Approved: April 4, 2008
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:33 A.M. on March 13, 2008, in Room 123-S of the Capitol.

All members were present except:
Terry Bruce arrived 9:37 A.M.
Greta Goodwin- excused
Barbara Allen- excused
Donald Betts- excused
Les Donovan arrived, 9:40 A.M.
David Haley arrived, 9:39 A.M.
Derek Schmidt arrived, 9:42 A.M.
Dwayne Umbarger arrived, 9:38 A.M.

Committee staff present:
Bruce Kinzie, Office of Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Judge Ernest Johnson, 29th Judicial District (Wyandotte County)
Roger Werholtz, Secretary, Kansas Department of Corrections
Dave Debenham, Deputy District Attorney, Shawnee County
Representative Bill Otto
Steve Schwarm, Kansas Judicial Council
Larry Magill, Kansas Association of Insurance Agents
Paul Allen, Chair, Board of Accountancy
Tony Scott, Kansas Society of CPAs
Richard Cram, Department of Revenue
Tom Whitaker, Kansas Motor Carriers Association
Gary Reser, Kansas Veterinarian Medical Association
John Campbell, Kansas Insurance Department
Rick Fleming, General Counsel, Kansas Security Commission
Yvonne Anderson, General Counsel, Kansas Dept. Of Health and Environment

Others attending:
See attached list.

The Chairman opened the hearing on **HB 2780–Criminal procedure; new crime committed on probation or community correction, service of warrant for violation of original conviction**.

Judge Ernest Johnson spoke in support, reviewing the bill as suggested by the Kansas Re-entry Policy Council (Attachment 1). The bill's intended goal is to create a legislative requirement and implementation procedure to require the State to pursue the revocation of an earlier case of probation at the beginning of a new felony imprisonment rather than at the end.

Roger Werholtz appeared in support, stating his agreement with Judge Johnson (Attachment 2). The Secretary added the Department of Corrections has made significant progress in decreasing recidivism and the bill which requires local jurisdictions to notify the DOC will aid in the reentry efforts by resolving detainees in a timely manner.

David Debenham spoke in favor stating the Kansas County and District Attorney's Association believe that inmates will be in the best position to know if they have a probation violation warrant outstanding (Attachment 3). By placing the burden on the inmate to initiate the process of resolving probation violations it will ensure the inmate desires to have the matter resolved in a timely fashion in order to best take advantage of any rehabilitative programs.

MINUTES OF THE Senate Judiciary Committee at 9:33 A.M. on March 13, 2008, in Room 123-S of the Capitol.

Written testimony in support of **HB 2780** was submitted by:
Marilyn Scafe, Executive Director, Kansas Re-entry Policy Board (Attachment 4)
Representative Pat Colloton (Attachment 5)

There being no further conferees, the hearing on **HB 2780** was closed.

The Chairman opened the hearing on **HB 2845–Increasing the penalties for theft and aiding escape when such crimes concern employees or volunteers of the department of corrections**.

Roger Werholtz testified in support, stating the proposed bill would make the failure to return security related property of the department a severity level 8 felony and raise assisting an offender in an escape to a severity level 4 (Attachment 6).

There being no further conferees, the hearing on **HB 2845** was closed.

The Chairman opened the hearing on **Sub HB 2618–Administrative procedure amendments; office of administrative hearings, presiding officers, actions negatively affecting licensure, judicial review**.

Representative Bill Otto appeared in support, providing a summary of the House floor amendment he sponsored (Attachment 7).

Steve Schwarm spoke in favor, stating the bill contains several Judicial Council recommendations (Attachment 8). Mr. Schwarm also stated the Council does not support portions of Section 1 and 2 containing House floor amendments. The amendments are particularly problematic and could cause unintended and costly consequences for the State and urged the committee to remove the amendments.

Larry Magill spoke in support of the original bill and voiced concern regarding the House floor amendment (Attachment 9).

Paul Allen testified in opposition, stating the profession of certified public accountancy is a highly technical profession with many procedures in place to ensure fair treatment (Attachment 10). Members of the Board possess the inherent knowledge, and understanding which is an invaluable tool in addressing and resolving issues. Prohibiting the Board from serving as a presiding officer would substitute one person's judgement for that of highly qualified professionals. Mr. Allen requested the Board of Accountancy be exempted from using the agency head as the presiding officer.

Tony Scott appeared in opposition (Attachment 11). The Kansas Society of Certified Public Accounts believe it is in the best interest of the State and the public to continue to be self-governed.

Richard Cram spoke in opposition, stating the bill infringes on the Department of Revenue's ability to administer the licensing provisions it is charged with enforcing (Attachment 12). Agency heads are uniquely situated to have in-depth knowledge of the laws and their appropriate applications. Mr. Cram also voiced strong concern regarding Section 1 as amended by the House which would require extensive research and analysis and extremely costly to the taxpayers of Kansas.

Tom Whitaker appeared in opposition to the amendment by the House Committee of the Whole (Attachment 13). In its present form **Sub HB 2618** is unworkable and would delegate authority of the Kansas government to other states.

Gary Reser testified in opposition, requesting the committee to reinstate language giving the Kansas Board of Veterinary Examiners the option to conduct its own hearings (Attachment 14).

John Campbell spoke in opposition, indicating there are at least 58 statutes in the Insurance Code that mandate KAPA (Kansas Administrative Procedure Act) procedures and all would have to be amended if the bill is enacted (Attachment 15). This will cause significant time delays and increased costs. Mr. Campbell also indicated the the House amendment regarding regulatory interpretations of other states would be extremely costly to research and maintain.

MINUTES OF THE Senate Judiciary Committee at 9:33 A.M. on March 13, 2008, in Room 123-S of the Capitol.

Rick Fleming appeared in opposition, indicating that while **Sub HB 2618** contains some improvements to the Kansas Administrative Procedure Act (KAPA) the removal of authority of agency heads is not one of them (Attachment 16). Such action would create inefficiencies in the system and undo the original intent of KAPA. Mr. Fleming stated that Sections 1 and 2 of the bill will put the job of protecting Kansas investors into the hands of whichever out-of-state official is the least inclined to protect them and urged removal of the House floor amendment.

Yvonne Anderson provided neutral testimony stating language in the bill is not clear regarding what is meant by "state official" or what form their interpretations must take to be considered (Attachment 17). In addition, unless such interpretations are published policies of the state, they are not readily available and thereby requiring extensive research by our State agencies. Ms. Anderson indicated the interpretation of other state officials could be found to be inconsistent with federal guidelines and ultimately could result in losses in federal funding and be subject to litigation. She urged the committee to remove Section 1 from **Sub HB 2618**.

Written testimony in support of **Sub HB 2618** was submitted by:
Robert Waller, Kansas Board of Emergency Medical Services (Attachment 18)

Written testimony in opposition to **Sub HB 2618** was submitted by:
Pam Scott, Kansas Funeral Directors Association (Attachment 19)
John Smith, Administrator, Kansas Department of Credit Unions (Attachment 20)
Sherry Diel, Executive Director, Kansas Real Estate Commission (Attachment 21)
Tom Thull, Kansas Bank Commissioner (Attachment 22)
Cecil Kingsley, Chair, Kansas State Board of Technical Professions (Attachment 23)
Patty Biggs, Kansas Parole Board (Attachment 24)
Mack Smith, Executive Secretary, Kansas State Board of Mortuary Arts (Attachment 25)
A. J. Kotich, Chief Counsel, Kansas Department of Labor (Attachment 26)
Dr. Verle D. Carlson, DVM, President, Kansas Board of Veterinary Examiners (Attachment 27)
Larry Buening, Kansas Medical Arts Board (Attachment 28)
Trudy Aron, American Institute of Architects (Attachment 29)
Phyliss Gilmore, Behavioral Sciences Regulatory Board (Attachment 30)
Capt. Daniel Meyer, Kansas Highway Patrol (Attachment 31)
Betty Wright, Kansas State Dental Board (Attachment 32)
Tim Madden, Kansas Department of Corrections (Attachment 33)

Neutral written testimony to **Sub HB 2618** was submitted by:
Joann Corpstein, Chief Counsel, Kansas Department on Aging (Attachment 34)
Don Jordan, Secretary, Kansas Dept. of Rehabilitation and Social Services (Attachment 35)

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 13, 2008

NAME	REPRESENTING
Jeff Bottenberg	Bd of Accountancy
Steven M. Seaborn	Judicial Council/APAC
John W. Campbell	KID
Patti Biggs	PAROLE BOARD
Yvonne Anderson	KDHE
Penny Bowie	Bd of Optometry
Rick Fleming	Securities Commission
Erin Hoesty	Securities Commission
Gail Bright	Securities Commission
Susan Bowers	Ks. Board of Accountancy
Paul J. Allen	Ks Board of Accountancy
Ginger Powell	Ks Board of Accountancy
DAVE STARKEY	KDA
Brenda Harmon	KSC
Helen Pedigo	KSC
Rebecca A Weeks	KS Fire Marshal
Marilyn Scafe	Kansas Reentry Policy Council
Mari Johnson	KDOC

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 13, 2008

NAME	REPRESENTING
Vicki Boyd	Ks Reentry Policy Council
Tracy Diel	OAH
David Debenham	Shawnee Co. DA & KCDAA
Richard Sommerlad	Kenny & Assoc.
KEVIN GREGG	KMCA
Betty Wyatt	Ks Dental Board
Patti Woods	SRS
John Badger	SRS
Kevin Glendenning	OSBC
Tom Thull	OSBC
Cory Shoaf	KHPA
Nick Hanson	KBVE
Adrian Severe	OSBC
Sonya Allen	OSBC
Trudy Aron	Am Inst of Architects
George Barbee	K SBTB
Jean Boleis	KSBTP
Mack Smith	KS ST BD of Mortuary Arts

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-13-08

NAME	REPRESENTING
Richard Cram	KDOR
Louise Mowell	State Bank Commissioner
Larry Magill	KAIA

To: The Senate Judiciary Committee

From: Judge Ernest L. Johnson, 29th Judicial District (Wyandotte County)
Member, Kansas Reentry Policy Council
Member, KRPC Subcommittee on Detainers

Re: House Bill 2780 (amending K.S.A. 22-3716)

Date: March 13, 2008

The KRPC is investigating ways to improve an inmate's chances of successful reentry to society on the release from imprisonment. The Council, its subcommittees, and its steering committee are studying and analyzing a broad range of different risk reduction strategies. During our studies we identified one narrow problem that could be separately addressed well before the more global proposals we expect to make are developed.

Relevant here, we have accepted as a premise that a defendant's participation in educational and rehabilitative programs while imprisoned can improve the chances of successful reentry.

The narrow problem: An inmate with a probation violation or related bench warrant "hold" from an earlier case can not participate in those rehabilitative programs. We of the Council understand that, because the true release date of the target defendant from incarceration is in suspense (in that the earlier probation might well be revoked and the sentence served), and because the availability of services to inmates is exceeded by the need, DOC only permits those with definite release dates to participate in those programs.

Statutory background: Under K.S.A. 21-4608(c) a defendant on felony probation or assignment to community corrections who then commits a new felony must be sentenced, on that new felony, consecutively to the earlier one. Under K.S.A. 22-3716(b) the court sentencing such a defendant for the new felony is relieved from applying any guideline presumption of probation and can remand the defendant to imprisonment.

Under K.S.A. 21-4610(a) the Legislature has required that " ... the court shall condition any order granting probation, suspension of sentence or assignment to a community correctional services program on the defendant's obedience of the laws of the United states, the state of Kansas and any other jurisdiction to the laws of which defendant may be subject." Clearly, then, the commission of a new felony is a violation of the probation previously granted.

Current Practices: Generally, when the earlier and then the new offense are committed in the same county the prosecutor and the court address each case so that, if the defendant is imprisoned on the new case, the earlier case has also been resolved. Our proposed amendment would prevent the problems that frequently arise when the new imprisonment sentence is imposed in a county other than the one where probation had been granted. The defendant is imprisoned in DOC custody for the new felony. It is not logical to expect that the defendant could comply from prison with any terms of the earlier probation already violated by the new conviction. It is logical to expect that the State would move, if it had not already done so before the new felony conviction, to revoke the earlier case probation for that noncompliance. Upon the inevitable failure of the defendant to appear at the revocation hearing the court generally issues a bench warrant. That

warrant is, or should be, reported to DOC and becomes a "hold" on that defendant. The defendant serves the new sentence and, on release from that, is then finally returned for the revocation hearing in the earlier court. Depending, obviously, on the length of the new sentence, such warrants and bench warrants can languish for years.

K.S.A. 22-4301 provides that a person imprisoned in a Kansas prison can request a "final disposition of any untried indictment, information, or complaint pending against him in this state." However, we have no mandatory disposition process for probation revocation warrants. Although there is little question that the earlier sentencing court has the inherent power to order the return of the defendant to that county for a revocation hearing, the anecdotal experience of the Council's members was that the state rarely requests such an order.

The solution to this narrow problem: We propose a legislative requirement, with a procedure to implement it, that the State must pursue the revocation of an earlier case probation at the beginning of a new felony imprisonment rather than at the end.

This proposed amendment places on the State through the new felony prosecutor the obligation to notify the State agency prosecuting the earlier case that its probationer has been imprisoned. This would not seem to be a great burden: the new felony presentence investigation report must note the earlier conviction/probation case for criminal history purposes as well as for the special sentencing rules I mentioned earlier. Once notified, that earlier prosecutor must choose whether to have the inmate probationer returned for a revocation hearing or, essentially, allow the earlier case to be closed. We suggest that successful reentry can be promoted by requiring the return of the probation-violating inmate to the earlier court at the outset of the imprisonment for the new felony rather than at its end. That would result in the elimination of the "holds" that prevent the inmate from program participation.

