Approved: 3/22/07
Date

MINUTES OF THE SENATE ELECTIONS AND LOCAL GOVERNMENT COMMITTEE

The meeting was called to order by Chairman Tim Huelskamp at 1:30 P.M. on March 22, 2007 in Room 423-S of the Capitol.

All members were present.

Committee staff present:
Martha Dorsey, Kansas Legislative Research Department
Matt Spurgin, Kansas Legislative Research Department
Ken Wilke, Revisor of Statutes
Zoie Kern, Committee Secretary

Conferees appearing before the committee:
J. Neil Jednoralski
Tracy Streeter, Kansas Water Office
Richard E. Levy, Kansas University Law Professor
Mike Kautsih , Kansas University Law Professor
Richard Gannon for Doug Anstaett, Kansas Press Association

Others attending:
See attached list.

Ken Wilke handed out new language for **HB 2307 - Sherman County Board of Commissioners; election at large** (Attachment 1).

Martha Dorsey gave summary of events surrounding the Suspension of J. Neil Jednoralski, Chairman, Smoky Hill/Saline Basin Advisory Committee (Attachment 2).

Tracy Streeter of the Kansas Water Office gave testimony on behalf of his actions in regards to the dismissal of J. Neil Jednoralski (Attachment 3). Mr Streeter used (Attachment 4) to support his actions.

Richard E. Levy, Law Professor at Kansas State University gave testimony personal, not that of the University, regarding free speech rights of public employees (Attachment 5).

Mike Kautsih, Law Professor from Kansas University also gave personal testifimony, not that of the University (Attachment 6), concurring with Professor Richard E. Levy testimony.

Richard Gannon of the Kansas Press Association gave testimony expressing his own personal views not those of the Association.

Written testimony was submitted by Richard Gannon for Doug Anstaett, of the Kansas Press Association (Attachment 7).

Meeting adjourned.

Respectfully submitted,

Zoie C. Kern, Committee Secretary

Senate Elections and Local Government Committee

Daily, 1:30 - 2:30 p.m. Room 423S

Senator Tim Huelskamp, Chair

Guest List for March 22, 2007

Please print in BLACK ink.

Name	Representing
Kim Christiansen	KWO
Joe Fund	KWO
CV Cotsoradis	KPA
Richard Gannon	KPA
Judy Moler	KAC
Brad Riemenschneider	KAC
Richard E. Levy	Self
Joe Fund	KWO
Mike Lawless	Self
Don Moler	LKM
John Donley	KS Lvst Assn
J. Neil Johnson	Self
Brad Bryant	Sec. of State

Sherman County; pertaining to the county commission thereof; amending K.S.A. 19-201 and 19-202 and K.S.A. 2006 Supp.19-101a and repealing the existing sections. Also repealing K.S.A. 2006 Supp. 19-1011.

Se

HOUSE BILL No. 2307

By Committee on Elections and Governmental Organization

1-31

AN ACT concerning counties; amending K.S.A. 19-202 and repealing the existing section.

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

Section 1. K.S.A. 19-202 is hereby amended to read as follows: 19-202. (a) The board of county commissioners of each county shall consist of three, five or seven qualified electors.

(b) One county commissioner shall reside in and represent each commissioner district within the county. During the time that any person is a candidate for nomination or election to office as a member of the board of county commissioners and during the term of office of the county commissioner, such candidate or county commissioner shall be and remain a qualified elector who resides in such person's district.

(c) Except as provided by K.S.A. 19-203, and amendments thereto, terms of office for the board of county commissioners shall be staggered in such a way that no more than a simple majority of commissioners is elected at any general election.

(d) Except as provided by K.S.A. 19-203, and amendments thereto, all county commissioners shall hold office for a term of four years from the second Monday of January next after their election and until their successors are qualified.

(e) The provisions of subsections (a), (c) and (d) of this section may be modified by the adoption of a charter for county government in any county which has established a charter commission pursuant to law.

(f) The board of county commissioners of Sherman county may be elected at large. Any such change in the method of electing such commissioners shall be subject to the procedures set forth in subsections (c) and (d) of K.S.A. 2006 Supp. 19-204 and amendments thereto.

5 Sec. [illegible] K.S.A. 19-202 is hereby repealed.

6 Sec. [illegible] This act shall take effect and be in force from and after its publication in the statute book.

19-201 and 19-202 and K.S.A. 2006 Supp.19-101a and 19-1011 are

in accordance with the provisions of section 2

New Sec. 2. (a) The board of county commissioners of Sherman County may provide for the election of county commissioners in accordance with this section. This procedure shall be adopted in accordance with the provisions of K.S.A. 19-204 and amendments thereto.

(b)(1) All electors, who are otherwise qualified according to law, and who reside in Sherman County, Kansas, may vote in both the primary and general election for all county commissioner positions which are being elected. Each candidate shall file for the office of county commissioner in the manner provided by law. Elections for positions of county commissioner shall be conducted in accordance with the provisions of article 25 of the Kansas Statues Annotated and amendments thereto except as provided in this section and amendments thereto.

(2) Primary elections under this section shall be conducted or a partisan basis. In the primary election, each qualified voter shall be allowed to vote for the same number of candidates as the number of county commission positions being elected. The candidate, or two candidates if two county commission positions are being elected, receiving the highest number of votes shall appear on the ballot in the general election. No person shall be permitted to cast more than one vote for any specific candidate. The candidate receiving the highest number of votes for each county commission position.

(3) In the general election, each qualified voter shall be allowed to vote for the same number of candidates as the number of county commission positions being elected. The person receiving the most votes for each position of county commissioner shall be deemed to have been elected to such position.

(c) Notwithstanding any provision of K.S.A. 19-201, and amendments thereto, to the contrary, the county commission of Sherman County, Kansas, may establish the size of the county commission districts in such county in any manner chosen by such county commission.

(d) In each election year as specified in K.S.A 25-101, and amendments thereto, in which the president of the United states is elected, two county commissioners shall be elected. In each election year as specified in K.S.A 25-101, and amendments thereto, in which the governor of this state is elected, one county commissioner shall be elected.

(e) The provisions of this section shall expire on December 31, 2008, unless the qualified voters of Sherman County, Kansas elect to adopt the provisions of this section prior to such date.

Elections and Local Government
3-22-2007
Attachment 1

Sec. 3 . K.S.A. 19-201 is hereby amended to read as follows: 19-201. [Each] county in the state of Kansas shall have three [(3)], five [(5)] or seven [(7)] commissioner districts, which shall be designated numerically and serially beginning with number 1.

The provisions of this section may be modified by the adoption of a charter for county government in any county which has established a charter commission pursuant to law.

Except as provided in section 2, and amendments thereto, each

1-2

Section 4. K.S.A. 2006 Supp. 19-101a is hereby amended to read as follows: 19-101a. (a) The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restrictions or prohibitions:

(1) Counties shall be subject to all acts of the legislature which apply uniformly to all counties.

(2) Counties may not affect the courts located therein.

(3) Counties shall be subject to acts of the legislature prescribing limits of indebtedness.

(4) In the exercise of powers of local legislation and administration authorized under provisions of this section, the home rule power conferred on cities to determine their local affairs and government shall not be superseded or impaired without the consent of the governing body of each city within a county which may be affected.

(5) Counties may not legislate on social welfare administered under state law enacted pursuant to or in conformity with public law No. 271–74th congress, or amendments thereof.

(6) Counties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers.

(7) Counties shall be subject to the limitations and prohibitions imposed under K.S.A. 12-187 to 12-195, inclusive, and amendments thereto, prescribing limitations upon the levy of retailers' sales taxes by counties.

(8) Counties may not exempt from or effect changes in statutes made nonuniform in application solely by reason of authorizing exceptions for counties having adopted a charter for county government.

(9) No county may levy ad valorem taxes under the authority of this section upon real property located within any redevelopment project area established under the authority of K.S.A. 12-1772, and amendments thereto, unless the resolution authorizing the same specifically authorized a portion of the proceeds of such levy to be used to pay the principal of and interest upon bonds issued by a city under the authority of K.S.A. 12-1774, and amendments thereto.

(10) Counties shall have no power under this section to exempt from any statute authorizing or requiring the levy of taxes and providing substitute and additional provisions on the same subject, unless the resolution authorizing the same specifically provides for a portion of the proceeds of such levy to be used to pay a portion of the principal and interest on bonds issued by cities under the authority of K.S.A. 12-1774, and amendments thereto.

(11) Counties may not exempt from or effect changes in the provisions of K.S.A. 19-4601 through 19-4625, and amendments thereto.

(12) Except as otherwise specifically authorized by K.S.A. 12-1,101 through 12-1,109, and amendments thereto, counties may not levy and collect taxes on incomes from whatever source derived.

(13) Counties may not exempt from or effect changes in K.S.A. 19-430, and amendments thereto.

(14) Counties may not exempt from or effect changes in K.S.A. 19-302, 19-502b, 19-503, 19-805 or 19-1202, and amendments thereto.

(15) (A) Counties may not exempt from or effect changes in K.S.A. 13-13a26, and amendments thereto.

(B) This provision shall expire on June 30, 2006.

(16) (A) Counties may not exempt from or effect changes in K.S.A. 71-301a, and amendments thereto.

(B) This provision shall expire on June 30, 2006.

(17) Counties may not exempt from or effect changes in K.S.A. 19-15,139, 19-15,140 and 19-15,141, and amendments thereto.

(18) Counties may not exempt from or effect changes in the provisions of K.S.A. 12-1223, 12-1225, 12-1225a, 12-1225b, 12-1225c and 12-1226, and amendments thereto, or the provisions of K.S.A. 12-1260 through 12-1270 and 12-1276, and amendments thereto.

(19) Counties may not exempt from or effect changes in the provisions of K.S.A. 19-211, and amendments thereto.

(20) Counties may not exempt from or effect changes in the provisions of K.S.A. 19-4001 through 19-4015, and amendments thereto.

(21) Counties may not regulate the production or drilling of any oil or gas well in any manner which would result in the duplication of regulation by the state corporation commission and the Kansas department of health and environment pursuant to chapter 55 and chapter 65 of the Kansas Statutes Annotated, and amendments thereto, and any rules and regulations adopted pursuant thereto. Counties may not require any license or permit for the drilling or production of oil and gas wells. Counties may not impose any fee or charge for the drilling or production of any oil or gas well.

(22) Counties may not exempt from or effect changes in K.S.A. 79-41a04, and amendments thereto.

(23) Counties may not exempt from or effect changes in K.S.A. 79-1611, and amendments thereto.

