

Approved: Feb. 9, 1998
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Emert at 10:10 a.m. on February 5, 1998 in Room 514-S of the Capitol.

All members were present.

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson Legislative Research Department
Gordon Self, Revisor of Statutes
Mary Blair, Committee Secretary

Conferees appearing before the committee: Charles Simmons, Secretary, Department of Corrections (DOC)

Others attending: See attached list

The minutes of the February 4 meeting were approved on a motion by Senator Oleen and a second by Senator Goodwin. Motion carried.

SB 513 - An act concerning public officers and employees; relating to the legal representation thereof before grand juries and inquisitions

Conferee Simmons testified in support of **SB 513**. He stated that the bill addresses a need "for a governmental entity to provide legal representation to employees who are summoned to appear before a grand jury on account of an act or omission in the scope of their employment as an employee of the governmental entity." He discussed specifics of the bill and pointed out the manner in which it would benefit the state. (attachment 1) Following brief discussion, Senator Bond moved to pass the bill out favorably, Senator Goodwin seconded. Motion carried.

SB 519 - An act relating to recovery of costs and expenses in apprehension of escaped defendants; reward for capture of escaped inmates

Conferee Simmons testified in support of **SB 519**. He reviewed two specific issues the bill addresses: increased reward money for the apprehension of an escapee and establishment of a requirement that the escapee pay restitution. (attachment 2) Following discussion, Senator Harrington moved to pass the bill out favorably, Senator Bond seconded. Motion carried 10-1 with Senator Pugh voting nay.

SB 520 - An act concerning crimes and punishment; relating to unlawful sexual relations

Conferee Simmons testified in support of **SB 520**. He briefly reviewed the bill which he stated "prohibits the consensual intentional touching by KDOC staff of offenders under KDOC supervision with the intent to arouse or satisfy the sexual desires of the employee or another." (attachment 3) Following discussion, Senator Donovan moved to pass the bill out favorably, Senator Schraad seconded. Motion carried.

Meeting adjourned at 10:40 a.m. The next scheduled meeting is Monday, February 9.

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Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

DATE: February 5, 1998
TO: Senate Judiciary Committee
FROM: Charles E. Simmons
Secretary of Corrections
RE: SB 513

SB 513 amends the provisions of K.S.A. 75-6108 to require a governmental entity to provide representation to employees summoned to appear before a grand jury or inquisition on account of an act or omission in the scope of their employment as an employee of the governmental entity. A governmental entity may refuse to provide representation if the act or omission was not within the scope of the employee's employment, the employee acted or failed to act because of actual fraud or actual malice, or the representation would create a conflict of interest between the governmental entity and the employee. SB 513 further specifies that a governmental entity shall not be required to provide the defense or representation to any employee in a criminal or civil service proceeding.

While the convening of grand juries in Kansas is atypical, the Kansas Supreme Court has had occasion to determine that grand jury hearings are not criminal proceedings. [*Ferris v. Lockett*, 175 Kan. 704 (1954)]. Regardless of how the courts have categorized grand jury proceedings, from an employee's perspective, being summoned to appear before a grand jury is a serious matter that should be approached with the advice and counsel of an attorney. After incurring personal expenses for representation, it would be of little solace to a governmental employee that an internal investigation conducted by the employing governmental entity concluded that no criminal behavior had occurred and that the employee had acted without actual fraud or malice. Likewise, it would not benefit an employee to have borne the cost of legal representation before a grand jury even though the grand jury did not return an indictment. The failure of a governmental entity to provide representation and leaving the employee to bear the cost of representation before a grand jury proceeding is as demoralizing as the abandonment of the employee in traditional civil litigation.

Due to the nature of the services provided to the citizens of Kansas by the Department of Corrections and other agencies, it is a reality that state employees will be subjected to various legal proceedings. In order

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to attract and retain competent and dedicated staff, the state should not expect its employees to bear the cost of legal representation in proceedings relating to their actions when those actions have been taken within the scope of their duties and without fraud or malice. A governmental employee should not have to pay for legal representation related to the performance of his or her duties. Public policy is best served when employees are not forced to consider whether they will be exposed to financial hardship when performing duties on behalf of the government. The importance of this public policy is exemplified by K.S.A. 48-241a which provides for the representation of members of the Kansas national guard and Kansas air national guard in both civil and criminal proceedings for any action performed in furtherance of their military duties. The extensive representation provided by K.S.A. 48-241a is not sought in SB 513. SB 513 specifically excludes the provision of representation in criminal proceedings.