Although not directly related to our reentry concerns, we also had concerns that the appeals courts would find the practice of leaving inmate bench warrants hanging could result in a Due Process violation dismissal of the earlier case. In September, 2007, the Court of Appeals made such a ruling, albeit in an egregious case. In *State v. Hall*, 38 K.A.2d 465, issued September 21, 2007, the syllabus of the Court indicated:

> "1. K.S.A.2006 Supp. 22-3716(b) provides that upon formal notice that a defendant has violated the conditions of his or her probation, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charged. Determining whether inaction constitutes an unnecessary delay depends upon the circumstances of each case.
> 2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution limits procedurally and substantively the ability of the State to revoke a probationer's probation. The State is required to proceed in a timely and reasonable manner in order to meet the requirements of due process. An unreasonable delay by the State in the issuance and execution of a warrant for the arrest of a probationer whose whereabouts are either known or ascertainable with reasonable diligence may result in the State's waiver of the violation and entitle the defendant to discharge.
> ...
> 4. Under the facts of this case and specifically due to the State's unexplained delay of 6 years in prosecuting a probation violation, the fact that the defendant could have been transported to McPherson County for revocation proceedings during his incarceration on

the subsequent conviction, the defendant's unanswered correspondence requesting timely resolution of the revocation motion, the State's failure to comply with the district court's order to transport the defendant to resolve this matter, and the potential prejudice to the defendant of the unresolved detainer and its impact on program eligibility during his incarceration, we hold that the defendant's due process rights were violated and the State must be barred from its belated efforts to prosecute the revocation motion."

That case confirmed our concerns about Due Process under the *status quo* and also made clear that the onus to obtain the inmate's return for the revocation hearing was properly on the attorney/prosecutors for the State.

Finally, and more personally, this proposed mandated procedure seems more consistent with the legislative intent I see in the consecutive sentencing and presumption elimination provisions cited above. I agree with the adage that justice delayed can be justice denied. In a circumstance like this, it follows from those provisions that the inmate who was granted probation in the earlier case, then violated that probation by committing a new felony resulting in imprisonment, should appear sooner rather than later before the probation granting court. Whether the judge then revokes the probation, closes the earlier case, or something in between would remain in the court's discretion. Then, though, the inmate and all aspects of the justice system would have a definite release date for the inmate, and the bench warrant/probation violation problem would be eliminated.

House Amendments: The Kansas Reentry Policy Council does not oppose amendments adopted by the House that:

- Clarify that the notified prosecutor, or the prosecutor if the new conviction is in the same county, has 90 days to obtain personal service on the offender;
- Clarify that the prosecutor does not have to personally serve the warrant on the offender;
- Add the Heart of America Regional Computer Forensics Laboratory to the list of facilities that can perform and charge for criminalistic laboratory services.
- Adopt the clarification amendments recommended by the Revisor;
    - The fine for cruelty to animals;
    - Aggravated endangering a child is an offense that cannot be expunged;
    - That an offender whose non prison sanction is revoked and whose crime was sexually motivated is required to serve post-release supervision;
    - That when a non prison sanction is issued on a presumptive prison sentence, an offender is required to serve post-release supervision; and
    - That the fine for a domestic battery would be $1,000 to $7,500.

Respectfully submitted,
Ernest L. Johnson

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on HB 2780
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
March 13, 2008

The Department of Corrections supports the amendment of K.S.A. 22-3716 which governs procedures for the revocation of probation and other nonprison sentencing dispositions. The amendment of K.S.A. 22-3716 pertaining to revocation procedures is set out in section 4 of HB 2780 as amended by the House Committee of the Whole on page 13 at lines 28 through 43. The Department is neutral in regard to the other provisions added to HB 2780 by the House regarding fines for domestic battery and cruelty to animals, expungement of aggravated endangering a child convictions, imposing a postrelease supervision obligation for sexually motivated crimes and those crimes providing a presumption of imprisonment but due to the offense severity level and criminal history falling within a "border box offense" that allows for a nonprison sanction that would not constitute a departure and extending the imposition of fees for forensic laboratory services to the Heart of America Regional Computer Forensics laboratory. In fact, the House amendments to HB 2780 do not diminish the Department's support of HB 2780. HB 2780 passed the House by 123-0.

HB 2780 amends K.S.A. 22-3716 to address situations where an offender is convicted and sentenced to prison while under probation supervision in another criminal case. HB 2780 provides a requirement that notification of the subsequent conviction and prison sentence be given to the prosecutor involved in the criminal case in which probation was granted. HB 2780 also provides a procedure for bringing the offender back to court for the revocation of the earlier probation. The court from which the offender was on probation would have 90 days from receiving notice of the subsequent conviction to serve a probation violation warrant on the incarcerated offender.

HB 2780 would aid the Department's reentry efforts by resolving detainers in a timely manner. Under current law, an offender can be sentenced to prison for a crime committed in one criminal case but have the status of his or her probation from another criminal case left in limbo throughout the term of his or her imprisonment. This causes the Department to expend its resources structuring the release plan for an offender only to

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find out shortly before the offender's scheduled release that an earlier probation is being revoked and thus the housing, employment and treatment arrangements that have been made must be cancelled. Reserving space in substance abuse or mental health treatment programs as well as housing in a residential community bed for persons scheduled for release, only to have the release delayed due to an unresolved detainer, can cause those resources to be wasted. HB 2780 serves to resolve probation violation detainers in a timely manner.

The Department urges favorable consideration of HB 2780.

LAW OFFICES OF
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Third Judicial District
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District Attorney

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MEMORANDUM

Subject: House Bill 2780 (amending K.S.A. 22-3716)

To: Senator Vratil, Chairman
Senate Judiciary Committee
And all Members of the Judiciary Committee

From: Robert D. Hecht, District Attorney,
Third Judicial District, Shawnee County, Kansas

Date: March 13, 2008

House Bill 2780 proposes to amend K.S.A. 22-3716 to impose an obligation on prosecuting attorneys that have secured a conviction and sentence of incarceration to notify prosecutors of different counties/judicial districts that have secured a prior conviction with a suspended sentence and probation of the same defendant and to do so within 30 days. The prosecutor of the former case will have 90 days from the date of sentence in the subsequent case to then commence proceedings to revoke the probation and serve the warrant on the offender. Clearly such will actually result in the subsequent prosecutor having approximately 60 days to serve the warrant.

It further appears that a failure would constitute a bar to proceedings to revoke probation for all subsequent circumstances that might warrant revocation of probation occurring thereafter.

Prosecutors clearly understand the bed-space concerns of the Department of Corrections and the need to not waste or underutilize the resources by having the space assigned to an offender who then becomes ineligible.

It appears that the intent of the amendment is to provide an inmate with a higher chance of successful reentry into society by making available rehabilitative programs to these

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Attachment 3

inmates. We understand that inmates with probation violation "holds" cannot participate in the rehabilitative programs due to indefinite release dates.

RECOMMENDATION

As a member of the Kansas County and District Attorneys Association (KCDAA), we would propose that instead of placing this burden on the offices of the county and district attorneys that the burden for moving forward to dispose of these warrants be placed with the inmate. In this regard the amended statute would be similar to the procedure utilized within K.S.A. 22-4301, which allows an inmate to request a final disposition on any untried indictment, information or complaint pending against them.

It is the recommendation of the KCDAA that after an inmate has made a written request to the court and the county/district attorney in the jurisdiction in which the probation violation warrant is pending, that the county/district attorney shall have 90 days in which to return the inmate to dispose of the pending probation violation. Should the pending probation violation not be brought before the court within 90 days of the inmates written request, then the probation violation should be dismissed with prejudice.

This recommendation only addresses those situations in which a warrant or probation violation has been issued and is pending as a detainer against an inmate.

There are situations in which an inmate who was on probation and then convicted and imprisoned for a criminal offense in a subsequent criminal case will not have violated the terms of the inmate's probation.

In *State v. Gary*, 282 Kan. 232, 141 P.3d 644 (2006) the Kansas Supreme Court held that the defendant's probation could not be revoked based upon a criminal act that occurred prior to being placed on probation.

It is the opinion of the KCDAA that the inmate will be in the best position to know if they have a probation violation warrant outstanding. By placing the burden on the inmate to initiate the process of resolving probation violations this will also insure that the inmate desires to have the matter resolved in a timely fashion in order to best take advantage of any rehabilitative programs.

The inmate is also protected in that should the county/district attorney fail to return the inmate for disposition of the show cause violation within 90 days, then the court shall dismiss the show cause with prejudice.

Thank you for the opportunity to present a point of view and we would urge modification of H.B. 2780 consistent with the foregoing.

Very truly yours,

OFFICE OF THE DISTRICT ATTORNEY
THIRD JUDICIAL DISTRICT

By: _____
Robert D. Hecht
District Attorney

(g) Any person who is imprisoned in a penal or correctional institution of this state may request final disposition of any warrant or detainer pending against him in this state issued pursuant to subsection (a). The request shall be in writing addressed to the court in which the warrant or detainer is pending and to the county attorney charged with the duty of prosecuting it, and shall set forth the place of imprisonment.

(h) The warden, superintendent or other official having custody of prisoners shall promptly inform each prisoner in writing of the source and nature of any warrant or detainer against him issued pursuant to subsection (a) of which the warden, superintendent or other official has knowledge or notice, and of his right to make a request for final disposition thereof.

(i) Failure of the warden, superintendent or other official to inform a prisoner, as required by this section, within one (1) year after a detainer has been filed at the institution shall entitle him to a final dismissal of the warrant or detainer issued pursuant to subsection (a) with prejudice.

(j) This request shall be delivered to the warden, superintendent or other officials having custody of the prisoner, who shall forthwith:

(1) Certify the term of commitment under which the prisoner is being held, the time already served on the sentence, the time remaining to be served, the good time earned, the time of parole eligibility of the prisoner, and any decisions of the state board of probation and parole relating to the prisoner;
(2) For crimes committed on or after July 1, 1993, certify the length of time served on the prison portion of the sentence, any good time earned and the projected release date for the commencement of the postrelease supervision term; and
(3) Send by registered or certified mail, return receipt requested, one copy of the request and certificate to the court and one copy of the request and certificate to the court and one copy to the county attorney to whom it is addressed.

(k) Within ninety (90) days after the receipt of the request and certificate by the court and county attorney or within such additional time as the court for good cause shown in open court may grant, the prisoner or his counsel being present, the warrant or detainer issued pursuant to subsection (a) shall be brought before the court for a hearing on the violation charged pursuant to subsection (b); but the parties may stipulate for a continuance or a continuance may be granted on notice to the attorney of record and opportunity for him to be heard. If, after such a written request for disposition, the warrant or detainer issued pursuant to subsection (a) is not brought before the court for a hearing on the violation charged within that period, then the court issuing the warrant or

detainer pursuant to subsection (a) shall no longer have jurisdiction thereof, nor shall the warrant or detainer issued pursuant to subsection (a) have any further force or effect, ahd the court shall dismiss it with prejudice.

(l) Escape from custody of any prisoner subsequent to his execution of a request for final disposition of a warrant or detainer issued pursuant to subsection (a) voids the request.

(m) This section does not apply to any person adjudged to be a mentally ill person or an incapacitated person.

(n) The warden, superintendent or other official having custody of prisoners shall arrange for all prisoners to be informed in writing of the provisions of this section, and for a record thereof to be placed kin the prisoner's file.

KANSAS
Reentry Policy Council

MEMORANDUM

To: **Senator John Vratil, Chair**
Judiciary Committee, Kansas Senate

From: **Marilyn Scafe, Executive Director**
Kansas Reentry Policy Council

Date: **March 13, 2008**

Re: **HB 2780, Detainers**

The Kansas Reentry Policy Council (KRPC) has endorsed the changes to K.S.A. 22-3716 (a) as stated in the proposed legislation. The process for drafting these changes started with recommendations from the KRPC Detainer task force as suggested by Judge Ernie Johnson. The changes were approved by the KRPC Steering Committee, and proceeded to final approval by the Kansas Reentry Policy Council.

Attached you will find an outlined explanation of the organization of the Kansas Reentry Policy Council. The members of the Kansas Reentry Policy Council are designated by an MOA, with the Attorney General as Chairperson and Secretary of Corrections as Vice Chairperson. This council has appointed a Steering Committee to oversee the assignment of work to task forces relevant to the 20 goals of the Kansas Rick Reduction and Reentry Plan.

The Detainer task force was formed to address the goal regarding legal barriers: Identification (Drivers License) and Detainers: *Through relationships with law enforcements, courts, prosecutors, and Division of Motor Vehicles, address pending detainers and driver's license issues in a timely way to remove them as barriers to reentry whenever possible.*

Judge Ernie Johnson from the KRPC presented the issue of pending probation violation warrants on original sentences after the imposition of a second sentence as a situation that could be addressed by the Detainer task force. While there was not a large number of inmates identified as having pending probation violation warrants, the situation affected more than just KDOC classification and reentry planning. Since courts were unable to hold violation hearings until after inmates were released, these cases created a tracking problem and a backlog of pending hearings for the courts. Many of the warrants are lodged only after KDOC gives final notice of an upcoming release date.

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(785) 296-7938 • Fax: (785) 368-8914

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3-13-08
Attachment 4

This last minute lodging of warrants creates confusion for offenders and their families, victims, landlords and interrupts reservations for treatment beds and halfway houses.

The timing of release planning is important. Final reentry planning begins 14 months from the release date. When planning begins, if there are pending warrants, the KDOC will investigate the situation to see if they can be resolved in order to move the inmates into certain programs identified to address risk factors. Reclassification is sometimes necessary in order to move inmates into specific programs. A detainer or pending warrant can block this move, especially to programs in minimum such as work release.

