

Approved: _____
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on February 4, 1999 in Room 313-S of the Capitol.

All members were present except:

Representative David Adkins - excused
Representative David Haley - excused
Representative Andrew Howell - excused
Representative Tony Powell - excused
Representative Clark Schultz - excused

Committee staff present:

Jerry Ann Donaldson, Legislative Research Department
Avis Swartzman, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

HB 2135 - secretary of corrections authorized to issue warrant for apprehension of an escaped inmate

Representative Carmody made the motion to report HB 2135 favorably for passage. Representative Lloyd seconded the motion. The motion carried.

HB 2137 - secretary of corrections authorized to issue warrant for apprehension for an individual supervised under an interstate compact

Representative Carmody made the motion to report HB 2137 favorably for passage. Representative Lightner seconded the motion. The motion carried.

HB 2136 - legal representation of state officials before grand juries and inquisitions

Representative Carmody made the motion to report HB 2136 favorably for passage. Representative Loyd seconded the motion.

A balloon amend was provided by the Department of Corrections that would delete the section of the bill dealing with the tort claims act. (Attachment 1)

Representative Carmody made the motion to adopt the balloon and amend on page 2, line 25 and page 3 line 37 to state "except as otherwise provided by sub-section (a) of section 1. Representative Loyd seconded the motion. The motion carried.

Representative Flaharty made the motion to amend in court services officers who are employed by the judicial branch. Representative Pauls seconded the motion. The motion carried.

Representative Carmody made the motion to report HB 2136 favorably for passage, as amended. Representative Loyd seconded the motion. The motion carried.

HB 2102 - availability of pre-sentencing reports

Representative Pauls made the motion to report HB 2102 favorably for passage. Representative Carmody seconded the motion. The motion carried.

HB 2102 - jury size and peremptory challenges in proceedings involving commitment of sexually violent predators

Representative Pauls made the motion to report HB 2102 favorably for passage. Representative Carmody seconded the motion.

Representative Pauls made the motion to strike line 6, on page 2. Representative Carmody seconded the motion. The motion carried.

Representative Pauls made the motion to change six peremptory challenges to eight. Representative Klein seconded the motion. The motion carried.

Representative Pauls made the motion to report **HB 2102** favorably for passage, as amended. Representative Long seconded the motion. The motion carried.

HB 2083 - court, debt and restitution collection, authority of attorney general

Representative Swenson made the motion to table the bill. Representative Klein seconded the motion. The motion carried 8-6.

The committee meeting adjourned at 4:30 p.m. The next meeting is scheduled for February 8, 1999.



DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
900 S.W. Jackson — Suite 400-N
Topeka, Kansas 66612-1284
(785) 296-3317

Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

To: Rep. Michael O'Neal, Chairman
House Judiciary Committee

From: Tim Madden
Chief Legal Counsel *TG*

Re: HB 2136

Date: February 4, 1999

At the direction of Secretary Simmons, I have prepared the proposed amendment of HB 2136 which provides for the provision of representation by the state to employees summoned to appear before grand juries and inquisitions. A copy of the proposed amendment of HB 2136 is attached. This proposed amendment to the bill currently before the Committee deletes changes to K.S.A. 75-4360 relative to the ability of the state to deny representation to employees who have acted with actual fraud or actual malice. The proposed amendment, however, retains the original proposal to have K.S.A. 75-4360 amended to specifically state that nothing in that section is to be construed as requiring the state to provide representation to an employee in a criminal or civil service proceeding.

The changes recommended in this proposed amendment of HB 2136 involve striking the language beginning on page 1, line 41 through line 24 of page 2; changing "(f)" to "(b)" at line 25 of page 2; and striking the language beginning at line 28 of page 2 through line 35 of page 2.

I respectfully request that you consider this amendment to HB 2136. Please feel free to contact me if you have any questions regarding this matter or if the Department can be of assistance to you.