In addition to attracting and retaining competent staff and alleviating the fear on the part of employees that they will have to bear their own legal expenses for actions taken within the scope of their duties, the state directly benefits from providing experienced representation to its employees summoned to appear before grand jury proceedings when it undertakes the representation of the state and the employee in collateral tort litigation. Competent counsel must treat a grand jury proceeding as a discovery tool available in a subsequent tort action. The secrecy of a grand jury proceeding is not absolute. In some situations the transcripts of grand jury proceedings may be available to civil litigants. Furthermore, privileges such as confidential attorney client communications and attorney work product may be waived forever by a witness appearing before a grand jury, thus adversely affecting the rights of the state and its employees in subsequent tort litigation. The ability to provide competent representation to the state and its employees as intended by K.S.A. 75-6108 in tort litigation is hindered by ignoring the ramifications of a grand jury proceeding.

The amendment of K.S.A. 75-6108 relative to the provision of representation to government employees summoned to appear before grand juries and inquisitions is also mirrored in the amendment of K.S.A. 75-4360. K.S.A. 75-4360 was enacted prior to the passage of the Tort Claims Act and requires the state to represent the Governor, adjutant general, highway patrol troopers, Kansas Bureau of Investigation agents, and employees of correctional institutions. However, K.S.A. 75-4360 currently does not allow for the state to refuse to provide representation to those officials. SB 513 allows the state to refuse to provide representation pursuant to K.S.A. 75-4360 for the same reasons as are set out in K.S.A. 75-6108.

SB 513 also amends K.S.A. 75-4360 to include employees of the Department of Corrections who do not work at a correctional facility and the Kansas Parole Board. The Department urges favorable consideration of SB 513.

CES/TGM/nd

cc: Legislation file



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MEMORANDUM

DATE: February 5, 1998
 TO: Senate Judiciary Committee
 FROM: Charles E. Simmons
 Secretary of Corrections
 RE: SB 519

SB 519 amends the provisions of K.S.A. 21-4603d and 75-5222 pertaining to offenders who escape from custody. Amendment of K.S.A. 75-5222 would increase the amount of a reward that could be offered by the Secretary of Corrections for the apprehension of an escapee from \$500 to \$5,000. The Secretary's authority to offer a reward is rarely used, and is considered only if the escapee presents serious public safety concerns and the investigation conducted by the Department and other law enforcement agencies has proven unsuccessful. In recent years, the Secretary has only offered a reward on two occasions and it was necessary to pay the reward only on one occasion. The \$500 limit provided by currently law was established in 1973 and is not sufficient to encourage persons to come forward with information if they perceive there might be some personal risk in doing so. SB 519 would provide the Secretary flexibility to provide greater reward incentives in those situations that warrant it.

SB 519 would also permit a district court to order an offender convicted of escape or aggravated escape to repay the costs and expenses incurred by a law enforcement agency in the apprehension of the offender. The Kansas Court of Appeals in State v. Jones, 11 Kan.App.2d 428 (1986) held that it was not the intent of the Legislature, relative to the court's authority to impose restitution requirements, to include the cost of the apprehension of escapees. SB 519 would legislatively overrule that decision.

The recent escape of an inmate from the Lansing Correctional Facility illustrates the benefits of SB 519. This inmate had approximately \$6,000 in his inmate account. During the course of apprehending him, law enforcement officers discovered a newer model car belonging to him in

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storage. While current law permits recovery of any rewards paid, SB 519 would permit the use of those assets to repay a portion of the costs and expenses incurred by law enforcement agencies in the inmate's apprehension. The inmate was at large for two and one half months. His apprehension involved an extensive investigation involving law enforcement officers from the Department, Federal Bureau of Investigation, Kansas Bureau of Investigation, Kansas City, Kansas, Kansas City, Missouri, Lee Summit, Missouri, and Clay and Jackson Counties in Missouri as well as investigators in Oklahoma and Arkansas. Under current law none of these costs and expenses can be recovered.

Used judiciously, the Department believes that rewards are a useful tool in the apprehension of fugitives. Furthermore, it is believed that offenders who escape from custody should be fiscally responsible for the costs incurred in their apprehension.

The Department urges favorable consideration of SB 519.

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Bill Graves
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Charles E. Simmons
Secretary

MEMORANDUM

DATE: February 5, 1998
TO: Senate Judiciary Committee
FROM: Charles E. Simmons
Secretary of Corrections
RE: SB 520

SB 520 amends the provisions of K.S.A. 21-3520 by prohibiting the consensual intentional touching by KDOC staff (including contract employees) of offenders under KDOC supervision with the intent to arouse or satisfy the sexual desires of the employee or another. Commission of this crime would be a severity level 10 person felony.

Since 1993, it has been a felony for Department staff and certain contract employees to engage in sexual intercourse and sodomy with persons in their custody irrespective of whether the inmate or parolee appeared to have given consent. Sexual abuse of inmates and parolees by persons charged with the responsibility of confining and supervision those persons is a clear abuse of authority. Current law, however, does not address all of the forms of sexual abuse that can be perpetrated by a person in these positions of authority. SB 520 would criminalize conduct that would otherwise constitute sexual battery but for the inmate or parolee appearing to have given consent to the sexual touching.

The Department urges favorable consideration of SB 520.

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