The outcome of the violation hearing can impact the time the offender is required to serve in KDOC, or it may have consequences in the community if continued on supervision. If the offender is revoked for the violation and must be returned to KDOC to serve additional time, the release planning efforts will have to be repeated for the subsequent release. If the offender is continued on supervision and released by the court to the community, the offender may end up in an area that is not the designated plan. This can be troublesome if the offender has problems working out transportation back to the approved place for residency. It can also present a public safety issue for victims. For example, some victims may be depending on special conditions given to the offender to prohibit entrance into an area where the victim resides. Without careful coordination of the timing of release to the community, it can be difficult to ensure that the offender is in compliance with all of the conditions of the release.

Disposing of the pending probation violation warrants allows for the courts to clear their dockets, enables KDOC to complete a more accurate calculation of time needing to be served by the offender for both sentences, helps to ensure the most appropriate release plan and gives the offender the opportunity to focus on the conditions established for the supervised release in the community.

Kansas Reentry Policy Council

- Kansas Attorney General; Chairman, Kansas Reentry Policy Council
  Stephen Six
- Senator
  Pete Brungardt
- Secretary, Kansas Department of Health and Environment
  Roderick Bremby
- Deputy Secretary, Kansas Department of Commerce
  Rae Anne Davis
- Chair, Kansas Parole Board
  Paul Feleciano
- Judge; Chairman, Kansas Sentencing Commission
  Ernie Johnson
- Justice, Kansas Supreme Court
  Lee Johnson
- Secretary, Kansas Department of Social Rehabilitation Services
  Don Jordan
- Victim Represenative, Office of Attorney General
  Lori Marshall
- House of Representatives
  Joe Patton
- President, Kansas Housing Resources Corporation
  Steve Weatherford
- Secretary, Kansas Department of Corrections
  Roger Werholtz
- Executive Director, Kansas Reentry Policy Council
  Marilyn Scafe
- Communtiy Developer, Kansas Reentry Policy Council
  Vicki Boyd
- Administrative Specialist, Kansas Reentry Policy Council
  Kari Johnson

Kansas Reentry Policy Council Steering Committee

- Deputy Secretary, Kansas Department of Social Rehabilitation Services
  Lori Alvarado
- Deputy Secretary, Kansas Department of Social Rehabilitation Services
  Ray Dalton
- Deputy Secretary, Kansas Department of Social Rehabilitation Services
  Candace Shively
- Director of Skills Enhancement Services
  Kansas Department of Commerce
  David Brennan
- Apprentice Program Manager
  Kansas Department of Commerce
  Loretta Shelley
- Adult and Youth Services Manager
  Kansas Department of Commerce
  Susan Weidenbach
- Program Director of Support and Services,
  Kansas Housing Resources Corporation,
  Al Dorsey
- Deputy Secretary, Kansas Department of Health and Environment
  Aaron Dunkel
- Chief of Police
  Lenexa Police Department
  Ellen Hanson
- Sheriff
  Crawford County
  Sandy Horton
- CSO Specialist
  Office of Judicial Administration
  Chris Mechler
- Executive Director
  Kansas Sentencing Commission
  Helen Pedigo
- Judge
  3rd Judicial District
  Mark Braun
- Community Corrections Director
  3th Judicial District
  Robert Sullivan
- Deputy Secretary
  Kansas Department of Corrections
  Roger Haden
- Deputy Secretary
  Kansas Department of Corrections
  Keven Pellant
- Deputy Secretary
  Kansas Department of Corrections
  Chuck Simmons
- Director of Reentry and Release Planning
  Kansas Department of Corrections
  Margie Phelps
- Parole Board Member
  Kansas Parole Board
  Robert Sanders
- KCCCA
  Joshanna Stone

Kansas Offender Risk Reduction and Reentry Plan

Vision

Every offender released from prison will have the tools needed to succeed in the community.

Structure

Statewide Policy

Legislature

Role of the legislature is to provide oversight and funding to support the "big picture" goals of increasing public safety, reducing recidivism and averting costs and growth in the prison population.

Kansas Reentry Policy Council

Role of the KRPC is to oversee the successful execution of the state's comprehensive risk reduction and reentry plan by promoting interagency collaboration, investing in neighborhood based strategies, and holding state agencies accountable.

Statewide Implementation

Steering Committee

Role of the steering committee is to execute the state's comprehensive risk reduction and reentry plan. When necessary, the steering committee will establish task forces to address a particular goal, strategy, or challenge.

- **Task Force**
- **Task Force**
- **Task Force**
- **Task Force**

Goals

1. Reduce Revocations
2. Create Organizational/Cultural Change
3. Establish Individualized Risk Reduction Planning & Case Management
4. Increase Available Housing
5. Provided Cognitive Services
6. Increase Sustainable Employment
7. Build Capacity of Community & Faith Based Organizations
8. Remove Legal Barriers (Identification and Detainers)
9. Address Child Support & Family Issues
10. Ensure Access to Transportation
11. Engage Law Enforcement in Reentry
12. Reduce Substance Abuse Related Failures
13. Provide Transitional Services to Offenders with Mental Illness
14. Raise Awareness & Build Public Support
15. Engage in Rigorous Data Collection & Evaluation
16. Establish Ongoing Legislative Support & Oversight
17. Establish & Sustain the Kansas Reentry Policy Council
18. Establish & Sustain a Steering Committee
19. Engage Local Communities
20. Engage Probation & Community Corrections

Local Implementation

Sedgwick County
- Wichita Neighborhood Project
- Reentry Program
- COR-Pathways

Shawnee County
- Reentry Program

Wyandotte County
- COR-Pathways
- Reentry Program

Johnson County

Other Counties

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

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COMMITTEE ASSIGNMENTS
EDUCATION
VETERANS, MILITARY AND HOMELAND SECURITY
JUDICIARY

PAT COLLOTON
28TH DISTRICT

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Testimony on HB 2780
Senate Judiciary Committee
March 13, 2008

Mr. Chairman and Committee Members:

HB 2701 was passed unanimously by the House Judiciary Committee and, at the suggestion of the House Judiciary Chairman, was later amended into HB 2780 as Section 5 of HB 2780. Section 5 amends the existing statute that provides for a judge, in his discretion, to assess a $400 court cost against a convicted defendant to be paid as an offset to the cost of developing laboratory evidence. The amendment expands the list of laboratories to include the digital forensic laboratory that serves Kansas and Western Missouri, the Heart of America Regional Computer Forensics Laboratory. This laboratory does the digital analysis on computers and cell phones for the sheriff departments in Sedgwick, Johnson and other Kansas counties and for the KBI. There were no opponents to this bill.

I respectfully urge the adoption of HB 2780 and the inclusion of Section 5 thereof.

Pat Colloton

Pat Colloton

Senate Judiciary
3-13-08
Attachment 5

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on HB 2845
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
March 13, 2008

The Department of Corrections supports HB 2845. HB 2845 addresses the security concerns of the Department regarding employees and volunteers of the Department and its contractors. HB 2845 increases the penalty for those persons who aid in the escape of a prisoner as well as fostering the return of uniforms, badges, identification cards and other security property of the Department by former employees and volunteers by increasing the penalty for the theft of that property. HB 2845 passed the House by a vote of 123-0.

Under current law, persons who aid in the escape of a prisoner commit a Severity Level 8 nonperson felony. Severity Level 8 offenses carry a presumptive sentence of probation if the defendant has a criminal history of less than 2 person felony convictions. Employees of the Department aiding in the escape of a prisoner do not have a sufficient criminal history to warrant a prison sentence unless the court can make the requisite findings to support a dispositional departure. HB 2845 would amend K.S.A. 21-3811 to provide that for employees and volunteers of the Department and its contractors, aiding an escape would be a Severity Level 4 nonperson felony.

Severity Level 4 offenses carry a presumptive sentence of imprisonment for all criminal history categories. For defendants with no criminal history or only 1 misdemeanor offense, a Severity Level 4 offense carries a presumptive sentence of incarceration for at least 38 months.

HB 2845 also addresses the failure of former employees and volunteers to return uniforms, badges, identification cards and other property of the Department that could compromise the security of the Department. The retention of this property could aid in the escape of a prisoner. The recent escape of two special management custody inmates from the El Dorado Correctional Facility, allegedly with the assistance of a former officer, illustrates the Department's interest in having its security related property promptly returned upon an employee or volunteer leaving state service. In the case of the EDCF escape, the former officer's uniform and the inmates' clothing were recovered at a rest stop in Oklahoma.

DEPARTMENT OF CORRECTIONS
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HB 2845 provides that the theft by an employee or volunteer of the Department's uniforms, badges, identification cards and other property that could compromise the security of the department valued at less than $1,000 is a Severity Level 10 non person felony. Currently, the theft of property of a value of less than $1,000 is a class A nonperson misdemeanor. Additionally, the statutory provision defining the *prima facie* evidence of intent to permanently deprive the owner of property would be amended to include the failure of a former employee or volunteer to return that property after have been given notice to do so.

The Department considered an alternative to amending the theft statutes to foster the return of security related property at the end of a person's employment with the Department. The Department considered withholding an employee's last paycheck until issued property was returned but that proposal would be in conflict with federal labor law.

The Department urges favorable consideration of HB 2845.

STATE OF KANSAS

HOUSE OF REPRESENTATIVES

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BILL OTTO

Testimony: HB 2618

Mr. Chairman and Members of the Committee:

I wish to speak in favor of HB 2618. Although I support all of the bill, I wish to address the part involving interpretation of federal regulation. One of the first bills I introduced in 2004 was this part of HB 2618. My local custom processor was upset about state meat processing regulations and inspections. Subsequent negotiations with the Department of Agriculture resolved the complaint, but I felt the whole thing was backward.

If elections are to matter, then elected officials should be the ones to decide if federal regulations are more restrictive. Bureaucrats should come to elected leaders and make their case for more restrictive measures. The most recent case was the KCC's desire to make Kansas one of the first to force Kansas farm trucks to comply with interstate commerce rules is a glaring example.

The bill allows elected leaders at all levels of government to set more restrictive measures. I would appreciate the input of the learned members of the committee to improve the bill but beg you to keep the idea that it is the responsibility of the elected leaders to make the law.

Bill Otto

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MEMORANDUM

TO: **Senate Judiciary Committee**
FROM: **Kansas Judicial Council - Steve A. Schwarm**
DATE: **March 13, 2008**
RE: **Sub. HB 2618**

BACKGROUND

While Sub. HB 2618 is not a Judicial Council bill, it does contain several Judicial Council recommendations. Some history may be helpful. The original 2008 HB 2618 was the product of the Special Committee on Judiciary. The Judicial Council's Administrative Procedure Advisory Committee offered oral and written testimony before the interim committee and, at the request of the Interim Committee Chair, followed up with a comprehensive report with additional suggestions. The Judicial Council's comprehensive recommendations, which were based on the Revised Model State Administrative Procedure Act, did not arrive in time to be incorporated into the original HB 2618, which was slightly different. Accordingly, the Judicial Council requested that the House Judiciary Committee amend HB 2618 to include its prior recommendations, and Substitute for HB 2618 does incorporate those recommended amendments with no substantial differences. The Judicial Council continues to support those amendments, which are described in the next section of this testimony.

Importantly, the House Judiciary Committee also included a number of amendments in Sub. HB 2618 involving the ability of agency heads to act as presiding officers. In addition, provisions were added to the bill on the House floor requiring that the state follow "less restrictive" interpretations of federal law in other states. These provisions would likely cause serious problems for the State. The Judicial Council and/or its Administrative Procedure Advisory Committee does not support these provisions.[1]

JUDICIAL COUNCIL RECOMMENDATIONS

The Judicial Council's recommendations are found in Sections 6, 7, 9, 11, and 14 of Sub. HB 2618 and are described below.

Burden of Proof in Licensing Proceedings - Section 6 (K.S.A. 77-512)

Section 6 amends K.S.A. 77-512 to clarify that the burden of proof for disputed issues of fact in occupational or professional licensing disciplinary proceedings against an individual is by clear and convincing evidence. This provision is narrowly drafted so that it applies only to proceedings

[1] The Council has approved the Administrative Procedure Advisory Committee's recommendations and its position on agency heads as presiding officers. However, only the Advisory Committee, and not the full Council, has had the opportunity to consider the amendments contained in Section 1 and 2 of Sub. HB 2618.

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against an individual licensee and not business licensing proceedings. Also, if another statute specifically states a different burden of proof, that statute will control.

Separation of Functions and *Ex Parte* Communications - Section 7 (K.S.A. 77-514) and Section 9 (K.S.A. 77-525)

The Council's recommended amendment to K.S.A. 77-514 is contained in new subsection (h). Subsection (h) is a separation of functions provision that is intended to address the troubling situation that arises when agency personnel who act in an investigatory, prosecutorial or adversarial capacity are also involved in the adjudication by the agency. The amendment would prohibit a person who has participated in an investigatory or prosecutorial capacity in connection with a proceeding, or who is supervised by such a person, from acting as presiding officer or providing confidential legal or technical advice to a presiding officer in that proceeding.

The Council's recommended amendment to K.S.A. 77-525 is directly related to the amendment described above. The amendment would expand the prohibition on *ex parte* communications by prohibiting intra-agency communication between presiding officers and investigatory or prosecutorial personnel.