TGM/nd
Attachment

House Judiciary
2-4-99
Attachment 1

Session of 1999

HOUSE BILL No. 2136

By Committee on Judiciary

1-26

9 AN ACT concerning public officers and employees; relating to the legal
 10 representation thereof before grand juries and inquisitions; amending
 11 K.S.A. 75-4360 and 75-6108 and repealing the existing sections.
 12

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

14 Section 1. K.S.A. 75-4360 is hereby amended to read as follows: 75-
 15 4360. (a) If the governor, the adjutant general, the superintendent of the
 16 highway patrol or any officer or trooper of the highway patrol, or agent
 17 of the Kansas bureau of investigation; or any person employed by the
 18 state correctional institutions *or the Kansas department of corrections or*
 19 *Kansas parole board* in a correctional or supervisory or custodial capacity;
 20 or any person formerly serving in such capacity is prosecuted by civil
 21 action *or summoned to appear before a grand jury or inquisition*, for any
 22 act performed or committed by such person in the performance of duties
 23 imposed upon such person by law, and required in the enforcement of
 24 the laws of this state, all of the expenses of the defense of such actions
 25 *or representation by legal counsel*, including attorney's fees, witnesses'
 26 fees for the defense, defendant's court costs and all costs for transcripts
 27 of records and abstracts thereof on appeal, shall be paid by the state
 28 during ~~his or her~~ *such person's* term of office or employment, or after
 29 such term of office or employment if such action was based upon any act
 30 performed or committed by such person during such term of office or
 31 employment. The attorney general shall be first consulted in regards to
 32 the selection of the attorney for the defense of any such person, and shall
 33 have approval thereof, except that the attorney general may, if ~~he or she~~
 34 *the attorney general* sees fit, assume the responsibility for the defense *or*
 35 *representation* of such person and may conduct the same personally or
 36 by one or more of ~~his or her assistants~~ *assistant attorney generals*. The
 37 expenses of such defense *or representation* shall be paid by the attorney
 38 general from any moneys made available to the attorney general for such
 39 purpose upon vouchers approved by the attorney general and in accord-
 40 ance with the provisions of appropriation acts.

41 ~~(b) The state may refuse to provide for the defense of an action against~~
 42 ~~an employee or representation of the employee if the state determines that:~~

43 ~~(1) The act or omission was not within the scope of such employee's~~

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1 ~~employment;~~

2 ~~(2) such employee acted or failed to act because of actual fraud or~~
3 ~~actual malice; or~~

4 ~~(3) the request was not made in accordance with subsection (c).~~

5 ~~(c) An employee's request for the state to provide for the defense of~~
6 ~~the employee or representation shall be made in writing with 15 days~~
7 ~~after service of process or subpoena upon the employee in the action. Such~~
8 ~~request shall be filed in the office of the attorney general. The state, in its~~
9 ~~discretion, may provide requested defense or representation for any of its~~
10 ~~employees who failed to make a request within the time prescribed by this~~
11 ~~subsection.~~

12 ~~(d) If after a timely request in accordance with subsection (c), the~~
13 ~~state fails or refuses to provide an employee with a defense or represen-~~
14 ~~tation and the employee retains the employee's own counsel to defend the~~
15 ~~action or proceeding or provide representation, such employee is entitled~~
16 ~~to recover from the state such reasonable attorney fees, costs and expenses~~
17 ~~as are necessarily incurred in defending the action or proceeding or pro-~~
18 ~~viding representation if the action or proceeding or representation arose~~
19 ~~out of an act or omission in the scope of employment as an employee of~~
20 ~~the state and the trier of fact does not find that such employee acted or~~
21 ~~failed to act because of actual fraud or actual malice.~~

22 ~~(e) Nothing in this section shall be construed to deprive an employee~~
23 ~~of the right to petition a court of competent jurisdiction to compel the~~
24 ~~state to perform the duties imposed by this section.~~

25 ~~(f) Nothing in this section shall be construed to require the state to~~
26 ~~provide the defense or representation to an employee in a criminal or civil~~
27 ~~service proceeding.~~

28 ~~(g) Notwithstanding any other provision of law to the contrary, the~~
29 ~~state may reimburse an employee such reasonable attorney fees, costs and~~
30 ~~expenses as are necessarily incurred in defending a claim against the em-~~
31 ~~ployee for punitive or exemplary damages if the state finds that:~~

