

Approved: 2/3/99
Date

MINUTES OF THE SENATE WAYS AND MEANS.

The meeting was called to order by Chairperson Dave Kerr at 11:00 a.m. on January 26, 1999 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: Alan Conroy, Legislative Research Department
Debra Hollon, Legislative Research Department
Rae Anne Davis, Legislative Research Department
Norman Furse, Revisor of Statutes
Michael Corrigan, Revisor of Statutes
Judy Bromich, Administrative Assistant
Ann Deitcher, Committee Secretary

Conferees appearing before the Committee:

Others attending: See attached list.

Bobbi Mariani, Assistant Director of Personnel for the Department of Administration, who gave an explanation of **9 rs 0345, 0165, 0167 and 0290**.

It was moved by Senator Salisbury and seconded by Senator Ranson that rs 0345, 0165, 0167 and 0290 be introduced. The motion carried by a voice vote.

Paul West of the Legislative Research Department, explained **SB 17** to the Committee. This bill would allow the court in cases where there's construction litigation and the state is successful, to award the state attorney's fees and expert witness fees arising out of the litigation. For the court to award that kind of fee there has to be some kind of statutory authorization for the attorney fees or other damages outside the direct damages that are awardable.

Next to testify before the Committee was Dan Carroll of the Department of Administration who spoke in favor of **SB 17** saying that the bill would allow the Attorney General's office to defend as well as prosecute claims concerning the state capital improvement projects. It would also allow courts to award the state litigation costs to include attorney's fees expended by the state to support their claims. The second part would allow the litigation cost recovered to be deposited in the fund used to pay litigation costs. (Attachment 1).

Will Larsen, Council for the Associated General Contractors of Kansas spoke as an opponent to **SB 17**. (Attachment 2). He said the bill is unique in that it provides something to the state that private individuals can't have. Asked if he would still oppose the bill if it was written in such a manner as to allow opposing parties to also receive attorney fees, Mr. Larsen said he personally would not oppose it.

Next to testify before the Committee was Trudy Aron, Executive Director of the American Institute of Architects who spoke as an opponent to **SB 17**. (Attachment 3).

It was agreed by the Committee that **SB 17** would be held and worked at a later date since it might require an amendment to be passed.

Julian Efirid of the Legislative Research Department explained **SB 40** to the Committee saying it amends section in current law which was originally passed in 1988 to provide some text on the issue of returning to work after retirement for members of the executive and legislative branches of government. There was an exemption in statutes, however that allowed people to come back and work as employees of the legislature or legislators themselves so that after retiring from KPERS these individuals would not be subject to any earnings limitations after retirement. **SB 40** amends that particular section of the law and adds the provision that would make effective on or after July 1, 1998, any legislator who retires as a member of the legislature and comes back for the current session, beginning January 11, 1999, or for future sessions would have the retirement benefits suspended during the terms of office in which the legislator would

...ve subsequently.

CONTINUATION SHEET

MINUTES OF THE SENATE WAYS AND MEANS, Room 123-S Statehouse, at 11:00 a.m. on January 26, 1999.

Mr. Eford explained that if a KPERS member such as a teacher, retires they can serve on the Legislature and collect both retirements if they were off the payroll for 30 days.

Jack Hawn, Deputy Director of KPERS spoke to the Committee in regard to **SB 40** and prefaced his comments by informing them that he was not an attorney. He told them that in 1962 when KPERS was first established, if you retired from the state, you couldn't go back to work for the state. Virtually from the beginning, exceptions were being made and finally in 1978 the legislature did away with work restrictions altogether and it remained that way for the next 10 years. In 1988 work restrictions were reimposed by the legislators for everyone who retired on and after the effective date.

Mr. Hawn was asked how when KPERS reviewed the specific case of a legislator who retired between election day and the date of swearing in for a new term, they concluded the benefits should be paid when it so clearly went against legislative intent. He explained that the person wasn't doing anything that any other employee couldn't do under the new law. This individual was advised that he couldn't stay in the legislature and draw benefits. He had to have a break in employment so he had to resign and he had to wait thirty days after he retired.

Senator Kerr pointed out that all of those legislators who are vested are in the class of people who, if they don't do anything to change the law, can after the next election, retire after being elected and begin to draw benefits. If that is not what the Committee wants to have continue, then they do have to change the law.

