerns with expertise of the ALJ should be balanced against concerns with the impartiality of the ALJ.

Respectfully submitted,
David L. Ryan, Chair
Administrative Law Committee
Judicial Council

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TESTIMONY BEFORE THE
HOUSE JUDICIARY COMMITTEE

By
Art Griggs, Department of Administration
Regarding HB 2604

January 29, 1998

I am appearing today to testify on behalf of the Department of Administration regarding HB 2604 and to support the bill with amendments that address some issues of concern to the Department of Administration.

With the passage of K.S.A. 75-37,121 last session, the Department of Social and Rehabilitation Services (SRS) administrative hearings office will be transferred on July 1, 1998, to a newly created Office of Administrative Hearings within the Department of Administration. HB 2604 would expand the scope of responsibilities for the Office of Administrative Hearings beyond SRS administrative hearings. K.S.A. 77-551, which is part of the Kansas Administrative Procedures Act (KAPA), would be amended, effective July 1, 1999, to provide that the presiding officer for all hearings that are subject to KAPA must be the agency head, one or more members of the agency head (if the agency head is a board or commission), or a presiding officer assigned by the Office of Administrative Hearings. This amendment would make the Office of Administrative Hearings responsible for conducting all hearings held under KAPA in which the agency head or one or two of its members did not personally act as presiding officer. In addition, the Office would be required to provide a presiding officer for non-KAPA hearings upon request of a state agency. Effective July 1, 1999, "personnel in the administrative hearings section of all agencies and support personnel for such presiding officers" would be transferred to the Office of Administrative Hearings.

In addition to the expansion of the Office of Administrative Hearings, HB 2604 makes a number of amendments to K.S.A. 75-37,121 that are also contained in SB 405, as amended by Senate Committee. The Department of Administration supported these changes in testimony regarding SB 405.

Implementation Issues

Number of Affected Agencies. Planning for the transfer of only the SRS hearing section has involved numerous issues and discussions over the last seven months, even though the transfer is a straightforward shift of an organizational unit as a whole and does not involve any physical relocation of staff. Effective July 1, 1999, HB 2604 would dramatically and rapidly expand the responsibilities of the new Office of Administrative Hearings to include approximately 40 state agencies that conduct KAPA hearings. Consequently, implementation of HB 2604 would be very complex, complicated, and time-consuming. Numerous issues would need to be identified and resolved, relating to staffing, location, facilities, funding, billing, docketing and prioritizing cases, developing and preserving the presiding officer's subject expertise, and staffing an expanded office. Currently, there are extensive gaps in information about the resources currently required to handle hearings in other agencies, which greatly hinders the Department's ability to develop reasonable assumptions about caseloads, staffing, needed facilities, and costs.

Ambiguities in Personnel Transfer Language. HB 2604 states that "personnel in the *administrative hearings section* of all agencies and support personnel for such presiding officers" would be transferred to the Office of Administrative Hearings (emphasis added). However, a number of state agencies that are responsible for one or more KAPA hearings do not have an "administrative hearings section." Therefore, it appears that some agencies that hold KAPA hearings may not have any staff transferred to the Office of Administrative Hearings under HB 2604, thereby further complicating assessments of the effect of HB 2604 on the Department of Administration and other state agencies.

Office Consolidation. During FY 1999, the SRS administrative hearings section will continue to remain in its present office space and will not need additional facilities or equipment upon its transfer to the Department of Administration. However, HB 2604 creates a need to establish a consolidated office, relocate the transferred staff and make provisions for new positions. Consolidation would entail a number of new expenses, including moving costs; additional space rental charges; development of a compatible, unified information system, including new software and hardware; and purchase of any equipment or services currently shared with other programs in the transferring agencies. (HB 2604 does not address transfer of equipment, supplies, or funding.) However, the large number of affected agencies, as well as uncertainty about staffing requirements and the number of positions that would actually be transferred under HB 2604, would greatly complicate planning for creation of a single, unified office.