(24) Counties may not exempt from or effect changes in K.S.A. 79-1494, and amendments thereto.

(25) Counties may not exempt from or effect changes in subsection (b) of K.S.A. 19-202, and amendments thereto.

(26) Counties may not exempt from or effect changes in subsection (b) of K.S.A. 19-204, and amendments thereto.

(27) Counties may not levy or impose an excise, severance or any other tax in the nature of an excise tax upon the physical severance and production of any mineral or other material from the earth or water.

(28) Counties may not exempt from or effect changes in K.S.A. 79-2017 or 79-2101, and amendments thereto.

(29) Counties may not exempt from or effect changes in K.S.A. 2-3302, 2-3305, 2-3307, 2-3318, 17-5904, 17-5908, 47-1219, 65-171d, 65-1,178 through 65-1,199, and amendments thereto.

(30) Counties may not exempt from or effect changes in K.S.A. 2006 Supp. 80-121, and amendments thereto.

(31) Counties may not exempt from or effect changes in K.S.A. 19-228, and amendments thereto.

(32) Counties may not exempt from or effect changes in the wireless enhanced 911 act, in the VoIP enhanced 911 act or in the provisions of K.S.A. 12-5301 through 12-5308, and amendments thereto.

(33) Counties may not exempt from or effect changes in K.S.A. 2006 Supp. 26-601, and amendments thereto.

(34) (A) From and after November 15, 2005, counties may not exempt from or effect changes in the Kansas liquor control act except as provided by paragraph (B).

(B) From and after November 15, 2005, counties may adopt resolutions which are not in conflict with the Kansas liquor control act.

(35) (A) From and after November 15, 2005, counties may not exempt from or effect changes in the Kansas cereal malt beverage act except as provided by paragraph (B).

(B) From and after November 15, 2005, counties may adopt resolutions which are not in conflict with the Kansas cereal malt beverage act.

(36) Counties may neither exempt from nor effect changes to the eminent domain procedure act. (37) Counties may not exempt from or effect changes in section 2 and amendments thereto

(b) Counties shall apply the powers of local legislation granted in subsection (a) by resolution of the board of county commissioners. If no statutory authority exists for such local legislation other than that set forth in subsection (a) and the local legislation proposed under the authority of such subsection is not contrary to any act of the legislature, such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper. If the legislation proposed by the board under authority of subsection (a) is contrary to an act of the legislature which is applicable to the particular county but not uniformly applicable to all counties, such legislation shall become effective by passage of a charter resolution in the manner provided in K.S.A. 19-101b, and amendments thereto.

(c) Any resolution adopted by a county which conflicts with the restrictions in subsection (a) is null and void.

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

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March 22, 2007

To: Members of the Senate Committee on Elections and Local Government

From: Martha B. Dorsey, Principal Analyst

Re: Events Surrounding the Suspension of J. Neil Jednoralski, Chairman, Smoky Hill/Saline Basin Advisory Committee

The Specific Events

Following is a summary of the events mentioned above, as described in a newspaper report of the situation. The information was taken from a March 3, 2007 article in the *Salina Journal* by Duane Schrag.

- J. Neil Jednoralski e-mailed a letter to the editor and copied it to several individuals.
- The letter was signed with Mr. Jednoralski's name, his professional qualifications as a licensed professional engineer, and with his designation as Chairman of the Smoky Hill/Saline Basin Advisory Committee.
- The e-mailed letter was forwarded to the Kansas Water Office.
- On Thursday (March 1), Kansas Water Office Director Tracy Streeter sent Mr. Jednoralski a letter, "notifying him he had been suspended for implying that his letter was written on behalf of the committee, even though the matter was not one the committee has discussed."
- On Friday (March 2), Mr. Jednoralski stated he intended the letter as a personal letter.

Background

KSA 74-2622 establishes the Kansas Water Authority (KWA). The statute provides for 24 members, of whom 13 are appointed and the remaining 11 serve as ex officio members. Among those ex-officio members is the Director of the Kansas Water Office (KWO). The KWO Director is required to serve as secretary of the KWA.

Subsection (e) of that statute provides the statutory authority for appointing the Basin Advisory Committees (BACs). It states:

> (e) The Kansas water authority may appoint citizens' advisory committees to study and advise on any subjects upon which the authority is required or authorized by this act to study or make recommendations.

The detail for administration of the BACs is provided through a Memorandum of Internal Policy (IPM), which is attached. The BACs are, therefore, authorized by KSA 74-2622, subsection (e), and administered pursuant to the Water Authority's IPM-04.

Enclosure

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Letter writer suspended

Water office director argues Salinan's letter made improper implications about committee

By DUANE SCHRAG
Salina Journal

The chairman of the Smoky Hill Basin Advisory Committee has been suspended pending the investigation of a letter he sent the Salina Journal but that hasn't been published before appearing on Page A8 of today's edition.

In the letter, J. Neil Jednoralski, 60, Salina, resurrected a controversy that arose six years ago when Allie Devine, who at the time was Kansas secretary of agriculture, pushed for legislation that would curtail the authority of the Division of Water Resources' chief engineer. She resigned in May 1999, several months after reports surfaced that her father had recently been denied a request for additional water rights.

Jednoralski said in the letter-to-the-editor that Devine was "fired for conflict of interest." Devine said Friday that is untrue.

"I don't want to get involved in this situation," she said. "I will tell you I was not fired as secretary of agriculture. I don't think it's my place to get involved in the relationship between the Water Office and this gentleman. I don't know him."

When she announced her intention to resign, Devine said she wanted to spend more time with her family and that criticism of controversial changes within the department were not the reason.

Former Gov. Bill Graves, who is now executive director of the American Trucking Associations, issued a brief statement through a spokesman Friday.

"Allie Devine was one of the finest people in state government," he said. "She was a trusted and valued member of my cabinet. I was sorry to see her leave."

Jednoralski's e-mail letter evidently was forwarded to the Kansas Water Office by one of the many people to whom he sent copies. Jednoralski signed the letter with his name, his professional qualifications as a licensed professional engineer and chairman of the Smoky Hill/Saline Basin Advisory Committee.

The committee advises the Kansas Water Authority, whose administrative arm is the Kansas Water Office. On Thursday, Kansas Water Office Director Tracy Streeter sent Jednoralski a letter notifying him he had been suspended for implying that his letter was written on behalf of the committee, even though the matter was not one the committee has discussed.

Jednoralski said Friday he intended it as a personal letter.

"I was not speaking for the BAC (Basin Advisory Committee)," Jednoralski said. "I was just saying I was the chair."

But Streeter said in his letter that Jednoralski's e-mail created a different impression.

"This format gives indicia that you are acting on behalf of the Smoky Hill/Saline BAC," Streeter wrote. "... The e-mails indicate activity that is contrary to the needs of the Basin and the (Kansas Water Authority). I would ask that you cease sending such messages that indicate or imply you do so as the chair of the Smoky Hill/Saline Basin Advisory Committee.

"I further note that your opinions on an issue may be strong, but you should take steps to indicate those opinions are your own and not those of the Smoky Hill/Saline BAC ... Until I have completed the investigation and presented the issue to the Kansas Water Authority at the April 2007 meeting of that body, I am ... suspending you as chair of the Smoky Hill/Saline Basin Advisory Committee."

Streeter did not return a call requesting comment.

Devine, a registered lobbyist for the KLA, recently promoted legislation that would have restricted the authority of the chief engineer. House Bill 2070, as originally proposed, would have eliminated Intensive Groundwater Use Control Areas in five years. The bill was modified to replace the sunset clause with a moratorium on new IGUCAs or expansion of existing IGUCAs until July 2008; in the meantime, the IGUCA law would be studied.

Leavenworth Times
Manhattan Mercury
Olathe Daily News
Pittsburg Morning Sun
Salina Journal

Proponents of the bill object to broad authority the IGUCA law gives the chief engineer. Since 1945, Kansas law has relied on the principle of "prior appropriation, "which is often summed up as "first in time, first in right." In short, those granted water rights most recently are said to have rights that are junior to those granted earlier.

When there isn't enough water to satisfy all users, prior appropriation requires that junior rights be suspended, in chronological order, until demand falls back in line with supply.

Starting in the 1950s — one of Kansas' deepest droughts was 1954-56 — there was a sharp acceleration in the granting of water rights, and by the 1970s the effect on streams and aquifers was evident. The IGUCA law, which went into effect in 1978, provided for the creation of areas where the chief engineer had vast power to limit water use. In particular, the chief engineer does not have to abide by the chronology-bound prior appropriation doctrine.

HB 2070 received a narrow majority of votes in the House — 61-59 — but fell two votes short of the 63 needed to send the bill to the Senate.

In the letter-to-the-editor, Jednoralski defended IGUCAs.

Jednoralski's letter to the editor

Is Kansas Livestock Association attorney Allie Divine related to former Kansas Department of Agriculture Secretary Alice Devine?

While Alice Devine was secretary, she tried to limit the authority of the Kansas Department of Agriculture Division of Water Resources chief engineer, when the KDA DWR turned down her father's new water appropriation in an over-appropriated area of southwest Kansas. She wanted the secretary to have final say. She was fired for conflict of interest.

Intensive Grounwater Use Control Areas are needed if the groundwater is to be preserved at a reasonable level. We must sustain the groundwater for future generations. If you are interested in this discussion, attend one of the 12 Basin Advisory Committee meetings. See the www.kwo.org calendar for locations and times.

— *J. NEIL JEDNORALSKI*
Salina

Water proposal taps debate

Garden City Telegram

State ag secretary would get power

WATER 2-17-99

By SARAH KESSINGER
Harris News Service

TOPEKA — Decisions over who can pump groundwater in Kansas would enter the political arena if a bill to change the process were to pass, opponents of the measure told legislators this week.

Opposing sides spoke to the Senate Agriculture Committee Tuesday over a measure to give rule-making authority on water rights to Agriculture Secretary Allie Devine. That power is now in the hands of Division of Water Resources chief engineer David Pope.

The division is in the department of agriculture, but retains independence in ruling on water rights issues and approves regulations for the state's different water districts.

Water rights issues are particularly controversial in arid western Kansas where irrigators pump thousands of gallons of groundwater and some cities struggle to maintain adequate water supplies.

"It is imperative that the rules and regulations that the public is expected to follow be adopted with the knowledge and support of the secretary," said Mary Jane Stattelman, assistant secretary of agriculture. "However, under the current statute, the chief engineer can adopt rules and regulations without input or approval of the secretary."

Stattelman said the secretary is ultimately responsible for the division's decisions, so she should have the final say.