Gordon Self from the Office of Revisor of Statutes spoke to the Committee saying that the retroactive aspect of the bill raises constitutional issues. The major issue is the impairment of contract. In Kansas the law is that some reasonable changes may be made. For these changes to be deemed as reasonable, the changes or modifications must bear some material relation to the theory of the pension system and its successful operation. When the vested contract right applies to an individual, if there are changes which result in disadvantages to the employees, they must be accompanied by comparable advantages. From a legal standpoint, a bill which is prospective only, after the term that the legislator is currently serving, is the most sound from a constitutional standpoint. Retroactive application may be vulnerable depending on the facts and circumstances. This issue has not been specifically resolved in Kansas when dealing with a member of the legislature.

Mr. Self's opinion was that there would be two major arguments that this bill would be constitutional. One would be that the idea of retirement, serving again and then receiving compensation and still able to receive your retirement benefits is contrary to the purposes of the retirement system. The second one is that in some jurisdictions it's been found that the rules are different for members of the legislature. There's a line of federal cases that indicate that legislation relating to compensation of public officers creates no contract in their favor and they may be altered at will by the legislature. In Kansas there is a constitutional provision that allows the legislature to set its own compensation. There are reasonable changes that can be made. Kansas would not have to follow the federal line of reasoning. There are other states who have not. A retroactive application would raise these issues. The safest standpoint would be to not have this change take effect for any legislator currently in the legislature, even non-vested.

The meeting was adjourned at 12:25 p.m. The next meeting is scheduled for Wednesday, January 27, 1999.

SENATE WAYS AND MEANS COMMITTEE GUEST LIST

DATE: 1/26/99

NAME	REPRESENTING
Ken Bahr	Ks. Governmental Consulting
GARY R LASIACU	SRS
DAN CARROLL	Dept of Admin.
Jeff Wasamon	"
B. Manani	Dept of Adm.
Ron Seiber	"
John Pinegar	Topeka Public Building Commission
Tom Slattery	Asso Gen. Contractors
Will Larson	Behr + Roberts
Art Brown	m to m lumberman
Pat Lehman	KFSA
Keith Hoxton	SEAK
TRUDY ARON	Am Inst of Architects
GARY ANDERSON	NATIONAL ELECTRICAL CONTRACTORS ASSN.
Bob Totten	Ks Contractors Association
Jack Hawn	KIPERS
Bill Henry	Ks Governmental Consulting

Testimony in Support of Senate Bill No. 17

Mr. Chairman, I am appearing on behalf of the Department of Administration to testify in support of this bill.

Section 1 of the bill would allow the Attorney General's office to defend, as well as prosecute, claims concerning state capital improvement projects. It would also allow courts to award the state, litigation costs, to include attorney fees, expended by the state to support these claims.

Section 2 of the bill would allow the litigation costs recovered to be deposited in the Construction Defects Recovery Fund. This is the fund used to pay litigation costs in support of claims involving state capital improvements.

The need for the passage of this bill is that it is the law of our state courts and other state courts that each party to a lawsuit be responsible for the payment of its own attorney fees and expert witness fees. State courts cannot award these fees unless there is statutory authorization or a contractual obligation to do so. This bill would provide this statutory authorization.

I've attached a copy of a financial statement showing expenditures from this fund for this fiscal year and the current fund balance.

Encl.

Senate Ways and Means Committee

Date 1/26/99

Attachment # 1-1

LI 0:

CASH CONTROL FILE RECORD INQUIRY

FUND/DET: 2632

AGENCY:

GRANT/PHASE:

CM: X PM:

CP:

PP:

PY:

CUM: X ACTV:

OVER EXPEND DATE:

BEGINNING BALANCE	156,577.03	ADVANCES RECEIVED	0.00
RECEIPTS/COLLECTNS	2,076.94	ADVANCES MADE	0.00
DISBURSEMENTS	57,089.47	BORROWING LIMIT	0.00
TRANSFERS RECEIVED	0.00	TRANSFERS MADE	0.00
	BALANCE	101,564.50	

LAST PROC DATE: 010599

Z06 RECORD SUCCESSFULLY RECALLED

PLEASE ENTER INQUIRY KEY AND OPTIONS

THE SENATE COMMITTEE ON WAYS AND MEANS
TESTIMONY OF WILLIAM A. LARSON, COUNCIL FOR THE
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
ON SENATE BILL 17

January 26, 1999

Senate Bill 17 proposes to amend K.S.A. 75-1267(b) to allow a court to award the State Attorneys Fees and expenses in essentially any litigated dispute involving State building construction projects. Under this proposed amendment the State could recover attorneys fees and expenses whether it brought a claim or defended a claim. It could recover from anyone against whom it brought a claim or who brought a claim against it. This could include, under appropriate circumstances an architect, engineer, contractor, subcontractor or any other entity or person who could sue the State or who the State could sue in connection with a State Building construction project.