Billing and Funding. Because an entire organizational unit of SRS will be transferred to the Department of Administration at the beginning of FY 1999, the budgeting and funding for transfer of the SRS administrative hearings section is relatively straightforward. A budget for the administrative hearings unit was already developed and virtually all hearings conducted by the office during FY 1999 will be on behalf of SRS. However, under HB 2604 it would be necessary to develop a new system of funding and billing for presiding officers' services that takes into account such issues as complexity and length of hearings; location of the parties; and appropriate billing for cases that are dismissed, withdrawn, or settled prior to a formal hearing; projected caseloads; indirect costs; and cash flow requirements. This task is more complex because state agencies can still hold their own KAPA hearings if the state agency head (or a board member) acts as the presiding officer. Consequently, the number of cases or hearings assigned to the Office of Administrative Hearings will be up to the 40 agencies affected.

Establishing fees. We do not think the fees charged to state agencies by the Office should be set by regulation. K.S.A. 75-37,121 provides that the "department of administration may adopt rules and regulations to establish fees to charge a state agency" for the cost of using a presiding officer. However, as a provider of services to other state agencies, the Department of Administration sets numerous fees without adopting regulations, including motor pool rates, printing rates, personnel training class fees, health insurance premiums, building rental rates, leave assessment rates, self-insurance workers' compensation rates, telephone service rates, central data processing rates and other information system charges. In none of these instances, which involve fees charged to state agencies rather than private individuals or organizations, has there been any perceived need to set rates through regulations, which have the force and effect of law.

Proposed Amendments

Given the number and complexity of implementation issues associated with HB 2604, any expansion of the duties of the Office of Administrative Hearings should be carried out only in smaller, manageable stages. Adequate data-gathering and planning should be completed in advance. Experience should be gained with SRS and a small number of other agencies in order to evaluate the effectiveness of this approach and identify any other matters that need to be considered before further expansion. Any expansion should be thoughtfully planned and implemented in order to avoid unnecessary disruptions and hardships for parties to hearings and the affected state agencies. Therefore, the Department of Administration is proposing the following amendments to HB 2604:

- a. Limited expansion. Require the Human Rights Commission and the Board of Pharmacy to use presiding officers of the Office of Administrative Hearings for any hearing not handled by the agency head or by one or more members of the agency head. This transfer would be effective July 1, 1999. By including the Human Rights Commission and the Board of Pharmacy, some experience could be gained with smaller agencies that do not have a staff of presiding officers. (See Section 30, page 33, line 30 and line 40; Section 30, page 34, line 10 and lines 37-38; Section 35, page 38, line 11 and lines 26-27; and Section 39, page 39, line 37.)

- b. Report to Legislature. Require the Secretary of Administration to submit a report to the Legislature on or before October 1, 1999 describing progress in consolidating the hearing functions of SRS, the Human Rights Commission, and the Board of Pharmacy and providing recommendations regarding any further expansion. (See Section 30, page 35, after line 6.)
- c. Non-KAPA Hearings. Clarify that, to the extent resources are available, the Office of Administrative Hearings may provide a presiding officer for both KAPA and non-KAPA hearings when requested by a state agency. (See Section 29, page 32, lines 6-8, line 16 and lines 24-25; Section 30, page 33, lines 31-34 and line 40; and Section 35, page 38, line 26-27.)
- d. Establishing Fees. Permit the Secretary of Administration to establish fees for the services of presiding officers without adopting regulations. (See Section 29, page 33, line 6-7; and Section 34, page 34, lines 20-21.) This amendment was included in SB 405 by the Senate Judiciary Committee.
- e. Technical Clean-up. Delete sections of HB 2604, as introduced, that relate to agencies other than the Human Rights Commission and the Board of Pharmacy. Make technical amendments relating to transfer of positions so that they coincide with the start of the first payroll period in the appropriate fiscal year. (See bill title for affected sections. See also Section 29, page 31, line 40; Section 29, page 33, line 9; Section 30, page 33, line 23; Section 30, page 34, line 23 and line 37; Section 38, page 39, line 25; Section 39, page 39, line 33; and Section 48, page 46, lines 19-20.)