Standards of Agency and Judicial Review - Section 11 (K.S.A. 77-527) and Section 14 (K.S.A. 77-621)

The Council recommends two amendments relating to the standard of review. The amendment to K.S.A. 77-621 clarifies that judicial review of evidence "in light of the record as a whole" means that the adequacy of evidence in the record before the reviewing court to support a particular finding of fact must be judged in light of all the relevant evidence in the record including any evidence cited by a party that detracts from or supports that finding. The reviewing court must also consider any determination of veracity made by a presiding officer who personally observed the demeanor of a witness and the agency's explanation of why the evidence supports its findings of fact.

The amendment to K.S.A. 77-527 deals with agency review and requires agency heads, in reviewing findings of fact by a presiding officer, to give due regard to a presiding officer's opportunity to observe the witnesses. The language of both amendments was taken from the Revised Model State Administrative Procedure Act, which the Council believes strikes an appropriate balance between protecting the independent fact findings of a hearing officer and preserving the agency's policy-making role.

AMENDMENTS NOT RECOMMENDED BY THE JUDICIAL COUNCIL

Agency Head as Presiding Officer

The House Judiciary Committee included in Sub. HB 2618 amendments that would require

all state agencies, boards, and commissions (except BOTA and the KCC) to use the Office of Administrative Hearings (OAH) for conducting adjudicative hearings under the Kansas Administrative Procedure Act (KAPA). Under current law, an agency that is required to use OAH may have its agency head, or one or more members of its agency head, act as the presiding officer instead. The bill would eliminate that option.

The Judicial Council believes that agency heads should retain the option to hear cases, in the first instance, that the agency considers to present important policy issues or to require unique agency expertise for resolution. While Sub. HB 2618 does contain a provision allowing the presiding officer from OAH to certify policy questions for decision by the agency (new section 3), this provision is inadequate. Whether a case involves important policy issues is a question that should be decided by the agency in the first instance, not by the presiding officer. Furthermore, even when policy issues are not involved, agency expertise may be essential to the evaluation of evidence in a case.

The Council recognizes the issues of fundamental fairness that arise when an agency acts in multiple roles such as investigator, prosecutor and adjudicator. The Council believes that, rather than restricting agency head control over adjudications, increased protection for parties should be provided through reforms to judicial review under the substantial evidence standard, enhanced separation of functions requirements and requiring a higher burden of proof for agency action in certain cases. These protections are embodied in the Council's recommendations as described in the preceding section.

Interpretation of Federal Statutes and Regulations - Sections 1 and 2

Finally, the Judicial Council Administrative Procedure Advisory Committee believes that Sections 1 and 2 of the bill, which contain amendments made on the House floor, are particularly problematic. These amendments would require a state agency that interprets or enforces a federal statute, regulation, or national building or fire code that is interpreted less restrictively by other states to apply the less restrictive interpretation in Kansas unless the less restrictive interpretation conflicts with Kansas law.

The Committee believes these amendments could have unintended and costly consequences. First, these provisions would commit Kansas to the mistakes of other states whose "less restrictive" interpretations may be wrong as a matter of federal law and could result in the loss of substantial federal funding. In this regard, whether another state's interpretation is acceptable to federal authorities may take some time to determine. Second, the phrase "less restrictive" may have a variety of meanings in various contexts and its wide-ranging policy implications are impossible to predict. Finally, and most fundamentally, these amendments would delegate to other states authority to make policy for the State of Kansas.

As just one example, the Adoption and Safe Families Act requires the states to use "reasonable efforts" to keep a family together before removing a child from the home; failure to

comply could result in the loss of foster care funding. A "less restrictive" reading of this federal requirement would appear to mean that less effort to keep families together would be required by the state. If another state were to interpret "reasonable efforts" to require only a minimal effort, Kansas would be required to follow suit and children in Kansas would be more readily removed from their homes. If that other state's interpretation turned out to be wrong and that state was found to be in noncompliance with federal law, Kansas would also be in noncompliance and would stand to lose substantial federal funding.

CONCLUSION

The Judicial Council's Administrative Law Advisory Committee recommends that the Judiciary Committee adopt the significant changes we have recommended. The more extreme step of denying agency heads the authority to hear cases is not necessary at this time. While the amendments we have proposed may seem technical or procedural in nature and, thus, unimportant, the Advisory Committee believes they meet the legitimate concerns expressed in the Legislature about insuring fairness in agency hearings and restoring appropriate review of agency orders. Present standards of review as interpreted by the courts provide that only the evidence supporting the agency's decision is considered; all other evidence is disregarded on court review. *Blue Cross & Blue Shield of Kansas v. Praeger*, 276 Kan. 232, 263, 75 P.3d 226, 246 (2003). That standard, which is not applied in other states or in federal proceedings, makes it difficult to have meaningful review of agency decisions. The Advisory Committee believes that the change in these review standards, combined with better separation of function standards and restrictions on communication between investigators and decision-makers, will preserve the independence and fairness of agency adjudication without unduly hampering agencies in their policy making responsibilities. The Advisory Committee urges the Legislature not to enact additional provisions eliminating the ability of agency heads to act as presiding officers until the amendments recommended by the Judicial Council have been put in place and the effect of them can be observed. The Advisory Committee also urges the Legislature not to adopt provisions that commit Kansas to follow other states' potentially erroneous and costly interpretations of federal law.

Kansas Association of Insurance Agents

Testimony on House Bill 2618
Before the Senate Judiciary Committee
By Larry Magill
March 13, 2008

Thank you mister Chairman and members of the Committee for the opportunity to appear today in support of Substitute for House Bill 2618 without the floor amendment. My name is Larry Magill and I'm representing the Kansas Association of Insurance Agents. We have approximately 520 member agencies and branches throughout the state and our members employ approximately 2,500 Kansans, most of whom are licensed insurance agents.

We support the concept that if a person's license is at stake, and therefore their livelihood, the regulatory body that is bringing an action against them should not also be judge, jury and executioner. We support use to the Department of Administration's administrative hearing process in these cases. Where it is a matter of policy that requires a thorough knowledge of the industry we support leaving it with the regulatory agency.

We also support the change in the burden of proof from a preponderance or majority of the evidence to clear and convincing.

We do not support the change made on the House floor that will involve Kansas in a race to the bottom on building and fire codes. But that is also not our issue.

We would be happy to respond to questions. We urge the committee to pass the original Substitute for HB 2618 out favorable for passage.

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AGH
Allen, Gibbs & Houlik, L.C.
CPAs & Advisors

TESTIMONY ON HB 2618
KANSAS BOARD OF ACCOUNTANCY
PAUL S. ALLEN, CPA

Mr. Chairman, members of the Committee, my name is Paul Allen. I am Chairman of the Kansas Board of Accountancy, and I am here today on behalf of the Board, and as an individual practitioner, in opposition to HB2618, which would serve to prohibit agency heads from serving as presiding officers in administrative hearings. I am a resident of the city of Wichita and have been a practicing CPA for 35 years. I am the Chief Executive Officer of Allen Gibbs & Houlik, LC. I have served as a member of the Kansas Board of Accountancy since 1996 and have previously served as Chair in 1998, 2001 and 2004. During the period of my appointment to the Board, I have come to realize the benefit that my experience plays in the Board's role as a presiding officer.

The profession of certified public accountancy is a highly technical profession. Our profession necessitates that our methods, procedures and pronouncements comport with a multitude of governing standards which we incorporate by reference into our laws and regulations, which include all or a portion of the Federal Auditing Standards, Financial Accounting Standards, Governmental Accounting Standards and the Internal Revenue Code. Further, as a result of Enron, the Sarbanes Oxley Act was passed by Congress. This Act served to create the Public Company Accounting Oversight Board, which, in conjunction with the Securities and Exchange Commission, promulgates accounting standards relative to publicly held corporations. Certified public accountants are also required to abide by an extensive code of professional conduct. Our Board is comprised of 7 members, 5 of whom must be practicing CPAs. Our current

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Board (which is typical in make up) averages 28 years of practice, assuring both the public and the professional licensees knowledgeable presiding officers.

In fiscal year 2007, the Board of Accountancy conducted 25 hearings. To date in fiscal year 2008, the Board has conducted 19 hearings. While not all of these hearings require extensive technical expertise, it is fair to say that in many hearings, the inherent professional knowledge and understanding of the Board members is an invaluable tool in addressing and resolving the issues at hand. That benefit accrues to both the public at large and the profession. The ability of a Board member to bring experience and familiarity into the equation will more often than not, result in practical, reasonable resolutions. The Board follows precise procedures to assure anyone appearing before the Board will receive fair treatment. Each case is assigned a Board member to investigate the matter. That Board member collects information and data from any and all parties necessary to the case and then makes a determination of whether or not there is probable cause for a disciplinary action. To ensure fairness, the investigative Board member is not allowed to participate or service as a president officer in the administrative hearing, nor does such Board member communicate issues regarding the investigation of any pending proceeding with the presiding officer. The presiding officer comes to the administrative hearing without bias, prejudice or interest.

Quite frankly, as far as matters that relate to the Board of Accountancy, we believe HB2618 to be a cure without an ailment. Since the Board was established in 1915, there have been four instances of an appeal of a Board decision—three of which were by one individual, and on each occasion, the Board's decision was upheld. (The third case against this individual is currently being appealed by him to the Kansas Appellate Court). The fourth case is currently being appealed, but there was no contention of an unfair process. We are aware of no complaints from the public of

excessive leniency or failure to act, and there have been no complaints from the professional association as to the Board following an unfair process.

Prohibiting the Board from serving as a presiding officer would likely result in the need to hire expert witnesses to illustrate and explain the application of the various standards, and would result in additional briefs and argumentation relative to the structure of the law. These changes would not necessarily result in a more equitable or efficient system. Furthermore, the costs of retaining administrative hearing officers would adversely impact the Board's financial position, and would likely result in the need to recoup such costs from other sources, including increased professional fees, etc.

In closing, we oppose HB2618 which in its current form, will require the substitution of one person's judgment and knowledge for that of 7 people, five of whom possess decades of knowledge and experience in the profession and request that the Board of Accountancy be exempted from the prohibition of using the agency head as the presiding officer.

Thank you. I will be happy to stand for any questions.

* * * *

10-3

Kansas Society of
Certified Public Accountants

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TESTIMONY

Tony A. Scott, JD, CPA
Executive Director

To: The Honorable John Vratil, Chairperson
Members, Senate Judiciary Committee

From: Tony A. Scott

Re: Opposition to HB 2618

Date: March 13, 2008

Ladies and Gentlemen of the Committee:

Approximately 2,600 members strong, the Kansas Society of Certified Public Accountants is the statewide professional association of CPAs *dedicated to implementing strategies that enhance the well-being of our members, the accounting profession and the general public.* My name is Tony A. Scott and I am Executive Director of the KSCPA. **Today I am testifying in opposition to HB 2618.**

Certified Public Accountants have responsibilities to those who use their professional services. Members also have a continuing responsibility to cooperate with each other to improve the art of accounting, maintain the public's confidence, and carry out the profession's special responsibilities for self-governance (*AICPA Code of Professional Conduct, Principles of Professional Conduct, Article I, Section .01*).

In Kansas, "self-governance" of CPAs is carried on by and through the Kansas Board of Accountancy (hereinafter the "Board") employing statutory authority, including the authority to promulgate rules and regulations, granted to them through K.S.A. 1-201 and following. The Board is composed of seven members, five (5) of whom are certified public accountants actively engaged in the practice of public accounting, and two (2) who represent the general public and are persons whose business, occupation or profession requires reliance on, and understanding of, financial statements and their use.

A distinguishing mark of our profession is acceptance of our responsibility to the public – clients, grantors of credit, governments, employers, investors, the business and financial community, and others – those who rely on the CPA's integrity and objectivity to help maintain the orderly functioning of commerce. Public confidence is also maintained through the Board's sound professional oversight of licensing and disciplinary matters relating to Kansas CPAs.

The CPA profession in Kansas believes the Board regularly discharges their individual and collective duties with integrity, objectivity, independence, due professional care, and a genuine interest in serving the public. They do so not through statutory compulsion but through their individual and collective sense of personal and professional responsibility.

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Concepts like integrity, objectivity, independence and due professional care aren't simple buzzwords in our profession. They are, instead, concepts inherent in everything we do. **Integrity** is the quality from which CPAs derive public trust and is measured in terms of what is right and just. **Objectivity** is a state of mind that imposes the obligation to be impartial, intellectually honest, and free of conflicts of interest. **Independence** precludes relationships that may appear to impair a CPA's objectivity. **Due professional care** requires a CPA to plan and adequately supervise any professional activity for which he or she is responsible.

HB 2618 would take away Board authority to effectively oversee the CPA profession in Kansas. With no intended slight to the Office of Administrative Hearings and/or any individual or group of individuals who work there, we believe self-governing authority of the CPA profession should remain fully vested in the expert Board this legislature wisely established long ago. **Based upon the foregoing, we respectfully oppose HB 2618 and ask members of the Committee to do the same.**

It is my honor and privilege to appear before you today. I will be pleased to stand for questions.

Respectfully Submitted,

Tony A. Scott

TAS/mmi

KANSAS
DEPARTMENT OF REVENUE

Kathleen Sebelius, Governor
Joan Wagnon, Secretary

www.ksrevenue.org

Testimony to the Senate Judiciary Committee

Richard Cram

March 13, 2008

Opposition to Substitute for House Bill 2618

Senator Vratil, Chair, and Members of the Committee:

The Department opposes this bill because it would eliminate the agency head's ability under current law to act as the presiding officer of KAPA hearings arising within the agency, and for the additional reasons set forth below. This proposal needlessly infringes on the State Agency's ability to administer the licensing provisions it is charged with enforcing.