Kent Moore, board member of the Water Protection Association of Central Kansas, questioned why the chief engineer's authority should be diluted when he has the scientific and technical expertise to enforce water laws.

"The chief engineer needs protection from political pressure when required to make politically unpopular decisions. These rules and regulations, with few exceptions, have been administered fairly in the past," said Moore, a farmer from Iuka.

But Sen. David Corbin, R-Towanda, argued that water decisions are political, just like everything in government.

"I get the idea that (the chief engineer) can't be touched. It's like creating a fourth branch of government that can't be touched," Corbin said. "Everything in Kansas is political — even water."

Steve Frost, executive director of Southwest Groundwater Management District No. 3, agreed that water is a volatile issue because of competing interest.

Devine's position is political, while the chief engineer is a state employee, Frost said. The concern is this might have a long-term effect that might hurt agriculture. Every four years there might be a new secretary of agriculture that might have conflicting interests.

"The chief engineer is a state employee whose independence from the secretary offers stability and objectivity," Frost said. "There should be some concern from water users outside of agriculture about placing it under the secretary of agriculture."

Connie Owen, a former water division attorney, warned the change could jeopardize the state's limited water supply.

"If water use is approved based on political pressures, rather than on protecting existing rights and preserving the water supply, all water users will suffer," Owen testified. "The sooner the supply runs out, the sooner all users would be harmed."

The issue needs more study, Frost said, after the meeting.

"There are ramifications that affect many other areas. It think it needs a lot more discussion," said Frost, who is Garden City's mayor.

Pope was at the meeting, but declined comment afterward.

"I think the department has spoken for our agency on the bill," he said.

But during another recent committee hearing, Pope said he preferred leaving the authority as it exists now.

No action was taken on the bill — Senate Bill 287 — which also includes a proposed appeals process for people disputing water rights decisions. Stattelman said the only way a person now can appeal is by going to court. The department wants to provide the public an appeals process similar to those available through other state agencies.

The proposal joins other bills dealing with the water division this session. Two other measures would change the chief engineer's position to a political appointment rather than a classified post. Those bills, before the House and Senate agriculture committees, have not been voted on.

Moore requested the bills be tabled for study after the session ends.

The current bills "are being brought about so fast that no one really knows exactly what their full impact will be," he said.

"... We do know that these issues need more than three weeks debate."

Telegram reporter Soledad Quiñonez contributed to this report.

Media needs to report full story on water issue

By Alice A. Devine
Kansas Secretary of Agriculture

Hitch 4-18-99

I would like to submit additional information to help put readers on solid ground regarding the editorial dated April 10.

Issues regarding the structure and processes of the division of water resources within the Kansas Department of Agriculture have been present for many years. This structure and its processes have affected many Kansans adversely. This situation needs the attention of the Administration and the Legislature. A 1994 "Reinventing Kansas Government" report on Environmental Water Permitting outlined a number of permitting and processes issues needing to be addressed.

In 1992, the Kansas Sierra Club and the Kansas Natural Resources Council sued the Kansas Board of Agriculture, challenging its structure. The plaintiffs argued that because the Board of Agriculture was elected only by farm organizations, and because it regulated areas critical to ALL Kansans, such as water, meat and poultry, and weights and measures, that the 125-year-old structure was a violation of the U.S. Constitution. Under the Constitution, all citizens are entitled to representation in the government. The U.S. federal court agreed with the plaintiffs and declared the structure of the Board of Agriculture unconstitutional and placed the department in receivership until the Legislature revised the structure of the department.

In 1995, the Legislature responded by passing legislation that created a Cabinet-level Department of Agriculture, headed by a secretary, appointed by the Governor and confirmed by the Kansas Senate. Under that law, the authority to issue regulations (rules of the game that further define laws) was given to the secretary of agriculture. This structure follows the model of all other Cabinet-level agencies in state government. In addition, the legislation created an advisory Board of Agriculture to provide input on regulations. The advisory board has bipartisan representation and staggered terms to assure that politics do not override good public policy. According to the state senators present in 1995, the legislation did not change the statutes dealing with the role of the chief engineer or the position's degree of independence within the structure of the newly created Department of Agriculture because the opponents of the legislation asked for this compromise position.

Senate Bill 287 as originally introduced and passed by the Kansas Senate was a continuation of the evolution of the structure and processes of the Department of Agriculture. It did not come from "nowhere." During the approximately 10 hours of hearings before the Senate Agriculture Committee, the processes for appropriation of water, the structure of the division of water resources and the authorities of the chief engineer, the secretary of agriculture and the groundwater management districts were discussed at length. The Senate Agriculture Committee and subsequently the full Senate passed a bill that placed the regulations of the chief engineer under the same approval process as all other programs in the Department of Agriculture. Further, the original version of Senate Bill 287 provided for independent hearings within the department. Again, this is the process used by all other programs within the Department of Agriculture and state government.

When the bill moved to the Kansas House of Representatives, a number of objections were raised. First, opponents claimed such a bill dealing with water should not be handled quickly. The Legislature deals with major topics every year at various speeds. Opponents insinuated that proponents of the bill and the administration were trying to rush something past the Legislature before anyone understood the text of the bill. On Feb. 23, 1999, recognizing the need to assure that Kansans across the state knew of the legislation and the reasons the administration supported the bill, I sent and faxed approximately 80 letters to members of the boards of Water Pak, the Kansas Water Authority, the five groundwater management districts, and Southwest Kansas Irrigators. These letters were sent before the Senate committee completed its work and weeks before the House began discussions on the bill. Clearly, this was not the act of someone who was trying to be less than forthcoming.

Opponents argued behind the scenes that this bill was nothing but the results of a personality dispute between chief engineer David Pope and me; further, that I was conducting a "power play." I strongly believe that public officials have a boss – the people of Kansas. Accountability is the essence of democracy. If a position is not accountable to the people, it is outside the scope of the Constitution. If a position is not accountable to the publicly elected officials of the state, to whom is it accountable? Did we learn nothing from the challenge to the structure of the Board of Agriculture?

Some House Democrats continuously questioned the reasons behind this bill. They implied that since there was no mass public outcry, that nothing must be wrong, therefore no bill was necessary. There are people who have been adversely affected by the processes used with the division of water resources. I have met them and heard their stories. There are persons who support the legislation who would not testify for fear of retaliation by persons within the division of water resources. (I fully understand their fears.) When questioned as to whether I knew of any Kansans who were displeased, I responded with examples of Kansans who had complained about the division

Contra Costa Times

of water resources processes. I was later criticized for responding truthfully.

And finally, the opponents of the bill looked to the water-right application of my father to prove that I had some hidden purpose in supporting SB 287. These are the facts of my father's case: My father sought to develop a water right on a piece of property he owns. He contacted the groundwater management district to inquire as to the availability of water. He received verbal approval of the availability of water for appropriation. My father proceeded to complete the required paperwork and to drill test holes to locate a source of water, spending in excess of $5,000. On Jan. 21, 1999, he received notice from the department that staff would be recommending disapproval of the application because there was no water available for appropriation. Further, the letter indicated that he had 15 days to respond. My father was out of the state. Following instructions from department staff, my family asked for an extension of time, which was granted, as is normally done in similar situations. There has been no final decision on this application.

I think most Kansans would agree that if one entity of government approves something, and a closely coordinated second entity of government proposes to disapprove it, there is no real coordination. On its face this appears to be a process problem. My father has every right as a Kansan to understand and question what his government is doing, especially when its actions cost him money.

As a proponent of Senate Bill 287 I have been criticized for not disclosing the circumstances of this application to the Legislature. I have filed all the required disclosure documents required by state law. I have no financial interest in my family's operation. It is unlikely that the bill will affect this application. Legislators involved with agricultural issues have known since the day of my Senate confirmation that my family farms and irrigates.

If there is a new standard for disclosure for persons offering testimony to the legislature then it should apply to all perso[illegible] media and some legislators [illegible] scrutinized the water rights and motives of persons supporting the bill. Shouldn't the same scrutiny apply to opponents of the legislation?

Finally, I am pleased that the Legislature passed a bill that: (1) provides an appeal process for decisions of the chief engineer: (2) provides that all of the division of water resources policies that are required to be rules and regulations be submitted to the secretary of administration or attorney general by Nov. 15, 1999; (3) provides that all groundwater management district policies that are required to be rules and regulations be submitted to the chief engineer by March 1, 1999; (4) authorizes the secretary of agriculture to review and make recommendations to the chief engineer regarding proposed rules and regulations; (5) directs the Kansas Water Authority to study various water issues; (6) requires certification of water rights.

It is a good step forward but more work needs to be done. Hopefully, the Legislature will have the courage to ask the tough questions and the media will report the full story.

Frost finds no record of Devine's request

Garden City Telegram

By SARAH KESSINGER
Harris News Service

4/30-99

WATER

TOPEKA — The director of the Southwest Kansas Groundwater Management District said he has found no record to verify state Agriculture Secretary Allie Devine's allegation that his office gave her father bad advice before he applied for a water right.

Steve Frost, director of Groundwater Management District No. 3 in Garden City, said he has looked but can't find any correspondence or record of speaking with Meade County farmer Frank Devine before the irrigator requested a water right last fall.

The issue came up in a letter from Allie Devine to Harris newspapers in response to a recent news report on her father's water right application.

The application was denied in January, just prior to the secretary's advocacy for laws to give her greater oversight of the state water rights division and its chief engineer, who denied the Devine water right.

Devine wrote that her father sought to develop a water right and had contacted the groundwater management district in Garden City to see if water was available.

The secretary stated that her father "received verbal approval of the availability of water for appropriation. My father proceeded to complete the required paperwork," she continued, "and to drill test holes to locate a source of water, spending in excess of $5,000."

Frost said he was not surprised when he read the letter in the newspaper.

"I understand how these misunderstandings can happen and it's a very complicated process, so errors can happen. And if an error has happened and it's our fault I'm sure we'll make that right."

But he said his office had no record of telling Frank Devine that water was available when he applied for a water right last fall.

The office doesn't give verbal approval on water availability, he said. It counsels landowners on the availability of water and sends them to the state's Division of Water Resources if they want to apply for the right to pump. The process is supposed to be documented.

"We have searched extensively and we can find no record of that applicant's request for preliminary calculations or other inquiry, even if it was verbal," he said.

Frost declined further comment on the letter because the district could become a party to a legal inquiry on the water right.

On Thursday, Devine said she stood by her statements. She declined to offer verification that her father had spoken with someone in the groundwater district office except to say there were witnesses.