Thank you for this opportunity to testify regarding HB 2604 and for your consideration of our proposed amendments to this bill. I would be happy to stand for questions.

13641.01



DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
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Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

DATE: January 29, 1998
TO: House Judiciary Committee
FROM: Charles E. Simmons *CE Simmons*
Secretary of Corrections
RE: HB 2604

HB 2604 at section 30 page 33 creates the office of administrative hearings within the Department of Administration. This office is to employ the personnel necessary to conduct proceedings required by the Kansas administrative procedure act. That office may also conduct adjudicative proceedings of any agency which are not under the Kansas administrative procedure act when requested by such agency. Section 30 at page 34, beginning at line 37 the bill also provides for the transfer of personnel in the administrative hearings section of all agencies and support personnel for such presiding officers to the office of administrative hearings effective July 1, 1999.

The Department of Corrections has the concern that the language provided in HB 2604 section 30 regarding the transfer of personnel in the administrative hearings section of all agencies is not sufficient to limit its application to only those agencies and personnel involved in conducting administrative hearings pursuant to the Kansas administrative procedure act. The Department of Corrections conducts various types of hearings involving offenders released on supervision and inmates confined in correctional facilities. These hearings include disciplinary hearings, segregation placement hearings, hearings pertaining to transfers to the Larned State Security Hospital for acute psychiatric treatment, and preliminary parole revocation hearings as well as reviews concerning the award of good time, classification, programs, and grievances. However, none of the hearings or reviews conducted by the Department of Corrections fall within the requirements of the Kansas administrative procedure act. Conducting such hearings and reviews by department personnel are in addition to other duties assigned to those personnel. The Department of Corrections does not envision that it will ever request the office of administrative hearings to conduct a hearing pursuant to this legislation.

MEMO: House Judiciary Committee
Re: HB 2604
January 27, 1998
Page 2

The Department of Corrections believes that HB 2604 at section 30, (i), beginning at line 37 should be amended to clarify that only those personnel involved in hearings required by the Kansas administrative procedure act are to be transferred to the office of administrative hearings. The Department of Corrections would therefore retain all personnel involved in the various hearings conducted by department and would continue to utilize its own staff for the conducting of its hearings which fall outside the scope of the Kansas administrative procedure act.

A copy of the department's proposed amendment of HB 2604 is attached.

CES/TGM/nd

w/attachment

cc: Legislation file w/attachment

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1 consent of the employing agency. The designee must possess the same
2 qualifications required of presiding officers employed by the office.

3 (d) The director may furnish presiding officers on a contract basis to
4 any governmental entity to conduct any proceeding not subject to the
5 Kansas administrative procedure act ~~or not listed in K.S.A. 77-551 and~~
6 ~~amendments thereto.~~

7 (e) The secretary of administration may adopt rules and regulations:

8 (1) To establish procedures for agencies to request and for the di-
9 rector to assign presiding officers. ~~The department of social and rehabil-~~
10 ~~itation services~~ An agency may neither select nor reject any individual
11 presiding officer for any proceeding except in accordance with the Kansas
12 administrative procedure act;

13 (2) to establish procedures and adopt forms, consistent with the Kan-
14 sas administrative procedure act, the model rules of procedure, and other
15 provisions of law, to govern presiding officers; and

16 (3) to facilitate the performance of the responsibilities conferred
17 upon the office by the Kansas administrative procedure act.

18 (f) The director may implement the provisions of this section and
19 rules and regulations adopted under its authority.

20 (g) The secretary of administration may adopt rules and regulations
21 to establish fees to charge a state agency for the cost of using a presiding
22 officer.