The Alcohol Beverage Control (ABC) Division administers the liquor licensing laws. The ABC Director, as "agency head" of the Division, is uniquely situated to have in-depth knowledge of the liquor laws and their appropriate application. His awareness of the gamut of liquor issues -- and his regular and ongoing contact with both the liquor industry and the field agents who enforce the liquor laws -- enhances his ability to understand cases and to be fair in rendering judgment. The same is true for other "ABC" hearings, such as for tobacco licenses. Similarly, this bill likewise infringes on the Director of the Division of Motor Vehicles' (DMV) ability to administer the motor vehicle dealers' licensing laws.

Section 1 requires a State Agency to adopt the least restrictive interpretation of a federal regulation or statute. This presents numerous practical problems. Each State Agency would apparently need to know the manner in which federal statutes, regulations and codes have been interpreted by officials in all other states, a difficult and time consuming task. Whether a particular interpretation of federal law is "less restrictive" can be highly subjective, particularly when the factual circumstances to which federal law is applied can differ widely. It is not clear if the phrase "state officials in other states" is limited to administrative officials or includes members of the judiciary. Also, State Agencies would need to know the provisions contained in all local ordinances and resolutions in order to determine if they are in conflict with the interpretations of officials in other states. This would require extensive research and analysis.

Sections 3 through 14 of the bill make changes that may cause Kansas Administrative Procedures Act (KAPA) hearings to be unnecessarily complex and result in excessive delay. Issues raised in a KAPA hearing could be reviewed by various

persons at different agencies, which would be time consuming and result in duplication of effort by various agencies.

Section 3 of the bill provides that a hearing officer from the Department of Administration may certify to the Department of Revenue questions of policy that arise during the course of an adjudicative hearing. If a hearing officer from the Department of Administration is unavailable to conduct an adjudicative hearing involving the Department of Revenue, Section 4 of the bill would permit an employee of another agency to be designated as the hearing officer. After a presiding officer from the Department of Administration issues an initial order, Section 11 of the bill provides that the order may be reviewed by the Department of Revenue agency head for purposes of rendering a final order. This potential for circular shifting of a KAPA proceeding (or portions of it) back and forth between the Department of Administration and Department of Revenue could be easily avoided, if the agency head acts as the presiding officer to begin with, as permitted under current law.

This bill modifies certain evidentiary and review standards, creating lack of clarity and disrupting settled areas of law. Section 7 requires clear and convincing evidence with respect to disputed fact issues in certain disciplinary proceedings. This appears to apply to professional licenses, such as the healing arts. Would it apply to the Department of Revenue-issued licenses, such as liquor, cigarette, or automobile dealers?

Section 11 of the bill provides that in reviewing findings of fact in an initial order, the agency head shall "give due regard to the presiding officer's opportunity to observe the witness." This provision is vague and difficult to interpret.

Section 13 provides that agencies such as the Department of Revenue are required to include in the certified record on appeal any materials concerning a hearing conducted by, or an initial order issued by, the Department of Administration's office of administrative hearings that are related to the agency action. However, since such materials are not within the Department of Revenue's custody or control, it is unclear how they can be included in the certified record.

Section 14 would amend the Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), to define the statutory phrase, "in light of the record as a whole," as it appears in K.S.A. 77-621(c)(7). The definition provided is vague and would be difficult for courts to interpret and apply. It also seems unnecessary given that courts are already able to understand and apply the existing statutory language.

The Department's fiscal note describing the administrative costs anticipated from this bill is attached.

2008 House Bill 2618m Fiscal Note

Amended by House Committee of the Whole

Brief of Bill

Substitute for House Bill 2618, as amended by House Committee of the Whole, concerns the Kansas Administrative Procedure Act. In 2004, Senate Bill 141 mandated that KAPA hearings be conducted by the Office of Administrative Hearings beginning July 1, 2008, for KAPA hearings currently held by the Department of Revenue unless they are conducted by the agency head. Also, effective July 1, 2008, any full-time presiding officer in agencies specified in the bill and their support personnel are to be transferred to and shall become employees of the Office of Administrative Hearings.

The House Committee of the Whole inserted New Section 1 providing in the event a Kansas state agency is interpreting or enforcing a federal regulation, a federal statute or a national building or fire code and such regulation, statute or code is interpreted less restrictively by state officials in other states, such less restrictive interpretation shall be applicable in Kansas unless such less restrictive interpretation conflicts with a Kansas statute, regulation or local ordinance or resolution.

In Section 4, amending K.S.A. 2007 Supp. 75-37,121, the "agency head" exemption is being eliminated which would necessitate the transfer of all KDOR KAPA hearings effective July 1, 2008.

The effective date of this bill would be upon publication in the Kansas Register.

Fiscal Impact

Passage of this bill would not affect State revenues.

Administrative Impact

Most of the hearings conducted by the Department of Revenue are not under KAPA but are, instead, under the informal conference procedure, however, the Division of Vehicles, the Division of Alcoholic Beverage Control, and certain motor fuel and IFTA related license revocations are conducted under KAPA. The Department estimates that between 500 and 1000 hearings per year would be referred to the Office of Administrative Hearings. It is estimated that an average of 5 hours per hearing would be billed to the Department at a rate of $70 per hour and a $25 filing fee would also be charged per case. If, indeed, 750 hearings are conducted, approximately $262,500 (750 x 5 hrs x $70) would be charged the Department by the Office of Administrative Hearings plus an additional $18,750 (750 x $25) for filing fees if the Department were responsible for that fee. None of these expenses are currently budgeted.

It should also be noted that, at the present time, none of the current staff involved in KAPA hearings for the Department, hearing officers and support staff included are engaged on a full-time basis on that activity.

Administrative Problems and Comments

Taxpayer/Customer Impact

Legal Impact

The following comments relate to Sections 1 and 2 of this bill.

There would be numerous practical problems associated with Section 1. Each Kansas state agency would apparently need to know the manner in which federal statutes, regulations and codes have been interpreted by officials in all other states, which would be very difficult and time consuming. Further, whether a particular interpretation of federal law is "less restrictive" can be highly subjective, particularly since the factual circumstances to which federal law is applied can differ widely. It is not clear if the phrase "state officials in other states" is limited to administrative officials or includes members of the judiciary. Also, Kansas state agencies would need to know the provisions contained in all local ordinances and resolutions in order to determine if they are in conflict with the interpretations of officials in other states. This would require extensive research and analysis on the part of the agency.

Section 2 would amend the Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA) to permit the court to receive additional evidence concerning the interpretations of federal law by officials in other states, which could serve as the basis for determining the manner in which federal law shall be interpreted or enforced by a Kansas state agency pursuant to Section 1.

Kansas Motor Carriers Association
Trucking Solutions Since 1936

LEGISLATIVE TESTIMONY

Presented by the Kansas Motor Carriers Association
Before the Senate Judiciary Committee
Senator John Vratil, Chairman
Thursday, March 13, 2008

In Opposition to the House Committee of the Whole
To Substitute for House Bill No. 2618

MR. CHAIRMAN AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE:

I am Tom Whitaker, executive director of the Kansas Motor Carriers Association. I appear here this morning in opposition to the House Committee of the Whole amendment to Substitute for House Bill No. 2618.

The amendment reads:

> **In the event a Kansas state agency is interpreting or enforcing a federal regulation, a federal statute or a national building or fire code and such regulation, statute or code is interpreted less restrictively by state officials in other states, such less restrictive interpretation shall be applicable in Kansas unless such less restrictive interpretation conflicts with a Kansas statute, regulation or local ordinance or resolution.**

This amendment would allow Kansas to be subject to the whim of another state in the interpretation of Federal laws or regulations. If forty-eight states agree with the Kansas interpretation of a Federal law or regulation, and one state has a less restrictive interpretation, Kansas would be required to adopt the less-restrictive interpretation.

KMCA believes that Substitute for HB 2618 in its present form is unworkable and would delegate authority of the Legislative, Executive and Judicial branches of Kansas government to other states.

Mr. Chairman, we respectfully request the Senate Judiciary Committee remove the House Committee of the Whole amendment to Substitute for House Bill No. 2618.

We thank you for the opportunity to appear before you this morning. I would be pleased to respond to any questions you may have.

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Testimony on Sub. H.B. 2618
9:30 a.m. Thursday, March 13, 2008
Senate Judiciary Committee

Sen. Vratil, Sen. Bruce, and members of the Senate Judiciary Committee, thank you for the opportunity to appear today on **Sub. H.B. 2618.**

My name is Gary Reser and I am executive vice president of the Kansas Veterinary Medical Association (KVMA). The KVMA is the organization advocating on behalf of the Kansas veterinary profession through legislative, regulatory, educational, communications, and public awareness programs.

The KVMA respectfully requests the Senate Judiciary Committee reinstate language in **Sub. H.B. 2618** that will continue to give the Kansas Board of Veterinary Examiners the option to conduct its own administrative hearings.

The current version of **H.B. 2618** takes away regulatory and policy authority from the Kansas Board of Veterinary Examiners, the officials who are accountable for regulating veterinary medicine in Kansas.

Currently, the Kansas Board of Veterinary Examiners utilizes veterinarians, experts in veterinary medicine and community standards of care, as hearing officers. Historically, this has provided an efficient and just forum for resolving cases.

Sub. H.B. 2618 would require the Board to hire hearing officers from the Dept. of Administration for hearings, conferences, and routine motions, dramatically increasing costs. Both parties would have to spend time and money to present expert or foundational testimony to educate independent hearing officers on the scientific aspects of veterinary medicine.

The cost of hiring hearing officers and expert witnesses will dramatically increase the operating budget of the Board of Veterinary Examiners and subsequently escalate licensing fees for veterinarians and possibly charges passed on to veterinary clients.

Since the Dept. of Administration will have a limited number of hearing officers, veterinary medicine proceedings may not be handled with the same priority as those dealing with human medicine, for example.

Once again, the KVMA respectfully requests you reinstate language in **Sub. H.B. 2618 giving the Kansas Board of Veterinary Examiners the option to conduct its own hearings.**

(Over)

Senate Judiciary
3-13-08
Attachment 14

Reasons Why The Kansas Board of Veterinary Examiners Should Have the Option to Conduct Its Own Administrative Hearings

* The increased cost of hiring hearing officers and expert witnesses will dramatically increase the operating budget of the Kansas Board of Veterinary Examiners and subsequently escalate licensing fees for veterinarians and possibly charges passed on to veterinary clients.

* The cost to retain a Kansas Dept. of Administration hearing officer is $70 an hour. Kansas Board of Veterinary Examiners members receive $35 a day for conducting hearings.

* The Kansas Board of Veterinary Examiners will have to retain expert witnesses to testify before an adjudicative hearing officer in any proceeding involving a determination of the standard of veterinary care.

* The current widely accepted view that licensing boards do not need expert witnesses will no longer apply as adjudicative hearing officers will not be veterinarians, dentists, physicians, etc.

* There will be delays in reaching a final conclusion to disciplinary proceedings.

* The amount of hearing time available to the Board of Veterinary Examiners for a disciplinary hearing could be noticeably less before a presiding hearing officer who will also be handling multiple hearings involving other professionals.

* Veterinarians are fearful that, since the Kansas Dept. of Administration will have a limited number of hearing officers, veterinary medicine disciplinary proceedings may not be handled with the same priority as hearings dealing with, for example, human health care professionals.

* Not every licensing board has a hearing officer that can be transferred to the Office of Administrative Hearings and there will not be sufficient personnel to handle all of the proceedings that will be needed to be heard.

* Given the added layer for disciplinary proceedings, then review by the agency and possibly by a district court and potentially the Court of Appeals and the Supreme Court, veterinarians could find that the amount of coverage provided by AVMA insurance was easily exhausted long before the action comes to a conclusion.

Kansas Insurance Department
Sandy Praeger, Commissioner of Insurance

TESTIMONY IN OPPOSITION
TO
SUBSTITUTE FOR HOUSE BILL 2618

SENATE JUDICIARY
March 13, 2008

Mr. Chairman and Members of the Committee:

Every Kansan who insures their home, car, health and life relies on the elected Insurance Commissioner to protect them. Substitute for HB 2618 impedes her ability to provide that protection. HB 2618 will prohibit the Insurance Commissioner or the Assistant Commissioner from hearing contested cases. There is no reason in fact or law for such a costly prohibition.

If this bill is enacted, carefully crafted laws relating to insurance stock sales, company examinations, mutual insurance mergers, acquisitions, reciprocal insurance exchange mergers, firefighters relief act distributions, appropriation agreements, life and health guaranty associations, self insurance status revocations (motor vehicle and health care provider), Insurance Holding Company Act acquisitions, insolvencies, producer licensure procedures and unfair trade practice act protections have all been amended. A list of the 58 statutes in the Insurance Code that mandate KAPA procedures be used is attached.

Under HB 2618, in contested cases, consumers will face longer waits for restitutions due to them via the unfair trade practices act. Company mergers and acquisitions will face long delays. Actions to correct insolvency threats will be delayed. Market conduct examinations of insurance companies will take longer and cost more. Rogue insurance agents who have broken the law will continue to place consumers at risk while presiding officers are selected. Their license can't be taken without a hearing and this bill allows months to go by just in selecting a hearing officer.

There is a time value of money. A citizen with a damaged roof or inoperable car can be in dire straights. They need swift action, the Department cannot promise that under HB 2618.

Company mergers and acquisitions are complicated and important. If this bill had been in effect in 2002, the order dealing with the Blue Cross & Blue Shield-Anthem merger, (denial by Commissioner upheld by the Supreme Court in *Blue Cross & Blue Shield of Kansas, Inc., v. Praeger*, 276 Kan. 232, 75 P.3d 226 (2002), would have been made initially by a lawyer instead of the Insurance Commissioner.

Delays in financial examinations and market regulation information endanger the public which must be protected from insolvencies and illegal market practices.