"We're going to get into a 'he said, she said, they said,' and I don't think that's productive."

But, she added, "It's verifiable. I would not have written it if it were not verifiable."

Also in her letter, Devine questioned the coordination between the local and state agencies. She referred to her father's case as an example of a problem: the local agency said there was water, and the state agency denied the application.

Frost said he thought communication between the two agencies was good.

"But again there's a third party involved and that's always an unknown."

Frost said his office would welcome information from Devine on the case, which has been dismissed by the state's water resources division. He said landowners could appeal the chief engineer's ruling to a local water district board.

"Any applicant has an opportunity to have a hearing and a recommendation provided by the district board of directors before it is finally denied," Frost said. "I wish they would have availed themselves of this opportunity."

Frost said the board provides the hearings to hear disputes and correct them.

"That's much preferable to having a matter taken to court," he said.

Devine said in the letter that her father's water right request had nothing to do with the administration's intent to change oversight in the Division of Water Resources.

The bill originally intended to give her regulatory authority over the division's chief engineer David Pope. Pope's office is within the agriculture department, and Gov. Bill Graves contends it lacks the public accountability required of other state offices.

The change in regulatory authority was not included in the final bill, signed by Graves this week, but Devine was given authority to oversee water rights appeals.

Another part of the bill sets up two studies of water rights to be conducted this summer. A legislative interim committee and the Kansas Water Authority each will look at various issues, including groundwater management districts.

State ag secretary to step down

■ Allie Devine, the first woman to serve as agriculture secretary, plans to resign May 21.

By Scott Rothschild
Eagle Topeka Bureau

TOPEKA — Kansas Agriculture Secretary Allie Devine, who was at the center of a legislative fight over water rights this session, will resign later this month, Gov. Bill Graves announced Thursday.

"I'm sorry to see Allie go," Graves said. "She has just been a great part of this administration and certainly a great personal friend of mine."

The fight over water had nothing to do with her decision to leave, Devine said. Before the November election, she and Graves had discussed her leaving after the session, Devine said.

Devine, an original member of Graves' Cabinet who was appointed in January 1995, is leaving to spend more time with her family, Graves said. She has a 7-year-old daughter and a 3-year-old son.

"Allie is ready to go back and spend some time at home," Graves said.

But Devine said she has talked to several farm organizations about possible employment.

Devine grew up on a farm in southwest Kansas and has spent her professional life working on agriculture issues.

Before holding the state post, she served as an attorney for the Kansas Livestock Association, executive assistant to former U.S. Agriculture Secretary Edward Madigan, and minority counsel on the U.S. House Agriculture Committee.

"I'm just grateful to the governor and the agricultural organizations," Devine said. "We've made some real progress in this department."

Gary Hall, president of the Kansas Farm Bureau, said Devine was "very well respected in agriculture" because of her experience.

The state agriculture department has a $22.4 million budget and more than 300 employees.

During the session that ended Sunday, Devine fought local water officials from across the state as she pushed for legislation allowing the agriculture secretary to decide appeals of water-rights cases.

Graves signed the bill into law, saying it would make authority over water issues consistent with the regulation of other state resources.

But for years, water-rights appeals and rule-making authority have been handled by the chief engineer of the state's Division of Water Resources. And many water officials liked it that way, saying it protected decisions about water rights from the interests of politically appointed officials.

Devine "may have been a good secretary of agriculture, but in this one respect, I'm happy to see her go," said Wayne Bossert, manager of Groundwater Management District No. 4 in Colby, who lobbied against the legislation.

The bill Graves signed also calls for studies on water issues to be conducted before the 2000 legislative session. Graves said Devine would not be participating in those debates.

The governor said he will likely name an interim secretary later this month and then await nominees from the State Board of Agriculture before naming a permanent replacement.

Devine cited her major accomplishments as reforming meat inspections and the department's weights and measures program, and instituting a more standardized computer system at the department.

Last summer, officials at the U.S. Department of Agriculture criticized Kansas' meat-safety enforcement after finding unsanitary conditions at several processing plants.

Devine increased the number of inspectors and instituted several other changes. By November, the USDA was reporting that Kansas had improved.

In 1995, Devine brought to light problems in the department's program that tests fuel pumps, livestock scales and grocery store scanners for accuracy. At one point during an investigation, Devine, who was pregnant at the time, was assigned a bodyguard.

No criminal wrongdoing was found in the department, but Devine pushed for changes to make the measurements more accurate.

Scott Rothschild covers state government and the Legislature. He can be reached at (785) 296-3006.

Devine

2-8

From: <infoweb@newsbank.com>
To: <marthad@klrd.state.ks.us>
Date: 3/21/2007 3:20 PM
Subject: Requested NewsBank Article

Paper: Chanute Tribune, The (KS)
Title: Secretary of Agriculture Allie Devine resigns
Author: © 1999 The Chanute TribuneSarah KessingerHarris News Service
Date: May 7, 1999

TOPEKA - State Secretary of Agriculture Allie Devine will resign at the end of the month, leaving a second opening in the governor's cabinet.

"Allie and I have been talking about this for quite some time," Graves said Wednesday at his weekly press conference.

The governor said Devine has young children and wanted to spend more time with her family. She had agreed last fall to stay on the job through this year's legislative session, she said.

Devine's departure leaves another cabinet opening in addition to the vacancy for the secretary of the Kansas Department of Health and Environment.

"She has just been a great part of this administration and certainly a great personal friend of mine," the governor said.

Devine said later that instead of traveling so much, she preferred to spend time with her two children. She plans to work in an agriculture-related job that allows her more time with family.

The secretary leaves a department that has undergone controversial changes in recent years.

"I'm really pleased with the progress it has undergone, we've gone through numerous reforms. I'm pleased with the staff and think they have done and will continue to do a fine job."

Among the major issues Devine oversaw were a revamping of regulation in the Division of Weights and Measures and improvements to the state's meat locker inspection program, which federal regulators were poised to take over last year. Devine also worked to reform authority in the Division of Water Resources, which appropriates water rights.

Most recently, Devine asked the Legislature to give her authority over regulations approved by the water division's Chief Engineer David Pope. That request was turned down, but she gained approval of a new appeals process in the water division, that would allow the secretary to veto rulings by the chief engineer. Devine said the public deserved accountability. The issue became controversial when several water districts, some irrigators and cities opposed the changes, saying they would politicize water policy.

Devine, a former attorney for the Kansas Livestock Association, joined Graves' original cabinet in 1995. She was the first secretary named by a governor to the agriculture department. Prior to that, the state Board of Agriculture selected the secretary until a lawsuit forced reorganization of the department.

Rep. Dan Johnson, R-Hays, applauded Devine's leadership through that transition.

"I know she inherited a bunch of problems," he said. "A lot of people don't like change, but she was not afraid to tackle those things that needed to be tackled."

Legislators who served on agriculture committees praised the state's top farm official.

"I'm disappointed, but I'm probably being selfish," said Rep. Bill Feuerborn, R-Garnett. "I think she's done

an outstanding job for the state."

"I felt like she's been a strong voice for the farmers," said Rep. Bill Light, R-Rolla.

Environment committee member Rep. Dennis McKinney, D-Greensburg, said Devine brought about needed changes in problem areas. But he disagreed with her attempts to change the water division, saying it needed more study.

Graves said he will name an acting secretary by the end of the month. The State Board of Agriculture, which is now an advisory committee, will select three finalists for the position and recommend those to Graves.

The governor also is seeking a new secretary of Kansas Department of Health and Environment. He fired former secretary Gary Mitchell in January.

Author: © 1999 The Chanute TribuneSarah KessingerHarris News Service

Questions raised about Devine's motivation

(—) Garden City Telegram 4-9-99

By SARAH KESSINGER
Harris News Service

TOPEKA — Agriculture Secretary Allie Devine asked legislators for more control of the Kansas water regulator at the same time her father had a water right dispute pending with the state.

Legislators had mixed reactions to the news Thursday, with one saying Devine should have disclosed the fact when she proposed the changes.

Devine asked legislators Jan. 26 to approve a bill to change the chief engineer of water resources from the status of classified to unclassified, which would make it easier for the secretary to fire an employee.

Legislators' response was lukewarm, so Devine pushed for another bill to give her authority over the regulations and appeals process of the water division.

She said the public deserved a process held accountable to the governor's administration.

Currently, the division and its chief engineer, David Pope, have independent authority to regulate water use.

A few days earlier, on Jan. 21, the water division recommended the denial of a water right application from the secretary's father, Meade County farmer Frank Devine. A letter to him cited lack of available groundwater. Devine owns several water rights for irrigation, and had applied last November for the additional 654 acre feet.

Topeka attorney Greg Wright, who is Secretary Devine's husband, requested an extension on behalf of Frank Devine so he could gather more information in support of the application.

Pope granted a routine 60-day extension, and granted another 15-day extension on Thursday. Pope will make a final ruling April 20.

No connection

Secretary Devine said her father's case and her plans to change the water division are "absolutely unrelated."

"I have no financial interest in it. I didn't know anything about the circumstances of his application until my brother faxed me a copy of the letter Jan. 21," Devine said.

Her father was out of the state so she advised the water division he would request an extension, she said.

"Innuendo," Devine said, has led people to connect her father's case to her motives for the bill.

"The bill is about providing the public with real input into the rule and regulation process and providing individuals with the right to have fair hearings," Devine said.

Her father's case, she said, "is one of a private citizen dealing with the division of water resources."

"The bill would not have affected it in any way."

The legislation, promoted by Gov. Bill Graves, was changed significantly by legislators and faces another round of House and Senate votes this week. Although it no longer gives the secretary regulatory authority, Devine would have authority to review appeals from water right applicants.

Rep. Laura McClure said the fact that the secretary's father had a pending water right case at the same time legislation was introduced raises questions. McClure, who opposed the bill, said Devine could have appeased concerns by telling legislators about her father's water case.

"It's better to be up front about it," said the Osborne Democrat.

Plan was under way

Another critic of the bill, Rep. Dennis McKinney, D-Greensburg, said Devine spoke with him in December about her concerns with accountability in the water division.

The division is in the agriculture department, but has had independent regulatory powers since 1945.

McKinney disagrees with the secretary's plan, saying it will put water decisions into the political arena, because Devine is a political appointee of the governor.

But he didn't see a conflict with Frank Devine's case.

"I don't think that's the secretary's motive," he said.

Hugoton Sen. Steve Morris, a chief advocate for the bill, agreed.

"If it happened at the same time the bill was introduced it was pure coincidence," Morris said.