23 (h) Effective July 1, 1998, personnel in the administrative hearings
24 section of the department of social and rehabilitation services and support
25 personnel for such presiding officers, shall be transferred to and shall
26 become employees of the office of administrative hearings. Such person-
27 nel shall retain all rights under the state personnel system and retirement
28 benefits under the laws of this state which had accrued to or vested in
29 such personnel prior to the effective date of this section. Such person's
30 services shall be deemed to have been continuous. All transfers of per-
31 sonnel positions in the classified service under the Kansas civil service act
32 shall be in accordance with civil service laws and any rules and regulations
33 adopted thereunder. This act shall not affect any matter pending before
34 an administrative hearing officer at the time of the effective date of the
35 transfer, and such matter shall proceed as though no transfer of employ-
36 ment had occurred.

37 (i) *Effective July 1, 1999, personnel in the administrative hearings*
38 *section of all agencies and support personnel for such presiding officers,*
39 *shall be transferred to and shall become employees of the office of admin-*
40 *istrative hearings. Such personnel shall retain all rights under the state*
41 *personnel system and retirement benefits under the laws of this state*
42 *which had accrued to or vested in such personnel prior to the effective*
43 *date of this section. Such person's services shall be deemed to have been*

which conduct hearings pursuant to the Kansas administrative procedure act

#4

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE

**By Philip S. Harness, Director of Workers Compensation
January 29, 1998**

RE: House Bill No. 2604

The purpose of my testimony today, as Director of the Division of Workers Compensation and also as chairperson of the Workers Compensation Advisory Council formed pursuant to K.S.A. 44-596 (membership list attached), is to express opposition to the provisions of House Bill No. 2604 to the extent that they conflict with the Workers Compensation Act.

Although the preamble to the bill does not specifically refer to amending any provision of Article 5 of K.S.A. Chapter 44, which contains the Workers Compensation Act, Section 30 (i) commencing at Line 37 of Page 34 of the bill, infers that the Division of Workers Compensation may be included as "personnel in the administrative hearings section of all agencies . . ."

K.S.A. 75-5708 enables the Division to maintain 10 administrative law judges, which are presently located throughout the state. Appeals therefrom are taken to the Workers Compensation Board established pursuant to K.S.A. 44-555b. From an administrative standpoint, extending this philosophy of a pool of administrative law judges would be very difficult because of the unique nature of workers compensation law, along with the medical knowledge required when dealing with preliminary and regular hearings. The Division does, however, also conduct two (2) types of hearings pursuant to the Kansas Administrative Procedures Act for those individuals who are charged under the administrative fraud and abuse statute, K.S.A. 44-5,120, and civil penalties for failure to procure workers compensation insurance equal to twice the annual premium the employer would have paid or \$25,000 whichever amount is greater, pursuant to K.S.A. 44-532.

The Workers Compensation Advisory Council unanimously voted at its January 21, 1998, meeting that it supports the present law, and does not support House Bill No. 2604.

As to another part of the Kansas Department of Human Resources, the department has no objection to the bill as it pertains to wage and hour hearings. It is our reading of the bill that this is the only area that applies to the department, however, if there is any intent or understanding that the bill would apply to other divisions, particularly unemployment issues, we would oppose the bill. The Employment Security Law is federally funded and the removal of these hearings to the Department of Administration would cause the department federal compliance problems. If we are out of compliance with the federal program, Kansas employers could lose millions of dollars in federal tax credits.

Therefore, the Kansas Department of Human Resources respectfully requests that the bill, especially Section 30 (i) be amended to ensure that those administrative hearings sections be specifically excluded from the operation of this bill.

House Judiciary
1-29-98
Attachment 4

WORKERS COMPENSATION ADVISORY COUNCIL MEMBERS

(Revised 10-97)

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 OVERLAND PARK, OFFICE
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 KANSAS CITY, MO OFFICE**House Judiciary Committee, The Honorable Tim Carmody, Chairman**
January 29, 1998**Testimony of James E. Martin, Chairman**
KTLA Workers Compensation Committee
RE: House Bill 2604

Thank you Mr. Chairman and good afternoon. My name is James E. Martin. I am pleased to appear before you today on behalf of the Kansas Trial Lawyers Association. I am a Kansas City area attorney specializing in workers compensation. I currently primarily represent claimants however, I began my workers compensation career as an Assistant Director in the Division of Workers Compensation and I worked for many years as a defense attorney. In summary, I have experienced the workers compensation system from the judicial, claimant, and respondent perspective.