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www

The official fiscal notes on this bill are incomplete. No estimate of the cost is included in the note. Although not requested, we have filed a $250,000 fiscal note with the Division of Budget. A copy is attached.

The Department issued 142 published orders last year and had 6 contested hearings. We anticipate the number of contested hearings to increase under Substitute for HB 2618. Use of KAPA procedures is required in 58 Insurance Code statutes. The Department will need to retain at least one additional attorney along with clerical support in order to implement the statute. Quasi litigation discovery expenses will increase and the need for a more detailed agency record will require more attorney and staff time.

In addition, in that the cases and issues identified above will no longer be presented to an expert in insurance matters but to lawyers who may not have experience in the regulation of insurance, a large amount of time and money will be needed to educate the ALJ in addition to the time and cost of quasi-judicial discovery.

Finally, the Department would need to evaluate the regulatory interpretations of the 50 states with regards to national laws and codes. That will take a great deal of increased legal research.

Insurance in Kansas is big business. Gross premiums paid out in Kansas for 2006 were $15.19 billion. The Commissioner needs the tools developed over the last 137 years to protect consumers, to provide them with the protection they need. HB 2618 is a costly roadblock to that protection which should be rejected.

MEMORANDUM

2008
LEGISLATIVE FISCAL NOTE
Kansas Insurance Department

TO: Duane Goossen
FROM: John W. Campbell
RE: Substitute for HB 2618
DATE: March 13, 2008

1. A brief analysis of the proposed legislation:

This bill would transfer portions of the Commissioner of Insurance's authority to state employed or retained attorneys in the regulation of many insurance issues, including, insurance stock sales, insurance company examinations, mutual insurance company mergers, reciprocal insurance company mergers, the firefighters relief act, appropriation agreements, life and health guaranty associations, self insurance status revocation (motor vehicle and health care provider), the Insurance Holding Company Act, insurance company insolvencies, producer licensure and unfair trade practice act.

Under the act, the Commissioner would lose the authority to hear contested cases in KAPA proceedings. KAPA proceedings are mandated in 58 statutes found in the Insurance Code, K.S.A. Chapter 40. Regarding final agency orders, the Commissioner would be required to use K.S.A. 77-527 reviews if she, or any other party, disagrees, in whole or in part, with an "initial order." Also parties to the initial order would have the option of seeking review by the Commissioner.

In addition, the Department would be required in interpreting a federal statute or a national building or fire code, to find and use any less restrictive interpretations by state officials in other states, unless such less restrictive interpretation conflicts with a Kansas statute, regulation or local ordinance or resolution

2. How the bill would affect Kansas Insurance Department's responsibilities:

The responsibilities of the Department would remain unchanged, but portions of the authority to carry out a number of those responsibilities would be transferred to the Department of Administration. In addition, the Department would need to evaluate the regulatory interpretations of the 50 states with regards to national laws and codes.

3. The dollar effect upon KID's budget (expenditures and receipts) by funding source:

The Department estimates the cost of the bill at $250,000 per year.

4. The assumptions used to develop cost estimates or anticipated revenues:

The Department issued 142 published orders last year and had 6 contested hearings. We anticipate an increase number of contested hearings under Substitute for HB 2618. The Department will need to retain at least one additional attorney along with clerical support in order to implement the statute. Quasi litigation discovery expenses will increase and the need for a more detailed agency record in anticipation of the K.S.A. 77-527 reviews will require more attorney and staff time.

In addition, in that the cases and issues identified above will no longer be presented to an expert in insurance matters but to attorneys who most likely do not have extensive experience in the regulation of insurance, a large amount of time will be needed to educate the ALJ in addition to the time and cost of quasi-judicial discovery.

The Department would need to evaluate the regulatory interpretations of the 50 states with regards to national laws and codes. That will take a great deal of increased legal research.

5. Whether the bill could be implemented within KID's current approved staffing and operating expenditure levels, or whether additional positions and operating expenditures would be requested:

The Legal Division will need at least two additional people. Whether additional people will be needed in the Producers, Consumer Assistance Division, Accident and Health, or Financial Surveillance Division remains to be seen.

6. The long range fiscal effect of the measure including estimates for three fiscal years following the budget year:

A minimum of $750,000 will be needed over the next three years.

Authority of Insurance Commissioner Impacted by Substitute for HB 2618

1. **40-205. Application for permit to offer stock for sale; contents; duties of commissioner; findings; issuance or denial of permit; terms of permit; report by insurer; amendment or suspension of permit; notice and hearing; revocation, when; rules and regulations.**

Each insurance company or health maintenance organization applicant for a permit to offer its stock for sale shall file with the commissioner an application therefore, . .

The commissioner may from time to time for cause order the amendment, alteration or suspension of any permit granted pursuant to this act. After issuing such order the commissioner may on the commissioner's motion, or if within 15 days requested in writing by the company affected the commissioner shall conduct a hearing in accordance with the provisions of the **Kansas administrative procedure act**.

2. **40-205b. Denial of application to sell stock as agent; hearing.**

The commissioner of insurance shall have the power to deny any applicant's application, . . . Any applicant may request a hearing on the question of granting or refusing a license. Upon such request, the commissioner of insurance shall conduct a hearing in accordance with the provisions of the **Kansas administrative procedure act.**

3. **40-205c. Revocation of agent's license; hearing.**

Whenever the commissioner of insurance is in possession of information indicating that any licensed agent is not of good business repute, or does not serve the interest of the public under such license, or for any other good cause, the commissioner of insurance may issue an order requiring such agent to show cause why the agent's license should not be revoked, and in any such order the commissioner of insurance shall fix the time and place for a hearing which shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**. After the hearing, the commissioner of insurance shall have the right to continue or revoke the license according to the findings made at such hearing.

4. **40-222. Examination of condition of company, when; suspension or revocation of certificate; notice and hearing.**

(a) Whenever the commissioner of insurance deems it necessary but at least once every five years, the commissioner may make, or direct to be made, an examination of the affairs and financial condition of any insurance company in the process of organization, or applying for admission or doing business in this state.

(g) The refusal of any company, by its officers, directors, employees or agents, to submit to examination or to comply with any reasonable written request of the examiners shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the company to engage in an insurance or other business subject to the commissioner's jurisdiction. Any such proceedings for suspension, revocation or refusal of any license or

authority shall be conducted in accordance with the provisions of the **Kansas administrative procedures act**.

(k) (7) . . .

Whenever it appears to the commissioner of insurance from such examination or other satisfactory evidence that the solvency of any such insurance company is impaired, or that it is doing business in violation of any of the laws of this state, or that its affairs are in an unsound condition so as to endanger its policyholders, the commissioner of insurance shall give the company a notice and an opportunity for a hearing in accordance with the provisions of the **Kansas administrative procedure act**. If the hearing confirms the report of the examination, the commissioner shall suspend the certificate of authority of such company until its solvency shall have been fully restored and the laws of the state fully complied with. The commissioner may, if there is an unreasonable delay in restoring the solvency of such company and in complying with the law, revoke the certificate of authority of such company to do business in this state. Upon revoking any such certificate the commissioner shall commence an action to dissolve such company or to enjoin the same from doing or transacting business in this state.

5. **40-222b. Insurance company in hazardous financial condition; order of commissioner, notice and hearing; requirements which may be imposed; transfer of special deposit to guaranty fund, when.**

(a) Whenever the financial condition of any insurance company, hereinafter referred to as "company," authorized to do business in this state attains a condition such that the continued operation of the company might be hazardous to the insuring public, the commissioner, after notice and hearing in accordance with the provisions of the **Kansas administrative procedure act**, may order the company to take such action as may be reasonably necessary to rectify the existing condition, . . .

6. **40-246a. Penalties for violating 40-246; hearings.**

The commissioner of insurance shall have the power to examine any agent, nonresident agent, company or assured if the commissioner has cause to believe that any provision of this act has been violated. . . .

Hearings under this section shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**.

7. **40-2,125. Violation of insurance laws; failure to file reports; penalties; emergency temporary cease and desist orders; definitions.**

(a) If the commissioner determines after notice and opportunity for a hearing that any person has engaged or is engaging in any act or practice constituting a violation of any provision of Kansas insurance statutes or any rule and regulation or order thereunder, the

commissioner may in the exercise of discretion, order any one or more of the following: . . .

(c) If the commissioner makes written findings of fact that there is a situation involving an immediate danger to the public health, safety or welfare or the public interest will be irreparably harmed by delay in issuing an order under subsection (a)(3), the commissioner may issue an emergency temporary cease and desist order. Such order, even when not an order within the meaning of K.S.A. 77-502 and amendments thereto, shall be subject to the same procedures as an emergency order issued under K.S.A. 77-536 and amendments thereto. Upon the entry of such an order, the commissioner shall promptly notify the person subject to the order that: (1) It has been entered, (2) the reasons therefor and (3) that upon written request within 15 days after service of the order the matter will be set for a hearing which shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**. If no hearing is requested and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to the person subject to the order, shall by written findings of fact and conclusions of law vacate, modify or make permanent the order.

8. **40-2,135. Same** (MANAGING GENERAL AGENTS)**; sanctions for violations; rights of policyholders, claimants and auditors not restricted.**

(a) If the commissioner finds after a hearing conducted in accordance with the **Kansas administrative procedure act** that any person has violated any provision of this **act**, the commissioner may order each of the following, any combination thereof or all of the following: . . .

9. **40-2c19.** (RISK-BASED CAPITAL REPORTS) **Hearing under Kansas administrative procedure act.**

(d) upon notification to an insurer by the commissioner of a corrective order with respect to the insurer, the insurer shall have the right to a hearing under the **Kansas administrative procedure act**, at which the insurer may challenge any determination or action by the commissioner.

10. **40-2d19.** (HEALTH ORGANIZATION RISK-BASED CAPITAL REQUIREMENTS) **Hearing under Kansas administrative procedure act.**

(d) upon notification to an health organization by the commissioner of a corrective order with respect to the health organization, the health organization shall have the right to a hearing under the **Kansas administrative procedure act**, at which the health organization may challenge any determination or action by the commissioner.

11. **40-444. Same** (GENERAL PROVISIONS RELATING TO LIFE INSURANCE COMPANIES); **disapproval of policy form; notice, requirements; hearing.**

The commissioner may, within 30 days after the filing of any such form, disapprove such form if it contains a provision or provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation of such policy. . . In such notice, the commissioner shall specify the reasons for disapproval and state that a hearing will be granted within 20 days after request in writing by the insurer. Hearings under this section shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**.

12. **40-445. Same** (GENERAL PROVISIONS RELATING TO LIFE INSURANCE COMPANIES) **; withdrawal of approval; notice and hearing; unlawful for insurer to issue or use such form.**

The commissioner may at any time, after a hearing conducted in accordance with the provisions of the **Kansas administrative procedure act**, of which not less than 20 days written notice shall have been given to the insurer, withdraw approval of any such form on any of the grounds stated in this act.

13. **40-510. Same** (MUTUAL LIFE INSURANCE COMPANIES) **; merger or consolidation of companies; filing agreement with commissioner; hearing; disapproval, grounds; notice of disapproval.**

(a) No merger or consolidation of a domestic mutual insurer shall be effectuated unless, in advance of a proposed merger or consolidation, the agreement therefor and any other information requested by the commissioner of insurance has been filed with the commissioner and has not been disapproved in writing. If the domestic insurer is not then impaired, the commissioner of insurance shall **act** with respect to the agreement for merger or consolidation after a hearing thereon conducted in accordance with the provisions of the **Kansas administrative procedure act**.

14. **40-512. Same** (MUTUAL LIFE INSURANCE COMPANIES) **; impaired insurer.**

If a domestic mutual insurer is impaired in that the insurer's surplus is less than the amount required for authority to transact the kinds of insurance being transacted by the insurer, the commissioner of insurance may approve the agreement of merger or consolidation with a hearing thereon conducted in accordance with the provisions of the **Kansas administrative procedure act**, and the same may be effectuated without approval of the impaired insurer's policyholders.

15. **40-964. Same** (GENERAL PROVISION RELATING TO FIRE INSURANCE COMPANIES); **hearings under administrative procedure act.**

Any hearing required or requested under this **act** shall be conducted in accordance with the **Kansas administrative procedure act**.

16. **40-1219a. Same** (MUTUAL INSURANCE COMPANIES OTHER THAN LIFE) **; approval of policyholders of merger or consolidation of certain mutual companies not required.**

. . . if a domestic mutual insurer is impaired in that the insurer's surplus is less than the amount required for authority to transact the kinds of insurance being transacted by the insurer or the insurer has attained a financial condition such that its continued operation might be hazardous to the insuring public pursuant to K.S.A. 40-222b, and amendments thereto, the commissioner of insurance may approve the agreement of merger or consolidation after a hearing thereon conducted in accordance with the provisions of the **Kansas administrative procedure act**. Approval of the merger or consolidation by the policyholders of the insurers that are a party to the transaction is not required

17. **40-1618. Same** (MERGER OF ARMED FORCES COOPERATIVE INUSRING ASSOICATION WITH ARMED FORCES INSURANCE EXCHANGE) **; information required to be filed with insurance commissioner; notice and hearing on merger; approval, when; costs.**

(b) After notice and a hearing in accordance with the **Kansas administrative procedure act**, the commissioner of insurance shall approve the merger unless the commissioner of insurance determines that any one of the following exist or would result from the merger, in which event the commissioner of insurance shall disapprove the merger: (1) The insurance entities proposing to merge have not complied with the provisions of this **act**; (2) the merger of the two insurance entities is not in the best interests of the subscribers of Armed Forces Insurance Exchange; (3) after the merger, Armed Forces Insurance Exchange would be in violation of any of the laws of this state; or (4) the effect of the merger would be to substantially lessen competition in insurance in this state.