"We talked about the water division issue way back in the fall," he said. "Actually, we've been concerned about it over the last couple of years."

Morris said Devine was busy dealing with problems in other regulatory agencies in her department in recent years. She had no time to draft the water division bill until this session, he said.

The bill easily gained Senate support early on. But water specialists around the state complained they weren't consulted and weren't told of the legislation until it was well into the process. Since then, many have criticized the bill and how quietly it was introduced.

"That doesn't surprise me. This legislation came out of nowhere" Roger McEowen, professor of agricultural law at Kansas State University, said of the Devine water right case.

A concern among water law experts is southwest Kansas irrigators having too much say in water control, McEowen said. Well-heeled agricultural interests are active campaign contributors, he said, and could influence water regulation if a political appointee controls it.

But Devine is adamant that her bill solely aimed to bring the division into line with other regulatory agencies. She has worked with the division for more than a year on formalizing its processes, she said.

Gov. Bill Graves' spokesman Mike Matson echoed that.

"This legislation has nothing to do with an individual who made an application. This has everything to do with public accountability."

Every other state agency is accountable to the governor, Matson said.

"Find a case where an individual has benefited because they have some connection. It doesn't happen. Bill Graves doesn't operate that way. His Cabinet doesn't operate that way."

Devine resigns position

Secretary of Agriculture quits to spend time with children

By Sarah Kessinger
Harris News Service

TOPEKA – State Secretary of Agriculture Allie Devine will resign at the end of the month, leaving a second opening in the governor's cabinet.

Allie Devine

"Allie and I have been talking about this for quite some time," Gov. Bill Graves said Wednesday at his weekly press conference.

The governor said Devine has young children and wanted to spend more time with her family. She had agreed last fall to stay on the job through this year's legislative session, she said.

Devine's departure leaves another cabinet opening in addition to the vacancy for the secretary of the Kansas Department of Health and Environment.

"She has just been a great part of this administration and certainly a great personal friend of mine," the governor said.

Devine said later that instead of traveling so much, she preferred to spend time with her two children. She plans to work in an agriculture-related job that allows her more time with family. The secretary leaves a department that has undergone controversial changes in recent years.

"I'm really pleased with the progress it has undergone, we've gone through numerous reforms. I'm pleased with the staff and think they have done and will continue to do a fine job."

Now, a merger farmers can like

■ The combination of Farmland Industries and Cenex Harvest States would be good for their farmer-owners, economists say.

By Tim Todd
Bridge News

KANSAS CITY, Mo. — The potential unification of cooperative giants Farmland Industries and Cenex Harvest States would create a business suited to compete with industry's consolidating giants, agricultural economists say — and the benefits should pass along to the co-ops' farmer-owners.

After a series of joint ventures starting a decade ago, the country's two largest cooperatives Thursday revealed they are working toward total unification, with a target completion date of June 1, 2000.

The announcement comes amid a full slate of agribusiness mergers and pending deals, ranging from Cargill's planned acquisition of Continental Grain's grain assets to DuPont's purchase of the 80 percent of seed company Pioneer Hi-Bred it does not already own.

A united Farmland-Cenex would have had revenues of $20 billion in fiscal 1998, good enough to make it No. 65 on the Fortune 500 — ahead of such companies as Coca-Cola and American Express, but still behind privately held Cargill, with more than $52 billion in revenues, and food conglomerate ConAgra, which is No. 50 on the Fortune 500 with more than $23 billion in annual revenues.

Still the deal should be a relief for farmers concerned that growth by firms like Cargill and the publicly traded Archer Daniels Midland could monopolize commodity prices and reduce producer income. The Farmland-Cenex deal could increase earnings for the 900,000 farmer-owners of the two cooperatives, economists said.

For a farmer, a merger's "my best chance to compete against the Cargills, the Continentals, the ADMs," said Chris Hurt, an agricultural economist at Purdue University.

Individually, both cooperatives, like much of the rest of the industry, have taken steps toward creating a total food production system that would bring producers closer to end users.

On the first page of its most recent annual report, Cenex Harvest States said its vision was to be an integrated food system from the "back 40 to aisle 40," by linking producers and consumers. In Farmland's 1998 annual report, Board Chairman Albert Shivley said the cooperative "must have consumers' needs in mind in everything we do."

The consolidation is partly the result of scientific advancements in food production. Those advancements one day may have farmers producing commodities genetically catered to specific markets, such as feed for dairy cattle that increases milk production.

Industry leaders say end-users will pay more for products tailor-made to their needs. Some farmers, however, have suggested that the higher prices will mean more to corporate bottom lines than to farmers' checkbooks.

A united Farmland-Cenex could change that, economists say.

"There is a difference when you have the farmer control," said Bill Nelson, director of the Quinten Burdick Center for Cooperatives at North Dakota State University. "The farmer should benefit from the efforts."

Those benefits could come in the form of higher commodity prices or a boost in the annual patronage payments cooperatives make to their member-owners, he said.

However, other industry watchers noted that similar efforts in specific agricultural sectors, such as dairy production, have not always resulted in a significant earnings boost for producers.

"It's not a slam dunk," said Todd Duvick, an industry analyst for Bank of America.

And the unification is not necessarily a "slam dunk," either.

K A N S A S

TRACY STREETER, DIRECTOR

KANSAS WATER OFFICE

KATHLEEN SEBELIUS, GOVERNOR

Presented to
The Senate Elections and Local Governmental Committee

Tracy Streeter
Kansas Water Office
March 22, 2007

Chairman Huelskamp and members of the Committee, I am Tracy Streeter, Director of the Kansas Water Office. I appreciate the opportunity to appear this afternoon to present information relative to Basin Advisory Committees (BAC) and the authorities and policies affecting those committees.

Basin Advisory Committees are citizen advisory committees created by the Kansas Water Authority, under the statutory authorization. BAC's provide a valued source of citizen input to the Kansas Water Authority on various topics of interest to the Authority.

BACs were created in 1985 under the express powers of the Kansas Water Authority. The statutes creating the Kansas Water Authority and delineating the Authority's powers specifically authorize that the Kansas Water Authority ". . . may appoint citizens' advisory committees to study and advise on any subjects upon which the authority is required or authorized by this act to study or make recommendations." K.S.A. 74-2622(e). This statute also has enabled the KWA to create other committees as deemed necessary in carrying out its functions.

The current BAC structure and related issues, including basic ethics, are addressed in Internal Policy Memorandum 04 (IPM 04 - *attached*) amended by the Kansas Water Authority in June 2006. The Water Authority has long utilized Internal Policy Memorandums to document policy actions relative to internal operations.

IPM 04 was initially created in 1985 and has been amended several times in the intervening years. In 2006, the structure of the BAC was modified as a result of the Kansas Water Authority's desire to reinvigorate the BAC process for broader citizen input. The amended IPM 04 is a result of lengthy discussion, review and input from each basin advisory committee prior to its approval by the Water Authority.

Recent action regarding a BAC member was initiated due to apparent disregard to the terms stated in IPM 04. As Director of the Water Office, it was in my judgment that the member be temporarily suspended as committee chair pending further investigation into the issue and formal action by the Kansas Water Authority. I will be providing a report and recommendation to the Water Authority at its April 4 meeting.

Thank you again for the opportunity to appear today. I would be happy to answer questions at the appropriate time.

Elections and Local Government
3-22-07
Attachment 3

901 S. KANSAS AVENUE, TOPEKA, KS 66612-1249
Voice 785-296-3185 Fax 785-296-0878

KANSAS WATER AUTHORITY
901 South Kansas Avenue, Topeka, KS 66612-1249 (785) 296-3185

Steve Irsik, Chairman

IPM-04
Revised June 2, 2006

MEMORANDUM OF INTERNAL POLICY

A Basin Advisory Committee shall be appointed for each of the 12 major river basins. The Basin Advisory Committee's purpose is to advise the Kansas Water Office and the Kansas Water Authority pursuant to K.S.A. 82a-903, and amendments thereto. Their responsibilities include, though are not limited to, the following:

1. Advise the Kansas Water Office and the Kansas Water Authority in identification of water-related problems, issues, and concerns within their basin.
2. Advise the Kansas Water Office and the Kansas Water Authority in the formulation of revisions to the Basin Plan for their basin.
3. Advise the Kansas Water Office and the Kansas Water Authority regarding the *Kansas Water Plan* implementation priorities and actions.
4. Serve as a link to the public in the basin through interaction with various groups and individuals and communicate information on concerns and issues to citizens in the basin.
5. Advise the Kansas Water Office and the Kansas Water Authority on policy issues under consideration for inclusion in the *Kansas Water Plan*.

BASIN ADVISORY COMMITTEE STRUCTURE AND MEMBERSHIP

To assure that the membership of each Basin Advisory Committee best reflects the interests of the water users in its respective basin, the following membership procedures will be followed:

Number of Members:

Each Basin Advisory Committee shall consist of either nine or eleven members, subject to requirements for member representation outlined below, as recommended by the Basin Advisory Committee and approved by the Kansas Water Authority. Members shall be nominated by the identified constituent groups or organizations specific to the category and as identified by the basin advisory committee and approved by the Kansas Water Authority. A list of those constituent groups or organizations eligible to nominate for category specific membership is attached as Appendix A, which is subject to periodic internal review and modification by the Kansas Water Authority. It is recognized that a Basin Advisory Committee, through member resignation, attrition or other reasons, may fall below the prescribed number of members at some time. A committee that has less than the prescribed number of members may continue to meet and provide advice and service while open vacancies are filled.

Elections and Local Government
3-22-07
Attachment 4-1

Basin Advisory Committee Member Representation:

1. Each Basin Advisory Committee shall have a "Core Group" of seven (7) water use/interest categories, the qualifying criteria for which will be updated periodically, approved by the Kansas Water Authority and posted on the website of the Kansas Water Office. These categories are:
    a. Municipal Public Water Suppliers
    b. Industry/Commerce
    c. Agriculture
    d. Fish and Wildlife
    e. Recreation
    f. Conservation / Environment
    g. At Large Public
2. Each Basin Advisory Committee shall also have either two (2) or four (4) additional water use/interest categories that are "basin specific" that would be selected from, though not limited to, the list below. These categories would be recommended by each Basin Advisory Committee, subject to approval by the Kansas Water Authority, to represent the diversity of water uses and user groups in the basin. Other category specific membership criteria are attached as Appendix A, which is subject to periodic internal review and modification by the Kansas Water Authority, with approval by the Basin Advisory Committee that has that specific membership category.
    a. Dryland Farming
    b. Irrigated Farming
    c. Other Public Water Supplier
    d. Watershed Districts
    e. Groundwater Management Districts
    f. Water Assurance Districts
    g. Planning and Zoning organization/commissions/ groups
    h. Watershed Restoration and Protection Groups
    i. At Large Public
3. Applicants are eligible for committee membership only in the basin in which they have their principal or primary place of residence.
4. Each Basin Advisory Committee and the Kansas Water Authority should make reasonable effort to achieve geographical balance among the members of each Basin Advisory Committee.
5. Employees of state agencies represented by ex-officio members of the Kansas Water Authority are not eligible for membership on Basin Advisory Committees. This does not include individuals associated with organizations represented by voting members on the Kansas Water Authority.