Currently I serve as Chairman of the Workers Compensation Committee for the Kansas Trial Lawyers Association. Last week, I attended a statewide workers compensation seminar where I had the opportunity to meet with practitioners from across the state. These practitioners were both claimant and employer oriented. Admittedly, we had some differing interpretations of how this bill might affect the workers compensation trial process, however, we were unanimous in our defense of the current system. Therefore, I am here today to explain our concern and our opposition to House Bill 2604. I do want to note that we do not have concerns nor do we express opposition to those parts of the bill that do not concern workers compensation.

The Workers Compensation trial system is unlike other hearing and trial procedures and is not appropriate for the structure proposed in House Bill 2604. Workers Compensation is a very specialized law and is an inclusive remedy available to both the injured workers and their employers. This system demands a special expertise not limited to trial practice but to the particularities and idiosyncracies found only in the Workers Compensation Act.

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Currently, the Administrative Law Judges of the Division of Workers Compensation are trained in both the law and the trial process in Workers Compensation. These judges are currently guided by the Director of the Division of Workers Compensation which is appropriate as the Director has the expertise to train the judges and to maintain the continuing education program within the Division. This has been particularly helpful to establish a certain continuity in the decisions throughout the state of Kansas.

Currently, the Administrative Law Judges of the Kansas Division of Workers Compensation are appointed pursuant to the provisions of KSA 75-5708(b) (copy attached). Administrative Law Judges are required to be attorneys admitted to the practice of law in the state of Kansas. HB 2604 does not suggest that it affects KSA 75-5708 and, hopefully, it is not the intention of the bill to do so. A simple clarification within the bill might be beneficial.

It appears that it is the intention of the bill to bring under its umbrella those administrative law judges who conduct hearings in accordance with the Kansas Administrative Procedures Act. As previously indicated, the Workers Compensation Act has its own trial system and does not utilize the Kansas Administrative Procedures Act. Accordingly, it does not appear it is the intention of the bill to include administrative law judges from the Division of Workers Compensation.

House Bill 2604 would appear to create a separate division within the Department of Administration to which all administrative law judges would be attached. It is unclear whether the new *Presiding Officers* would have to be lawyers and whether they would hear exclusively workers compensation cases. As I am sure would be argued by some other agencies about their judges and as indicated herein above, workers compensation is a highly specialized area of law. It is our position that it would be patently unfair to ask administrative law judges to become specialists in many fields when it is difficult to be a specialist in one field.

In summary, while complaints continue to abound about judges and their decisions, that is simply the nature of trial practice. The current Workers Compensation system has worked for decades and there does not appear to be either an overriding reason for a change nor does there appear to be any benefit to be derived by moving the judges or changing the system.

Thank you for your time and attention. I will be happy to answer any questions which any of you may have.

compensation insurance carrier, self-insurer or group-funded workers' compensation pool, at such time and in accordance with regulations of the director, reports of all payments of compensation made by such workers' compensation insurance carrier, self-insurer or group-funded workers' compensation pool during any period.

74-717. Same; rules and regulations. The director is authorized to establish rules and regulations to carry out the provisions of this act.

74-718. Same; no charges or expenses until July 1, 1962. No charges, amounts or expenses shall be charged to workmen's compensation insurance carriers or self-insurers under K.S.A. 74-712 to 74-717, inclusive, and 74-719 until July 1, 1962, but in all other respects such sections shall be in effect as and when provided in section 11 of this act.

74-719. Judicial review of director's actions. Any action of the director of workers' compensation pursuant to K.S.A. 74-712 through 74-718, and amendments thereto, is subject to review in accordance with the act for judicial review and civil enforcement of agency actions.