18. **40-1621. Same** (MERGER OF ARMED FORCES COOPERATIVE INUSRING ASSOICATION WITH ARMED FORCES INSURANCE EXCHANGE) ; **hearing on conversion plan.**

Within 15 days of the date of the commissioner's approval or denial of the conversion plan submitted in accordance with K.S.A. 40-1620, and amendments thereto, the insurance company shall have the right to request a hearing by filing a written request with the commissioner. The commissioner shall conduct the hearing in accordance with the provisions of the **Kansas administrative procedure act** within 30 days after such request is filed. Any action of the commissioner pursuant to this section is subject to review in accordance with the provisions of the act for judicial review and civil

enforcement of agency actions.

19. **40-1706.** (FIREFIGHTERS RELIEF ACT) **Financial reports of firefighters relief associations, filing, proceedings for improper expenditures; authorized disposition of tax proceeds; determination and payment of amounts to state and local associations; procedures upon dissolution of local associations; handling and investment of moneys by local association, restrictions.**

(C)(6) One or more firefighters relief associations may apply, prior to October 1 of any year, to the commissioner of insurance for a redetermination of the proportionate amounts payable to all firefighters relief associations under subsection (c)(4) and, upon receipt of such application, the commissioner of insurance shall hold one joint hearing in accordance with the provisions of the **Kansas administrative procedure act** prior to December 1 of such year, at which all applicants shall be heard and may present information.

20. **40-2102. Apportionment or assignment of risk of certain motor vehicle bodily injury and property damage liability insurance; filing of plan; requirements; governing board of plan; membership; meetings, term of office and duties; review of plan; approval; disapproval; procedure; amendment; preparation of plan by commissioner; unreasonable or unfair activities by insurer or rating organization.**

. . . If, after a hearing conducted in accordance with the provisions of the **Kansas administrative procedure act**, the commissioner finds that any activity or practice of any insurer or rating organization in connection with the operation of such plan or plans is unfair or unreasonable or otherwise inconsistent with the provisions of this subsection the commissioner may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this subsection and requiring discontinuance of such activity or practice.

21. **40-2106. Same** (MISCELLANEOUS PROVISIONS) **; demand for examination; specification of mismanagement; hearing; powers and duties of commissioner.**

Any member or stockholder of any stock or mutual life, stock fire or stock casualty insurance company organized under the laws of this state may make demand to examine the membership records or records pertaining to stock issued and outstanding and the holders thereof of such company by filing a verified application with the commissioner of insurance of this state setting forth specification of mismanagement on the part of the officers of such company. Upon the filing of such application, the commissioner of insurance shall conduct a hearing thereon in accordance with the provisions of the **Kansas administrative procedure act**.

22. **40-2109.** (MISCELLANEOUS PROVISIONS) **Apportionment or assignment of risk of certain workers compensation and employer's liability insurance; filing of plan; requirements; governing board of plan; membership, meetings, term of office and duties; review of plan; approval; disapproval; procedure; amendment; preparation of plan by commissioner; unreasonable or unfair activities by insurer or rating organization.**

Every insurer undertaking to transact in this state the business of either workers compensation or employer's liability insurance or both, and every rating organization which files rates for such insurance shall cooperate in the preparation and submission to the commissioner of insurance of a plan or plans, for the equitable apportionment among insurers of applicants for insurance who are in good faith, entitled to but who are unable to procure through ordinary methods, such insurance. . .

If, after a hearing conducted in accordance with the provisions of the **Kansas administrative procedure act**, the commissioner finds that any activity or practice of any insurer or rating organization in connection with the operation of such plan or plans is unfair or unreasonable or otherwise inconsistent with the provisions of this section the commissioner may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this section and requiring discontinuance of such activity or practice.

23. **40-2113. Preparation of plan by commissioner, when; unreasonable or unfair activity or practice by insurer or rating organization; hearing; order.**

If no plan (e.g. FAIR Plan), meeting the standards set forth in K.S.A. 40-2111 and amendments thereto, is submitted to the commissioner within the period stated in any order disapproving an existing plan, the commissioner shall, if necessary to carry out the purpose of this section, and after hearing, prepare and promulgate a plan meeting such requirements. The commissioner may designate one or more rating organizations or other agencies to assist in the preparation, operation and promulgation of such a plan. If, after a hearing conducted in accordance with the provisions of the **Kansas administrative procedure act**, the commissioner finds that any activity or practice of any insurer or rating organization in connection with the operation of such plan or plans is unfair or unreasonable, or otherwise inconsistent with the provisions of this subsection, the commissioner may issue a written order specifying in what respects such activity or practice is unfair or unreasonable, or otherwise inconsistent with the provisions of this subsection, and requiring discontinuance of such activity or practice.

24. **40-2115. Hearings; compliance with 40-281 and the Kansas administrative procedure act.**

Any hearing held by the commissioner of insurance pursuant to the provisions of this act shall be in substantial compliance with the provisions of K.S.A. 40-281 and amendments thereto unless the hearing involves an order as defined in K.S.A. 77-502 and amendments

thereto, in which case the hearing shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**.

25. **40-2215.** (UNIFORM POLICY PROVISIONS) **Forms and premium rates, filing, regulation, violations, penalties.**

(a) No individual policy of accident and sickness insurance as defined in K.S.A. 40-2201 and amendments thereto shall be issued or delivered to any person in this state nor shall any application, rider or endorsement be used in connection therewith, until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto, have been filed with the commissioner of insurance.

(c) No such policy shall be issued, nor shall any application, rider or endorsement be used in connection therewith, until the expiration of 30 days after it has been filed unless the commissioner gives written approval thereof.

(d) . . . If the commissioner notifies the insurer which has filed any such form that it does not comply with the provisions of article 22 of chapter 40 of the Kansas Statutes Annotated, and amendments thereto, it shall be unlawful thereafter for such insurer to issue such form or use it in connection with any policy. In such notice the commissioner shall specify the reasons for disapproval and state that a hearing will be granted within 20 days after request in writing by the insurer.

(g) The commissioner may at any time, after a hearing of which not less than 20 days' written notice shall be given to the insurer, withdraw approval of any such form or disapprove any rate filed in accordance with subsection (a) in the event the commissioner finds such filing no longer meets the requirements of this section or of article 22 of chapter 40 of the Kansas Statutes Annotated, and amendments thereto. It shall be unlawful for the insurer to issue such form or use it in connection with any policy after the effective date of such withdrawal of approval.

(i) Hearings under this section shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**.

26. **40-22a04.** (UTILIZATION REVIEW) **Same; standards; rules and regulations; certificate; conditions; annual fee; suspension or revocation of certificate.**

(a) The commissioner shall adopt rules and regulations, with the advice of the advisory committee created by K.S.A. 40-22a05, establishing standards governing the conduct of utilization review activities performed in this state or affecting residents of this state by utilization review organizations. Unless granted an exemption under K.S.A. 40-22a06, no utilization review organization may conduct utilization review services in this state or affecting residents of this state on or after May 1, 1995, without first obtaining a certificate from the commissioner.

(d) The commissioner with the advice of the advisory committee may suspend or revoke the certificate or any exemption from certification requirements upon determination that the interests of Kansas insureds are not being properly served under such certificate or exemption. Any such action shall be taken only after a hearing conducted in accordance with the provisions of the **Kansas administrative procedure act**.

27. **40-22a07. Same** (UTILIZATION REVIEW) **; unlawful acts; penalties.**

(a) (1) It is unlawful for any person or utilization review organization to perform utilization review activities in this state except in accordance with this act.

(b) When the commissioner has reason to believe a utilization review organization subject to this act has been or is engaged in any conduct which violates this **act** or any rules and regulations adopted pursuant to K.S.A. 40-22a11, the commissioner, after a hearing conducted in accordance with the **Kansas administrative procedure act**, . . .

28. **40-2406. Same** (REGULATION OF CERTAIN TRADE PRACTICES)**; hearing conducted by commissioner.**

(a) Whenever the commissioner has reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice, whether or not defined in K.S.A. 40-2404 and amendments thereto, and that a proceeding by the commissioner in respect thereto would be in the interest of the public, the commissioner shall issue and serve upon such person a statement of the charges in that respect and conduct a hearing thereon in accordance with the provisions of the **Kansas administrative procedure act**.

29. **40-2407. Same** (REGULATION OF CERTAIN TRADE PRACTICES) **; cease and desist orders; penalties; suspension or revocation of license; restitution; modification of order.**

(a) If, after such hearing (referring to 40-2406 hearing), the commissioner shall determine that the person charged has engaged in an unfair method of competition or an unfair or deceptive act or practice, the commissioner shall render an order requiring such person to cease and desist from engaging in such method of competition, act or practice and if the act or practice is a violation of K.S.A. 40-2404 and amendments thereto, the commissioner may in the exercise of discretion order any one or more of the following: . .

(b) After the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time, the commissioner may at any time, after notice and opportunity for hearing in accordance with the provisions of the **Kansas administrative procedure act**, reopen and alter, modify or set aside, in whole or in part, any order issued under this section, whenever in the commissioner's opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

30. **40-2411. Same** (REGULATION OF CERTAIN TRADE PRACTICES); **penalties for violation of cease and desist orders; hearing.**

Any person who violates a cease and desist order of the commissioner issued under K.S.A. 40-2407 and amendments thereto, may after notice and hearing in accordance with the provisions of the **Kansas administrative procedure act** and upon order of the commissioner be subject at the discretion of the commissioner to any one or more of the following:. . .

31. **40-2506. Same** (AUTOMOBILE CLUB SERVICES); **revocation or suspension of certificate; hearings.**

If the commissioner at any time for good cause shown, and after hearing, determines that an automobile club has violated a provision of this act, that it is not operating its automobile club as defined herein, that it is insolvent, that its assets are less than its liabilities, that it refuses to submit to an examination by the commissioner or that it is transacting business fraudulently, the commissioner shall revoke or suspend the club's certificate of authority and shall give notice thereof to the public in such manner as the commissioner considers proper. In addition, the commissioner may, after hearing, revoke or suspend the certificate of authority of an automobile club if the commissioner finds that any owner, officer, member of the board of directors or manager of such automobile club is not of good reputation.

Hearings under this section shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**.

32. **40-2606.** (INSURANCE PREMIUM FINANCING) **Revocation or suspension of license, grounds; hearing; other penalties.**

The commissioner shall have the right to revoke or suspend the license of any premium finance company if the commissioner finds that: . . .

Before the commissioner shall revoke, suspend or refuse to renew the license of any premium finance company, the commissioner shall conduct a hearing in accordance with the provisions of the **Kansas administrative procedure act**. In lieu of revoking or suspending the license for any of the causes enumerated in this section, after hearing as herein provided, the commissioner may subject such company to a penalty of not more than $500 for each offense when the commissioner finds that the public interest would not be harmed by the continued operation of such company. The amount of any such penalty shall be paid by such company to the commissioner for deposit in the state general fund. At any hearing provided by this section, anyone testifying falsely, after having been administered an oath, shall be subject to the penalty of perjury.

33. **40-3011.** (LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION) **Additional powers of commissioner; revocation of authority; appeals; judicial review; notice of effect of act.**

(b) The commissioner may suspend or revoke, after notice and hearing in accordance with the provisions of the **Kansas administrative procedure act**, the certificate of authority to transact insurance in this state of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative the commissioner may levy a forfeiture on any member insurer which fails to pay an assessment when due. Such forfeiture shall not exceed 5% of the unpaid assessment per month, but no forfeiture shall be less than $100 per month.

34. **40-3104.** (KANSAS AUTOMOBILE INJURY REPARATIONS ACT) **Motor vehicle liability insurance coverage required; prohibited vehicle operation; verification; self-insurance; display of proof of financial security; penalties for failure to maintain financial security; reinstatement fees.**

(f) . . . Upon notice and a hearing in accordance with the provisions of the **Kansas administrative procedure act**, the commissioner of insurance may cancel a certificate of self-insurance upon reasonable grounds.

35 **40-3207.** (HEALTH MAINTENANCE ORGANIZATIONS AND MEDICARE PROVIDER ORGANIZATIONS) **Denial, suspension or revocation of certificate; administrative penalty; notice; hearing.**

When the commissioner has reasonable cause to believe that grounds for the denial, suspension or revocation of a certificate exists or when the commissioner levies an administrative penalty, such commissioner shall notify the health maintenance organization or medicare provider organization in writing stating the grounds upon which the commissioner believes the certificate should be denied, suspended or revoked or the penalty levied. The applicant may, within 15 days from receipt of such notice, make written request to the commissioner for a hearing thereon. The commissioner shall hear such party or parties within 20 days after receipt of such request in accordance with the provisions of the **Kansas administrative procedure act**.

36. **40-3302.** (INSURANCE HOLDING COMPANIES) **Definitions.**

As used in this act, unless the context otherwise requires:

(c) "Control" including the terms "controlling," "controlled by" and "under common control with", means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing 10% or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by subsection (k) of K.S.A. 40-3305 and amendments thereto, that control does not exist in fact. The

commissioner of insurance may determine, after a hearing in accordance with the provisions of the **Kansas administrative procedure act**, that control exists in fact, notwithstanding the absence of a presumption to that effect.

37. **40-3304.** (INSURANCE HOLDING COMPANIES) **Transactions affecting control of domestic insurer; approval of commissioner; statement filed with commissioner, contents, filing fee; substitution of securities registration statement; disapproval of transaction, hearing; retainer of professionals and experts to assist review; exempt transactions; violations; jurisdiction of courts; service of process.**

(d) (1) The commissioner of insurance shall approve any merger or other acquisition of control referred to in subsection (a) of this section unless, after a public hearing thereon conducted in accordance with the provisions of the **Kansas administrative procedure act**, the commissioner finds that: . . .