Appointment of Basin Advisory Committee Members:

Nomination, Recommendation and Appointment

1. The Kansas Water Office shall seek and accept nominations for each vacancy that occurs on any basin advisory committee and prior to the end of each expiring committee membership term. Nominations shall be sought from the designated nominating constituent groups or organizations as established for each Basin Advisory Committee and each basin category. Each nominating organization may submit no more than 2 nominations in a category for any single basin committee vacancy. Applications and nominations for each category will be solicited from the general public by publication of a notice of vacancy in newspapers within the basin.

    a. The Kansas Water Office will establish a deadline for accepting nominations for any vacancy. The deadline established for accepting nominations for any vacancy shall be not less than 60 calendar days and not more than 180 calendar days.
    b. The Kansas Water Office will attempt to have a pool of at least three (3) nominations for each vacancy. Nominations meeting membership criteria will be forwarded to the Basin Advisory Committee for consideration at the next Basin Advisory Committee meeting following the expiration of the deadline.

2. The Kansas Water Office will review each nomination received to insure that the nominee meets the criteria established for representation the Basin Advisory Committee, as well as the other general criteria. Nominations meeting the criteria to fill vacant positions will be submitted to the Basin Advisory Committee by the Kansas Water Office. The Basin Advisory Committee will then make a recommendation on a nominee to fill the vacancy on the Basin Advisory Committee to the Kansas Water Authority by majority vote. The Kansas Water Authority will then decide whether to ratify the recommendation. If the Basin Advisory Committee does not make a recommendation to fill a vacancy after reviewing the nominations, the Kansas Water Authority may select one of the nominees to fill the vacant position.

Basin Advisory Committee Chair:

1. The Chair is nominated by the members of the Basin Advisory Committee from the existing membership and approved by the Kansas Water Authority. The Chair serves a four year term, at the pleasure of the Kansas Water Authority. There is no limit on the number of terms a Chair may serve. Members of each Basin Advisory Committee are encouraged to assume this leadership role.

2. The responsibilities of the Chair include, but are not limited to, conducting meetings in an open and organized way; communicating the views of the Basin Advisory Committee to the Kansas Water Authority; setting meeting agendas, and working with Kansas Water Office staff on meeting organization.

3. In the event any member of any Basin Advisory Committee or any Kansas Water Office staff member assigned to the Basin Advisory committee believes the Chair of the Basin Advisory Committee is not meeting the expectations established below, working in a manner contrary to the Kansas Water Authority or Basin Advisory Committee or is not capable of serving as Chair for any reason, that member may make a confidential report

to the Director of the Kansas Water Office. The Director shall then investigate, share concerns, discuss or take action on the issue as the Director may deem necessary. In the event the Director believes that the report is correct, the Director may recommend that the Kansas Water Authority remove the duties of Chair from the member so serving. The Committee would then be asked to nominate another member to serve as Chair. The Vice Chair of the committee would assume duties of the Chair in the interim.

Basin Advisory Committee Member Terms and Expectations:

1. Basin Advisory Committee members serve four-year terms without limit on the number of consecutive terms to which they may be appointed. All expiration dates for terms will be equally staggered over a four year period so that biannually in each four year period, no more that one half (½) plus one (1) of the Basin Advisory Committee members will have terms expiring and the remaining Basin Advisory Committee members' terms will expire in the two years later. All terms will expire on June 30 of odd numbered years. The Kansas Water Office will take appropriate and timely action to ensure that BAC recommendations for vacant positions are presented to the Kansas Water Authority for approval at the next available Kansas Water Authority meeting.
2. Basin Advisory Committee members' views are a vital component of the purpose of the Basin Advisory Committee. Attendance and participation at meetings are critical to insure views are considered.
    a. Each Basin Advisory Committee member should regularly seek out input from members of the public, representative organizations and other sources of public information and input, to insure that the Basin Advisory Committee member is representing the issues and views of the citizens of the Basin.
    b. If a Basin Advisory Committee member does not attend three (3) consecutive meetings, the Kansas Water Office will notify the Chair of the Basin Advisory Committee. The issue shall be placed on the agenda of the next Basin Advisory Committee meeting for action. In the event the Basin Advisory Committee recommends the member's term be vacated, the Kansas Water Authority may vacate the remaining term and open the position for nomination.
3. Basin Advisory Committee members are free to express opinions as an individual on water issues of interest to the committee member. There will be the commensurate responsibility of the committee member to insure that the audience understands that personal views expressed are those of the committee member and not a position or view of or in behalf of the Kansas Water Office, Kansas Water Authority or the Basin Advisory Committee.

BASIN ADVISORY COMMITTEE OPERATIONS:

1. Each basin advisory committee shall select from its own membership a member to act as Vice-Chair of the committee. The Vice Chair shall have the following duties:
    a. Consult with the Chair on items, events and initiatives of the committee.
    b. Act as interim chair in the event the chair of any BAC is vacant, until such time as the membership selects a new chair and the chair is approved by the KWA.
    c. Assume the duties of chair in the event of a chair's absence from any meeting or event

2. All basin advisory committee meetings shall be open to the public, meet the requirements of the Kansas Open Meetings Act, K.S.A. 75-4317 *et seq*, and be held in ADA accessible facilities.

3. Meeting notices may be given by phone, telefacsimile, electronic mail, overnight mail or regular USPS postal service. All meeting materials will be posted on the KWO website no less than 5 days in advance of the meeting. Notices of all meetings for the Kansas Water Authority and Basin Advisory Committees will be posted on the KWO website.

4. Future Basin Advisory Committee meeting dates will be set at the previous meeting, whenever possible. If it is not possible to set future meeting dates, reasonable notice should be given to the Basin Advisory Committee members of the next meeting.

5. A Kansas Water Office staff member shall be assigned to each BAC. The staff member shall act as the secretary of the BAC. The Kansas Water Office staff member shall create meeting notes of all Basin Advisory Committees meetings. Notes shall be compiled and posted on the Kansas Water Office website.

6. A quorum shall consist of any 4 members of the Basin Advisory Committee. All Basin Advisory Committee actions shall be determined by a majority of those BAC members present and voting.

Internal Policy Memorandum No. 4, revised July 12, 2001, is replace in total.

June 2, 2006
Date

Steve Irsik, Chairman
Kansas Water Authority

Appendix A: Membership Criteria and Initial Nominating User Groups

These are examples of criteria and nominating user groups. Organizations and entities on this list will receive notification of vacancies from the Kansas Water Office. Any organization or entity that would like to receive notification of vacancies may make a written request to the Kansas Water Office for inclusion on this list.

Core Groups

1. Municipal Public Water Supply:

Criteria: An employee of the Public Water Supply utility or an elected or other appointed official of a city that operates a public water supply system as defined by K.S.A. 65-162a and amendments thereto.

Nominating Organization: Kansas Rural Water Association, League of Kansas Municipalities

2. Industry/Commerce:

Criteria: An individual engaged in a business that uses water in manufacturing, production, transport or storage of products or in providing commercial services, including use in connection with power plants, secondary and tertiary oil recovery, and aggregate extraction.

Nominating Organization: Kansas Chamber of Commerce and Industry, Kansas Independent Oil and Gas Association, American Petroleum Institute, local chambers of commerce, Aggregate Producers Association.

3. Agriculture:

Criteria: An individual whose livelihood is tied to agricultural production, through crops or livestock.

Nominating Organization: Kansas Livestock Association, Kansas Farm Bureau, Kansas Cattlemen's Association; Kansas Corn & Sorghum Growers, Kansas Wheat Growers, Kansas Corn Growers, Kansas Farmers Union, Kansas Agricultural Retail Association or Ks Co-ops, Kansas Dairy Association.

4. Fish & Wildlife:

Criteria: An individual with demonstrated and recognized expertise in fish or wildlife management or conservation of fish and wildlife habitat.

Nominating Organization: Pheasants Forever; Kansas Wildlife Federation; Ducks Unlimited, Audubon, Quail Unlimited, statewide angler organization.

5. Recreation:

Criteria: An individual with demonstrated and recognized expertise in the recreational use of streams or lakes or an employee of a city or county parks department, economic development board, or a chamber of commerce directly engaged in the promotion of water based recreation.

Nominating Organization: Ks Recreation and Parks Association, Ks Canoe Association, lake boating or outdoor camping organization, Kansas Wildscape, Economic Development organization member; Kansas Chamber of Commerce and Industry.

6. Conservation /Environment:

Criteria: An individual with demonstrated and recognized expertise in conservation or protection of natural resources.

Nominating Organization: Kansas Association of Conservation Districts, Kansas Rural Center, Watershed Restoration and Protection Stakeholder Groups, Stream Teams, Resource Conservation and Development Districts.

7. At Large Public:

Criteria: Anyone who lives in the basin with an expressed interest in water resources.

Nominating Organization: Self-nominating

Basin Specific Groups: each Basin Advisory Committee may establish additional membership for that Basin Advisory Committee from groups the Basin Advisory Committee identifies within the specific basin. The following are examples of additional categories.

Dryland Agriculture

Criteria: Own or leases land for dryland production.

Irrigated Agriculture

Criteria: Own or leases land for irrigated production.

Other Public Water Supply

Criteria: Staff or board member of entity that operates rural water district or water assurance district.

Groundwater Management District

Criteria: Manager and/or board member.

Watershed Districts

Criteria: Manager or board member.

Water Assurance District

Another at Large

WRAP

Planning and Zoning

Initial Appendix: June 2, 2006

State of Kansas

Senate Committee on Elections and Local Government

March 22, 2007

Testimony of Richard E. Levy*

Chairman Huelskamp and members of the Committee:

Thank you for inviting me here to speak with you today concerning the free speech rights of public employees, an important question for many thousands of Kansas residents (including myself) employed by state and local governments. The purpose of my testimony is to provide the Committee with general information concerning the constitutional doctrine that applies in this area and to try to answer any questions you might have.