75-5708. Division of workers compensation, establishment and administration; director of workers compensation, assistant directors, administrative law judges; appointment, compensation, qualifications. (a) There is hereby established within and as a part of the department of human resources a division of workers compensation. The division shall be administered, under the supervision of the secretary of human resources, by the director of workers compensation, who shall be the chief administrative officer of the division. The director of workers compensation shall be appointed by the secretary of human resources and shall serve at the pleasure of the secretary. The director shall be in the unclassified service under the Kansas civil service act and shall receive an annual salary fixed by the secretary of human resources, with the approval of the governor. The director of workers compensation shall be an attorney admitted to practice law in the state of Kansas. The director shall devote full time to the duties of such office and shall not engage in the private practice of law during the director's term of office.

(b) The director of workers compensation may appoint two assistant directors of workers compensation and also may appoint not to exceed 10 administrative law judges. Such assistant directors and administrative law judges shall be in the classified service. The assistant directors shall act for and exercise the powers of the director of workers compensation to the extent authority to do so is delegated by the director. The assistant directors and administrative law judges shall be attorneys admitted to practice law in the state of Kansas, and shall have such powers, duties and functions as are assigned to them by the director or are prescribed by law. The assistant directors and administrative law judges shall devote full time to the duties of their offices and shall not engage in the private practice of law during their terms of office.



KANSAS
DEPARTMENT OF HEALTH & ENVIRONMENT
BILL GRAVES, GOVERNOR
Gary R. Mitchell, Secretary

Testimony presented to
House Judiciary Committee

January 29, 1998

by

Gary R. Mitchell
Secretary of Health and Environment

House Bill 2604

Mr. Chairman and members of the committee, thank you for the opportunity to appear before you today to discuss House Bill 2604 and its implications for the Kansas Department of Health and Environment. My comments will be brief. I will describe the administrative appeals section within KDHE and discuss why I would urge the committee to move slowly in implementation of this bill which removes our administrative hearings staff and places it in the Department of Administration.

On July 1, 1993, KDHE established a separate and distinct Administrative Appeals Section to better assure that private parties are afforded impartial hearings and that hearings can be conducted as efficiently as possible. Administrative Appeals Section staff have no other responsibilities within the agency. Moreover, Administrative Appeals Section offices are located in a distinct suite which includes a hearing room. Presiding officers confer with parties only when both are available to participate in discussions, or when one of the parties has waived an appearance. To assist appellants in understanding the hearing process, presiding officers discuss procedural issues with the parties during the prehearing conference, and issue written prehearing orders following the completion of those conferences. In addition, this section publishes an "Administrative Appeals Section Operations Manual" which is available to private appellants and their attorneys.

Because of the steps we have taken, we believe our Administrative Appeals Section is fair and impartial and we know it is cost efficient. Our Section has 2.6 staff and an FY 98 budget of \$162,307 and has 138 actual cases pending on this month's docket. We have highly

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specialized areas of the law that require a high degree of technical understanding and background knowledge. While the details of each appeal are different, there is a baseline of core information that is specifically limited to the complex dual federal state regulatory scheme of issues affecting KDHE programs. Efficiencies currently gained through concentration in specialized areas of the law and the Presiding Officers' intimate knowledge of the subject matter and procedures increase the ability to reach settlements under the current process.

We concur with the Department of Administration that this bill raises several significant cost issues that should be studied before moving full speed ahead. Relocation of consolidated staff, office space, computer systems, transfer of people and positions across agency lines and establishment of fees by the Department of Administration to charge other agencies are concerns which all require sufficient study and perhaps a pilot project as proposed by the Department of Administration prior to implementation of the bill as currently drafted.

These are complex issues that could impact many regulated communities in Kansas as well as the efficiency of the agency. I want to assure members of the committee that my staff will be available to provide additional information if it is needed. Thank you for the opportunity to testify today. I will be happy to answer any questions you may have.