32 ~~(1) The action or proceeding arose out of an act or omission in the~~
33 ~~scope of the employee's employment; and~~

34 ~~(2) the employee reasonably cooperated in good faith in the defense~~
35 ~~of the claim.~~

36 Sec. 2. K.S.A. 75-6108 is hereby amended to read as follows: 75-
37 6108. (a) Upon request of an employee in accordance with subsection
38 (e), a governmental entity shall: (1) Provide for the defense of any civil
39 action or proceeding against such employee, in such employee's official
40 or individual capacity or both, on account of an act or omission in the
41 scope of such employee's employment as an employee of the govern-
42 mental entity, except as provided in subsection (c); and (2) provide legal
43 counsel to such employee when such employee is summoned to appear

(b)

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1 before any grand jury or inquisition on account of an act or omission in
2 the scope of such employee's employment as an employee of the govern-

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3 *mental entity, except as provided in subsection (c).*

4 (b) A governmental entity may provide for a defense *or representation*
5 *tion* by its own attorney or by employing other counsel for this purpose
6 or by purchasing insurance which requires that the insurer provide the
7 defense. A governmental entity has no right to recover such expenses
8 from the employee defended *or represented*, except as provided in K.S.A.
9 75-6109 and amendments thereto.

10 (c) Except as provided in K.S.A. 75-4360 and amendments thereto,
11 a governmental entity may refuse to provide for the defense of an action
12 against an employee *or representation of the employee* if the govern-
13 mental entity determines that:

14 (1) The act or omission was not within the scope of such employee's
15 employment;

16 (2) such employee acted or failed to act because of actual fraud or
17 actual malice;

18 (3) the defense of the action or proceeding by the governmental en-
19 tity would create a conflict of interest between the governmental entity
20 and the employee; or

21 (4) the request was not made in accordance with subsection (e).

22 (d) If after a timely request in accordance with subsection (e), a gov-
23 ernmental entity fails or refuses to provide an employee with a defense
24 and the employee retains the employee's own counsel to defend the ac-
25 tion or proceeding, *or provide representation*, such employee is entitled
26 to recover from the governmental entity such reasonable attorney fees,
27 costs and expenses as are necessarily incurred in defending the action or
28 proceeding *or providing representation* if the action or proceeding *or*
29 *representation* arose out of an act or omission in the scope of employment
30 as an employee of the governmental entity and the trier of fact does not
31 find that such employee acted or failed to act because of actual fraud or
32 actual malice.

33 Nothing in this section shall be construed to deprive an employee of
34 the right to petition a court of competent jurisdiction to compel the gov-
35 ernmental entity or the governing body or an employee thereof to per-
36 form the duties imposed by this section.

37 *Nothing in this section shall be construed to require a governmental*
38 *entity to provide the defense or representation to any employee in a crim-*
39 *inal or civil service proceeding.*

40 (e) An employee's request for a governmental entity to provide for
41 the defense of the employee *or representation* shall be made in writing
42 within 15 days after service of process *or subpoena* upon the employee
43 in the action. In actions involving employees of the state, such request

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1 shall be filed in the office of the attorney general. In actions involving
2 employees of a municipality, such request shall be filed with the govern-
3 ing body thereof or as otherwise provided by such governing body. A
4 governmental entity, in its discretion, may provide requested defense *or*

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5 *representation* for any of its employees who failed to make a request
6 within the time prescribed by this subsection.

7 (f) Notwithstanding any other provision of law to the contrary, a gov-
8 ernmental entity may reimburse an employee such reasonable attorney
9 fees, costs and expenses as are necessarily incurred in defending a claim
10 against the employee for punitive or exemplary damages if the govern-
11 mental entity finds that:

12 (1) The action or proceeding arose out of an act or omission in the
13 scope of the employee's employment; and

14 (2) the employee reasonably cooperated in good faith in the defense
15 of the claim.

16 Sec. 3. K.S.A. 75-4360 and 75-6108 are hereby repealed.

17 Sec. 4. This act shall take effect and be in force from and after its
18 publication in the statute book.