The proposed amendment does not require that the State either prevail in it's claim or in it's defense of a claim. Although it might be unlikely that a court would do so, a court would have the authority to award attorneys fees and expenses even if the State lost.

The proposed amendment does not provide any reciprocal right of any party bringing a claim against the State or defending a claim by the State to recover attorney fees and expenses even if the party prevails.

It appears from the wording of the proposed amendment that it may be intended to, and indeed may operate, retroactively so that the State would have a right to recover attorney fees and expenses in existing litigation even though the cause of action arose before the

Senate Ways and Means Committee

Date 1/26/99

Attachment # 2-1

effective date of the amendment.

The proposed amendment would allow the State to recover attorneys fees for State attorneys that are salaried employees of the State in addition to outside attorneys the State may hire to pursue or defend a claim.

The State of Kansas has always and still does follow what is referred to as the “American Rule” with respect to recovery of attorneys fees. This means that a party to a lawsuit is not entitled to recover attorneys fees unless such recovery is provided for by contract between the parties or is allowed by a specific statute. *Lieker v. Gafford*, 249 Kan. 554, syl. 4, 819 P2d 655 (1991). There are certain statutes that allow a litigant to recover attorneys fees for certain types of cases. For example, attorney fees may be recovered in actions under the Kansas Consumer Protection act. But statutes that allow the recovery of attorneys fees are relatively rare. In the vast majority of cases litigated in Kansas attorney fees are not recoverable.

The proposed amendment not only is a significant departure from the general rule that attorneys fees are not recoverable it is further unique, and we believe very unfair, in that it theoretically allows the State to recover whether it wins or loses and, most importantly of all, does not extend a reciprocal right to private litigants to recover attorney fees if they win.

The Associated General Contractors of Kansas believes Senate Bill 17 is patently unfair and asks the committee to reject it.

AIA Kansas

A Chapter of The American Institute of Architects

January 26, 1999



TO: Senator Kerr and Members of the Senate Ways and Means Committee
FROM: Trudy Aron, Executive Director
RE: Opposition to SB 17

Good Morning, Mr. Chairman and members of the Committee, I am Trudy Aron, executive director, of the American Institute of Architects in Kansas (AIA Kansas.) Thank you for the opportunity to address your committee today regarding our opposition to SB 17.

AIA Kansas is a statewide association of architects and intern architects. Most of our 700 members work in over 100 private practice architectural firms designing a variety of project types for both public and private clients including justice facilities, schools, hospitals and other health facilities, industrial buildings, offices, recreational facilities, housing, and much more. The rest of our members work in industry, government and education where many manage the facilities of their employers and hire private practice firms to design new buildings and to renovate or remodel existing buildings.

In addition, George Barbee, Executive Director, Kansas Consulting Engineers Council, has asked that I relay their opposition to SB 17 as well. Our concerns are the same and we hope to save the Committee some time by combining our testimony.

SB 17 allows the court to change the rules. It allows the state to recover their costs, including attorney fees, from the other party involved in litigation concerning state building construction. This change would affect anyone involved in design or construction, including architects, engineers, contractors, subcontractors, material suppliers, and others.

SB 17 totally disregards the current practice of each side in litigation bearing the costs of their own defense. More onerous, the bill allows the court to award costs to the state regardless of the fault or degree of fault of the other party. While not likely, the court could award the state reimbursement of their costs even if the other side prevailed.

Even more unjust, the other party would not have a right to recover their expenses from the state even if the state were judged at fault.

SB 17 is unfair. It seeks to allow the state to recover their costs without being provided for in a contract between the parties, allows the court to attribute costs to the state regardless of fault, and allows one but not both parties to recover their costs.

We urge you to oppose SB 17. Thank you.

700 SW Jackson, Suite 209
Topeka, Kansas 66603-3757
Telephone: 785-357-5308
800-444-9853
Facsimile: 785-357-6450

Senate Ways and Means Committee

Date 1/26/99

Attachment # 3