As a starting point, it is clear that firing or other adverse employment action based on a government employee's speech implicates First Amendment rights. Oliver Wendell Holmes once famously rejected the claim of a policeman who had been fired for violating a regulation restricting his speech with the simple pronouncement that "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[1] This understanding has long since been rejected by the United States Supreme Court, which has protected the speech, association, and political rights of public employees.

At the same time, however, the Court has recognized that state and local governments have legitimate interests, as employers, in preventing employee speech from undermining the effectiveness of government operations and that political loyalty may be a legitimate consideration for some positions within government. Thus, the government has greater discretion to regulate employee speech than to regulate similar speech by private persons.[2] For example, the Supreme Court has repeatedly upheld the Hatch Act, which prohibits federal employees from engaging in partisan political activity such as holding party office or participating in political campaigns.[3]

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*Professor of Law, University of Kansas School of Law. My affiliation with the University of Kansas School of Law is included for purposes of identification only. The views expressed are my own and do not in any way represent the views of the University of Kansas or the School of Law.

[1]McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

[2]In particular, the government has much broader authority to restrict speech made during the course of employment. *See* Garcetti v. Ceballos, 126 S.Ct. 195 (2006) (holding that the first amendment was not implicated by disciplinary action against a prosecuting attorney for a memorandum written in course of employment arguing to a supervisor that a case should be dismissed for prosecutorial misconduct). Likewise, it is clear that the government can prohibit employees from using their office to engage in partisan political activity. *See* United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973).

[3]*See* United Public Workers v. Mitchell, 330 U.S. 75 (1947); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973).

There are two key lines of cases concerning employee speech. The first line of cases begins with *Pickering v. Board of Education*,[4] in which the Court held that a teacher could not be fired for writing a letter critical of school officials to a local newspaper. The second line of cases begins with *Elrod v. Burns*,[5] which held that a newly elected Republican sheriff could not fire a process server, bailiff, and security guard because of their affiliation with the Democratic party, thus curtailing patronage hiring practices.

In the *Pickering* line of cases, the Court has developed a multi-part balancing test. First, the employee must establish that his or her speech motivated an adverse employment action.[6] Second, the employee must show that the speech in question was on a matter of "public concern."[7] Third, the employee's free speech rights must be balanced against the government's concern for the efficient functioning of the office. While this balancing test is less restrictive than the "strict scrutiny" test that would apply to similar regulation of private speech, it does require the government to articulate legitimate, employment related concerns before an employee may be disciplined for speech related activities. The same balancing test appears to apply whether or not the employee's speech on matters of public concern is job related, although it has been suggested that job related speech is more likely to implicate employment related interests and unrelated speech therefore receives greater protection.[8]

A critical aspect of this analysis is what kinds of employment related interests will be considered legitimate and potentially sufficient to warrant restrictions on speech. In *Rankin v. McPherson*,[9] the Court summarized the state interests part of this analysis as follows:

> We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are

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[4]391 U.S. 563 (1968). *See also* Perry v. Sinderman, 408 U.S. 593 (1973); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Rankin v. McPherson, 483 U.S. 378 (1987); U.S. v. National Treasury Employees Union, 513 U.S. 454 (1995)

[5]427 U.S. 347 (1976). *See also* Brante v. Finlkel, 445 U.S. 507 (1980); Rutan v. Republican Party, 497 U.S. 62 (1990); O'Hare Truck Service Inc. v. Northlake, Ill., 518 U.S. 712 (1996); Board of County Commissioners, Wabunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996).

[6]The government may avoid liability if it can show that the employee would have been fired anyway for other reasons, such as poor performance or other misconduct, an issue that typically arises in so-called "mixed motive cases," in which the employer has both legitimate and illegitimate reasons for firing an employee. *See* Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). This is essentially a causation requirement, in the sense that if the employee would have been fired anyway, his or her speech does not cause the firing.

[7]*See* Connick v. Myers, 461 U.S. 138 (1983); Waters v. Churchill, 511 U.S. 661 (1994). This requirement is unique to the employment context. Ordinarily, speech need not be on a matter of public concern to receive protection.

[8]Roberts v. Ward, 468 F.3d 963, 968 (6th Cir. 2006).

[9]483 U.S. 378, 388 (1987) (citations omitted).

necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. . . .

These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.

In the *Elrod* line of cases, the plaintiff must first establish that an adverse employment action was taken because of his or her political affiliation. This includes both a requirement that the employment action must be adverse (although this is a very low threshold) and a requirement that the plaintiff show the employer knew of his or her party affiliation and acted because of it.[10] Once the plaintiff establishes these elements, the critical question becomes whether the adverse employment action can be defended on the ground that political affiliation is a legitimate consideration for the particular government position in question. Obviously, high-ranking policy officials who serve as political appointees must be loyal to, and share the views of, the political leader that appoints them. Likewise, people who serve in a confidential capacity must also have the complete trust of their employer. But these exceptions apply to a relatively narrow class of employees, and political affiliation is not a legitimate consideration for most positions. Thus, for example the Court rejected dismissal based on the party affiliation of sheriff's personnel in *Elrod* and of public defenders in *Branti v. Finkel*. The Court has also extended the *Elrod* line of cases to apply to government contracts as well.[11]

This discussion is provides only the general contours of the constitutional doctrine, and does not reflect comprehensive research into the application of these principles by lower courts. Nor does it address some related issues, such as loyalty oaths and citizenship requirements for government service. Nonetheless, it is a fair general statement of the law to say that the following basic principles apply to speech related restrictions on government employment:

- ***Government employees retain their First Amendment rights and regulation of employee speech must be based upon legitimate employment-related considerations.***

- ***Government employees may not be punished for speaking on matters of public concern unless the government's interest in effective operations outweighs the employee's free speech rights.***

- ***Employment and contracting decisions may not be based upon party affiliation unless affiliation is an appropriate requirement for the performance of the office or contract.***

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[10] *See, e.g.*, Otero v. Commonwealth of Puerto Rico Indus. Com'n, 441 F.3d 18 (1st Cir.2006); Suppan v. Dadonna, 203 F.3d 228, 234+ (3rd Cir.2000).

[11] *See* O'Hare Truck Service Inc. v. Northlake, Ill., 518 U.S. 712 (1996); Board of County Commissioners, Wabunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996).

Statement by Mike Kautsch*
for the Senate Committee on Elections and Local Government.
3/22/07

My purpose is to highlight certain aspects of First Amendment, statutory and common law protection for public employee speech. I am a professor at the University of Kansas School of Law. However, I offer this statement as an individual only. The topic under consideration by this committee relates to public policy matters about which I have conferred with the Kansas Press Association and the Kansas Sunshine Coalition for Open Government.

I. Protection for Public Employee Speech as Viewed by the U.S. Supreme Court

A. Recent precedent: *Garcetti v. Ceballos*, 126 S. Ct. 1951 (U.S., 2006) *Garcetti* is the U.S. Supreme Court's most recent decision on First Amendment protection for public employees. The Court reviewed principles for determining whether a public employer unconstitutionally penalized employee speech.

1. Issue. In *Garcetti*, the question for the Court was "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties." (Garcetti, 126 S.Ct. 1951, 1955)

2. Facts. The complainant in Garcetti was a deputy district attorney, Richard Cabellos. He had been contacted by a criminal defense attorney who expressed concern about law enforcement procedures in a certain case. After looking into the case, Cabellos determined that a search warrant had been issued on the basis of a faulty affidavit. He wrote a memo to his superiors recommending dismissal of the case. Nevertheless, the prosecution went forward. At a hearing, the defense called Cabellos, and he testified regarding the affidavit.. Later, he alleged, his employer–the district attorney's office–reassigned and relocated him and denied him a promotion. Cabellos claimed that his employer had taken these actions against him because of the concerns he had expressed about the affidavit in the criminal case. The employer countered by asserting that the reassignment of Cabellos and other actions to which he objected were for legitimate reasons and that, in any event, the memo he written about the affidavit was not the kind of expression that the First Amendment protects.

3. Holding. In a 5-4 ruling in favor of the employer, the U.S. Supreme Court concluded that the First Amendment "does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." (Garcetti, 126 S.Ct. 1951, 1961)

B. Principles as Reviewed in *Garcetti*. The Court's majority and dissenting opinions in *Garcetti* made noteworthy points about the conditions under which the First Amendment protects a public employee's speech.

1. Public Concern. The Court said that public employees "do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." (126 S.Ct. 1951, 1957)

2. Two Inquiries: The Court said that constitutional protection for public employee speech depends on two inquiries:

> The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment

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cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. ~~~ This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations. ~~~ So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

(126 S.Ct. 1951, 1958)

3. Reason for Whistleblower Protection. In addition, the Court said, "Exposing governmental inefficiency and misconduct is a matter of considerable significance, and various measures have been adopted to protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws and labor codes and, for government attorneys, rules of conduct and constitutional obligations apart from the First Amendment. " (126 S.Ct. 1951, 1954)

4. Balancing. A dissenting opinion in Garcetti added that whistle-blowing, in the classic sense, consists "of exposing an official's fault to a third party or to the public." (126 S.Ct. 1951, 1970-1971) Another dissent noted that the First Amendment requires a balancing of "'the interests' of the employee 'in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" (126 S.Ct. 1951, 1973)

II. Kansas Courts' View of Protection for Public Employee Speech

A. Whistleblowing Distinguished from First Amendment Protection: *Dennis v. Ruskowitz*, 19 Kan.App.2d 515 (1994) and *Larson v. Ruskowitz*, 252 Kan. 963 (1993 These precedents are among those that indicate the nature and scope of protection for public employee speech in Kansas.

1. Facts and holdings in *Dennis* and *Larson*. In *Dennis*, a Wyandotte County Community Corrections employee alleged that she had been discharged because of her objections to how she was treated and to program management. Her discharge occurred after she filed complaints that she had been a victim of sex discrimination and after she had contact with a newspaper reporter, which resulted in a newspaper article about delays and overspending in setting up programs at Community Corrections. She also alleged that a misappropriation of funds had occurred at Community Corrections, and official investigations into the matter followed. A jury returned a verdict in favor of the employee, but the appellate court reversed and remanded for further proceedings. The appellate court based its decision on *Larson v. Ruskowitz*, 252 Kan. 963 (1993), in which, two other Community Corrections employees had alleged that they were victims of retaliatory discharge. In *Larson*, the Supreme Court held that there had been an "improper 'blending' of two related causes of action: retaliatory discharge based upon whistle-blowing and retaliatory discharge based upon a legitimate exercise of First Amendment rights."

2. Differences between causes of action. The *Dennis* court explained that, in *Larson*, the Supreme Court had restated the law regarding whistle-blowing:

"'Public policy requires that citizens in a democracy be protected from reprisals for performing their civic duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare. Thus, we have no hesitation in holding termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a co-worker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort. *To maintain such action, an employee has the burden of proving by clear and convincing evidence, under the facts of the case, a reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee; and the employee was discharged in retaliation for making the report.* However, the whistle-blowing must have been done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy or personal gain.' " *Larson*, 252 Kan. at 967 [, 850 P.2d 253]. (Emphasis added.)

The court then distinguished the retaliatory discharge of public or private employees because of whistle-blowing from the retaliatory discharge of a public employee for having exercised the right of freedom of speech as guaranteed by the First Amendment to the United States Constitution. The distinction between these two types of retaliatory discharge claims appears to be based upon the content, form, and context of the employee's statements: a whistle-blower reports an employer's wrongdoing; an employee exercising his or her First Amendment rights speaks out on issues of public concern. ~ ~ ~ ([T])he court summarized the applicable law regarding a retaliatory discharge action based upon the exercise of First Amendment rights:

"'The law has been clear ever since Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968), that a state cannot dismiss a public employee for exercising his or her right to speak out on issues of public concern. To allow a governmental unit to discharge a person because of his or her constitutionally protected speech would have an inhibiting effect on the exercise of that freedom. [Citation omitted.] To allow a governmental unit to suspend a public employee without pay for exercising his or her right to speak on matters of public concern would have the same inhibiting effect....

"'However, a public employee's right to free speech is not absolute. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." There should be a balance between the interests of a public employee, as a citizen, "in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [Citation omitted.]" 'In Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983), the United States Supreme Court expounded on the correct analysis to be applied to cases such as the one at bar. The first inquiry is whether ([an employee's expression]) can be fairly characterized as constituting speech on a matter of public concern. If it cannot be, it is unnecessary for this court to scrutinize the reason for his discharge. [Citation omitted.] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." [Citation omitted.] The question is one of

law, not fact.

"'If a public employee's speech can be characterized as addressing a matter of public concern, it is the court's responsibility to then balance the interest of the employee with the interest of the State in effectively and efficiently fulfilling its responsibilities to the public. One relevant inquiry is whether the action disrupted or undermined working relationships in the department. Also relevant is the manner, time, and place in which the letter was sent and whether this had a disruptive effect on the department or undermined the director's authority. If this balance tips in favor of the employee, the employee still has the burden of showing that ([his or her expression]) was a motivating factor for his or her suspension. [Citation omitted.]....

(*Larson*, 19 Kan.App.2d 515, 521-524)

B. Kansas Whistleblower Act, K.S.A. 75-2973. A noteworthy precedent is *Connelly v. State Highway Patrol*, 271 Kan. 944 (2001).

1. Facts. Positions held by four state troopers were eliminated after they began objecting to a policy of selective enforcement of motor vehicle weight limits on Kansas highways. The troopers said they were required to "leave the farmers alone" and not ticket them for weight-limit violations. The troopers initially voiced their objections through internal channels and then to the Kansas Attorney General and through newspaper articles. They alleged that the elimination of their positions was retaliation against them for objecting to the policy..

2. Holding. The court held that the Kansas Whistleblower Act, K.S.A. 75-2973 , "as applied to classified state employees with permanent status, provided [them] with an adequate exclusive remedy for claimed retaliation for whistleblowing and no common-law remedy exists that they are entitled to pursue." (*Connelly*, 271 Kan. 944, 955)

III. Selected Factors in Determining Whether Employee Speech Should be Protected

A. Motivation and Characteristics of Expression. *Thompson v. Topeka Convention & Visitors Bureau, Inc.*, 130 P.3d 149 (Kan.App.,2006), illustrates how protection of employees' speech may be determined by such factors as their motivation and the characteristics of their expression.

1. Facts. An employee of the Topeka Convention and Visitors Bureau (TCVB) had responsibility for attracting convention business to Topeka. She complained that the Kansas Expocentre was not available for the scheduling of conventions as needed. After making her views known generally within TCVB, she met and shared her complaints with a county commissioner. The TCVB then terminated her employment, and she sued, alleging that the termination was a wrongful act of retaliation against her for complaining to the commissioner. She claimed that TCVB had violated her rights both as a speaker protected by the First Amendment and as a whistleblower.

2. Public Concern as a First Amendment Consideration. The *Thompson* court observed that the First Amendment would protect the employee only if she had spoken on a matter of public concern. The court found that her complaints related to difficulties she had experienced in doing her job, which "likely would not enter the general public's awareness or concern." (*Thompson*, 130 P.3d 149, *4)

3. Good faith of the Whistleblower. The court in *Thompson* observed that an actionable tort arises when an at-will employee "is terminated in retaliation for the good faith reporting of a serious infraction of health, safety, and welfare rules. To maintain a whistle-blower action, the employee has the burden to prove by clear and convincing

evidence that a reasonably prudent person would have concluded the employee's employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare. The employee must also prove that the employer had knowledge of the employee's reporting of the violation and that the employee was discharged in retaliation." (*Thompson*, 130 P.3d 149, *6)

a. The court in *Thompson* held that the employee did not have a valid whistleblowing claim because she had complained, not about her employer, the TCVB, but rather about the Expocentre.

b. The *Thompson* court did not define good faith, and the meaning of the term generally is expressed in various ways. As has been noted, good faith may be viewed as "absence of malice, honesty of intention, and reasonable belief. In a majority of jurisdictions, a whistleblower does not receive absolute discretion and protection when alleging violations of law. 'The central good faith question to be answered is whether the employee made the whistleblowing report for a proper purpose, that is, to expose legal wrongdoing, as opposed to merely protecting oneself or one's co-workers.' Simply stated, in order for the court to determine a whistleblower's good faith, it must not only look at the content of the report, but also at the whistleblower's motivation." *(Whistler's Nocturne in Black and Gold - The Falling Rocket: Why the Sarbanes-Oxley Whistleblower Provision Falls Short of the Mark*, John B. Chiara and Michael D. Orenstein, 23 Hofstra Lab. & Emp. L.J. 235, 239-240)

IV. Balancing Interests in Regulating and Protecting Public Employee Speech.

The government's interest in efficient operations and non-disruptive conduct by employees must be weighed against the public interest in disclosures by employees of employer misconduct. The Legislature is to be commended whenever it reviews how these interests may be carefully balanced.

Kansas Press Association, Inc.

Dedicated to serving and advancing the interests of Kansas newspapers

5423 SW Seventh Street • Topeka, Kansas 66606 • Phone (785) 271-5304 • Fax (785) 271-7341 • www.kspress.com

March 22, 2007

To: Sen. Tim Huelskamp, chairman of the Senate Elections and Local Government Committee, and committee members

From: Doug Anstaett, executive director, Kansas Press Association

Re: Freedom of expression

Thank you, Mr. Chairman, and members of the committee, for this opportunity to address one of the most critical and fundamental rights we enjoy in America.

I am Doug Anstaett, executive director of the Kansas Press Association. Usually, I am here to extend or to defend the rights of the press in Kansas. Today, however, I am here to express my concern about a growing trend in Kansas and across our nation: placing undue restrictions on the right of Americans to speak freely — especially about their government.

I believe it could safely be argued that free speech is the bedrock for most of the other individual rights we cherish in America today. If we cannot speak freely, we cannot express our disagreement with the decisions of our government. Without that freedom, we cannot participate in the governance of our communities, state and nation.

This fundamental freedom to disagree is what sets us apart from most other nations. This right to be the proverbial devil's advocate, the rabble-rouser, to take unpopular stances, to offer different ideas, is critical to good government.

Yes, dissent and disagreement muddy the waters and make the legislative process more difficult. But that is exactly how the Founding Fathers wanted it. We didn't want a rubber stamp government; we wanted one that critically looked at all sides of an issue before coming to a decision. We wanted leaders who went out of their way to seek other views on important issues. And to make sure that happened, we put into place a system of checks and balances that has stood the test of time.

Certainly, we have seen just in these past few weeks numerous examples of how our right to free expression sometimes can clash with the rights of others. Kansas is not unique on this; other states face the same challenges each and every day.

On the front page of the Topeka Capital-Journal Tuesday, two stories caught my eye. They both referred to activities happening right here at the Capitol building.

One was about the bill to place limits on the followers of Fred Phelps, who have chosen the highly personal nature of military funerals to express their belief that God's wrath is being rained down on American troops because of our nation's acceptance of homosexuality. However you feel about these protests, this is still a debate about one of the fundamental rights we cherish in America — the right to free expression, no matter how abhorrent or seemingly indefensible that speech might be.

Presented by Richard Gannon
Elections and Local Government
3-22-07
Attachment 7-1

The other story was about Ashley Holm's expression of her deep disdain for war. The bumper sticker that utilized a highly charged four-letter word caused consternation among a number of your colleagues and led to a great debate earlier this week about what we are free to express in America, in Kansas, and, particularly, in the Statehouse parking garage. The debate focused at times on the offensive nature of the "F" word and at others on whether the bumper sticker was a partisan political statement.

A couple of weeks ago, a letter to the editor written by the volunteer chairman of a regional water advisory board led to his suspension. The letter was sent in e-mail form to the newspaper and others and, through the miracle of the modern grapevine called the World Wide Web, it arrived in the supervisor's e-mailbox in Topeka even before it was printed in the Salina Journal. The writer believed he was exercising his constitutional right to free speech, while supervisor suggested his e-mail insinuated he was speaking on behalf of the entire advisory board.

Freedom of expression is an issue that fires us up. When people speak out, feelings are hurt. When we exercise this right, sacred cows are attacked, oxes are gored, our fundamental beliefs sometimes called into question. The status quo is often the target as well, which irritates those who like things just the way they are.

While we often celebrate this right of free speech when it is ours to use, we condemn it when the message espoused by another is counter to our beliefs.

In his dissent to a decision to uphold the conviction of Jacob Abrams in Abrams v. U.S. in 1919, Supreme Court Justice Oliver Wendell Holmes, Jr., developed the notion of the "marketplace of ideas" to help define freedom of speech.

This "marketplace of ideas" concept is vital to our society's ability to consider alternative methods of solving problems. If we listen to all the ideas out there — even the ones we find offensive or outside the mainstream — we are more likely to make better decisions in the long run.

The bottom line? We don't need fewer voices in America; we need more. There is plenty of room at this table we call freedom of expression.

Thank you.