(d)(1)(E)(2) The public hearing referred to in paragraph (1) of subsection (d) of this section shall be held as soon as practical after the statement required by this subsection (a) of this section is filed, and at least 20 days' notice thereof shall be given by the commissioner of insurance to the person filing the statement. Not less than seven days' notice of such public hearing shall be given by the person filing the statement to the insurer and to such other persons as may be designated by the commissioner of insurance. At such hearing, the person filing the statement, the insurer, any person to whom notice of hearing was sent, and any other person whose interests may be affected thereby shall have the right to present evidence, examine and cross-examine witnesses, and offer oral and written arguments in accordance with the **Kansas administrative procedure act**. In the absence of intervention, such insurer or person shall have the right to present oral or written statements in accordance with subsection (c) of K.S.A. 77-523 and amendments thereto.

38. **40-3305.** (INSURANCE HOLDING COMPANIES) **Registration by insurers of an insurance holding company system; exceptions; registration statement, contents; information exempt from disclosure; changes in information disclosed; termination of registration; consolidated registration statements and reports; exemptions; disclaimer of affiliation; violations.**

(k) Any person may file with the commissioner of insurance a disclaimer of affiliation with any authorized insurer or such a disclaimer may be filed by such insurer or any member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between such person and such insurer as well as the basis for disclaiming such affiliation. After a disclaimer has been filed, the insurer shall be relieved of any duty to register or report under this section which may arise out of the insurer's relationship with such person unless and until the commissioner of insurance disallows such a disclaimer. The commissioner of insurance shall disallow such a disclaimer only after furnishing all parties in interest with notice and opportunity

to be heard in accordance with the provisions of the **Kansas administrative procedure act**.

39. **40-3308.** (INSURANCE HOLDING COMPANIES) **Confidentiality of information and documents disclosed to or filed with commissioner.**

. . . If the commissioner of insurance, after giving the insurer and its affiliates who would be affected thereby, notice and opportunity to be heard in accordance with the provisions of the **Kansas administrative procedure act**, determines that the interests of policyholders, shareholders or the public will be served by the publication thereof, the commissioner may publish all or any part thereof in such a manner as the commissioner may deem appropriate.

40. **40-3309.** (INSURANCE HOLDING COMPANIES) **Rules, regulations and orders of commissioner; hearings.**

. . . Hearings on orders, as defined in subsection (d) of K.S.A. 77-502 and amendments thereto, shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**.

41. **40-3413.** (HEALTH CARE PROVIDER INSURANCE) **Apportionment of risk among insurers; preparation of plan; contents; approval or disapproval; amendment; preparation by commissioner of insurance, when; order to discontinue unfair or unreasonable activities or activities inconsistent with act; governing board, membership; commissions on insurance written under plan.**

(d) If, after a hearing conducted in accordance with the provisions of the **Kansas administrative procedure act**, the commissioner and board of governors find that any activity or practice of any insurer or rating organization in connection with the operation of such plan or plans is unfair or unreasonable or otherwise inconsistent with the provisions of this act, the commissioner and board of governors may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this act and requiring discontinuance of such activity or practice.

42. **40-3610. Same** (IMPAIRED OR INSOLVENT INSURERS) **; persons required to cooperate with commissioner; definitions; civil and criminal penalties and supervision or revocation of licenses for failure to cooperate or obstruction or interference with commissioner.**

(a) Any officer, manager, director, trustee, owner, employee or agent of any insurer, or any other persons with authority over or in charge of any segment of the insurer's affairs, shall cooperate with the commissioner in any proceeding under this act or any investigation preliminary to the proceeding.

(d) Any person included within subsection (a) who fails to cooperate with the commissioner, or any person who obstructs or interferes with the commissioner in the conduct of any delinquency proceeding or any investigation preliminary or incidental thereto, or who violates any order the commissioner issued validly under this act may:

(2) after a hearing held in accordance with the **Kansas administrative procedure act**, be subject to the imposition by the commissioner of a civil penalty not to exceed $10,000 and shall be subject further to the revocation or suspension of any insurance licenses issued by the commissioner.

43. **40-3613. Same** (IMPAIRED OR INSOLVENT INSURERS)**; supervision of insurer by commissioner, grounds for, determination and order of commissioner; appointment of supervisor; conditions imposed upon insurer; service of notice of hearings and orders; civil penalties for violation of supervision order; enforcement of orders by court; personal liability of persons violating orders resulting in loss.**

(a) Whenever the commissioner has reasonable cause to believe, and has determined after a hearing held under subsection (f), that any domestic insurer has committed or engaged in, or is about to commit or engage in, any act, practice or transaction that would subject it to delinquency proceedings under this act, the commissioner may make and serve upon the insurer and any other persons involved, such orders as are reasonably necessary to correct, eliminate or remedy such conduct, condition or ground.

(f) The notice of hearing under subsection (a) and any order issued pursuant to such subsection shall be served upon the insurer pursuant to the **Kansas administrative procedure act**.

44. **40-3625. Same** (IMPAIRED OR INSOLVENT INSURERS) **; authority and responsibility of liquidator.**

(a) The liquidator shall have the power:

(6) to hold hearings, to subpoena witnesses to compel their attendance, to administer oaths, to examine any person under oath, and to compel any person to subscribe to testimony of the person after the testimony has been correctly reduced to writing; and in connection therewith to require the production of any books, papers, records or other documents which are relevant to the inquiry. Such hearings shall be held in accordance with the **Kansas administrative procedure act**;

45. **40-37a06.** (REGULATION OF BROKER CONTROLLED INSURERS) **Failure to comply with law, remedies for benefit of insurer; rights of policyholders, claimants, creditors and other third parties unaffected.**

(a) (1) If the commissioner believes the controlling producer or any other person has not

complied with this act, or any regulation or order promulgated hereunder, the commissioner may, after a hearing conducted under the provisions of the **Kansas administrative procedures act**, order the controlling producer to cease placing business with the controlled insurer;

46. **40-3810. Same** (REGULATION AND REGISTRATION OF ADMINISTRATORS)**; certification as an administrator; procedure; fees; duties of commissioner of insurance; hearings.**

No person shall act as or hold oneself out to be an administrator in this state, unless such person holds a certificate of registration as an administrator issued by the commissioner of insurance. . . Such certificate shall be issued or continued by the commissioner to an administrator unless the commissioner after due notice and hearing shall have determined that the administrator is not competent, trustworthy, financially responsible or of good personal and business reputation, or has had a previous application for an insurance license denied for cause within five years.

Hearings under this section shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**.

47. **40-4002.** (CONVERSION OF DOMESTIC MUTUAL INSURER INTO DOMESTIC STOCK INSURER) **Resolution by board of directors; plan of conversion; approval by commissioner and policyholders; withdrawal or amendment of plan.**

(a) A resolution shall be adopted by a 2/3 majority of the entire board of directors of the insurer which shall state the reasons such conversion would benefit the insurer and be in the best interests of its policyholders. Following adoption of such resolution a detailed plan of conversion shall be developed and shall be approved by a 2/3 majority of the entire board of directors. The plan of conversion shall not be effective unless the plan has been so approved by the board of directors.

(c) . . . The plan of conversion shall not be effective unless the plan has been approved by the commissioner.

(e) The board of directors by a vote of not less than 2/3 of the entire board may, at any time prior to the issuance of the certificate of authority pursuant to K.S.A. 40-4010 and amendments thereto:

(1) Withdraw the plan, if conversion is deemed to be no longer in the best interests of the insurer or its policyholders; or

(2) amend the plan, except that no amendment which materially changes the plan shall take effect unless such amendment is approved by the commissioner. In the event of a material change to the plan, the commissioner:

(A) Shall order a hearing to be conducted in accordance with the provisions of the **Kansas administrative procedure act** before approving or disapproving such material change; . . .

48. **40-4004.** (CONVERSION OF DOMESTIC MUTUAL INSURER INTO DOMESTIC STOCK INSURER) **Consideration and approval or disapproval of plan by commissioner; hearings.**

(a) The commissioner shall examine the plan submitted pursuant to subsection (b) or (c) of K.S.A. 40-4002, and amendments thereto. As a part of such examination, the commissioner shall order a hearing on the plan to be conducted in accordance with the provisions of the **Kansas administrative procedure act** and shall give not less than 20 days' written notice of the date of hearing to the insurer and give not less than 20 days' written notice to policyholders by publication or otherwise.

49. **40-4503.** (REGULATION OF REINSURANCE INTERMEDIARIES) **Licensure of reinsurance brokers, managers and intermediaries, application fee; nonresidents, designation of agent for service of process; refund of commissioner to issue license; exemption for attorneys.**

(a) No person, firm, association or corporation shall act as a reinsurance broker in this state if the reinsurance broker maintains an office either directly or as a member or employee of a firm or association, or as an officer, director or employee of a corporation: . . .

(e) The commissioner may, after a hearing conducted in accordance with the provisions of the **Kansas administrative procedure act**, held on not less than 20 days notice, refuse to issue a reinsurance intermediary license if, in the judgment of the commissioner, the applicant, any one named on the application, or any member, principal, officer or director of the applicant, is not trustworthy, or any controlling person of such applicant is not trustworthy to act as a reinsurance intermediary, or any of the foregoing has given cause for revocation or suspension of such license, or has failed to comply with any prerequisite for the issuance of such license.

50. **40-4905. Same** (UNIFORM INSURANCE AGENTS LICENSING ACT) ; **insurance agent license required; application; powers of commissioner; hearing.**

(a) Subject to the provisions of K.S.A. 2005 Supp. 40-4904, and amendments thereto, it shall be unlawful for any person to sell, solicit or negotiate any insurance within this state unless such person has been issued a license as an insurance agent in accordance with this act.

(h) Any applicant whose application for a license, is denied shall be given an opportunity for a hearing in accordance with the provisions of the **Kansas administrative procedure act**.

51. **40-4909. Same** (UNIFORM INSURANCE AGENTS LICENSING ACT); **suspension, denial of, revocation or refusal to renew license; grounds; hearing; powers of commissioner.**

(a) The commissioner may deny, suspend, revoke or refuse renewal of any license issued under this act . .

(c) Any action taken under this section which affects any license or imposes any administrative penalty shall be taken only after notice and an opportunity for a hearing conducted in accordance with the provisions of the **Kansas administrative procedures act**.

52. **40-5004. Same** (VIATICAL SETTLEMENTS); **suspension, revocation, refusal to issue or renew license; grounds; hearing; powers of commissioner.**

(a) The commissioner may refuse to issue, suspend, revoke or refuse to renew the license of a viatical settlement provider or viatical settlement broker . . .

(b) If the commissioner denies a license application or suspends, revokes or refuses to renew the license of a viatical settlement provider or viatical settlement broker, the commissioner shall conduct a hearing in accordance with the **Kansas administrative procedure act**.

53. **40-5007. Same** (VIATICAL SETTLEMENTS); **examinations; record keeping requirements; powers of commissioner.**

(a) (1) The commissioner may conduct an examination under this act of a licensee as often as the commissioner in such commissioner's sole discretion deems appropriate.

(2) . . . The refusal of a licensee, by its officers, directors, employees or agents, to submit to examination or to comply with any reasonable written request of the commissioner shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the licensee to engage in the viatical settlement business or other business subject to the commissioner's jurisdiction. Any proceedings for suspension, revocation or refusal of any license or authority shall be conducted pursuant to the **Kansas administrative procedure act**.

54. **40-5013. Same** (VIATICAL SETTLEMENTS); **penalties.**

(a) If the commissioner determines after notice and opportunity for a hearing that any person has engaged or is engaging in any act or practice constituting a violation of any provision of this act, the Kansas insurance statutes or any rule and regulation or order thereunder, the commissioner may in the exercise of discretion, order any one or more of the following: . . .

(c) If the commissioner makes written findings of fact that there is a situation involving an immediate danger to the public health, safety or welfare or the public interest will be irreparably harmed by delay in issuing an order under paragraph (3) of subsection (a), the commissioner may issue an emergency temporary cease and desist order. Such order, even when not an order within the meaning of K.S.A. 77-502, and amendments thereto, shall be subject to the same procedures as an emergency order issued under K.S.A. 77-536, and amendments thereto. Upon the entry of such an order, the commissioner shall promptly notify the person subject to the order that: (1) It has been entered; (2) the reasons therefor; and (3) that upon written request within 15 days after service of the order the matter will be set for a hearing which shall be conducted in accordance with the provisions of the **Kansas administrative procedure act**. If no hearing is requested and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to the person subject to the order, by written findings of fact and conclusions of law, shall vacate, modify or make permanent the order.

KANSAS

OFFICE OF THE SECURITIES COMMISSIONER

KATHLEEN SEBELIUS, GOVERNOR
CHRIS BIGGS, COMMISSIONER

TESTIMONY IN OPPOSITION TO
SUBSTITUTE FOR HOUSE BILL 2618

Senate Committee on Judiciary
March 13, 2008

Mr. Chairman and Members of the Committee,

On behalf of the Office of the Securities Commissioner, I appear in opposition to Substitute for House Bill 2618.

The bill contains some improvements to the Kansas Administrative Procedure Act that we would welcome. For example, section 7(h) clarifies the line of demarcation between the investigative and judicial functions of agencies, and section 9 clarifies the prohibition on ex parte communication with the hearing officer. Our agency follows internal policies that already satisfy those sections, so we do not oppose them, but we believe the bill as a whole is unnecessary, deeply flawed, and contains bad public policy.

Removal of Authority from Agency Heads

Sub. for HB 2618 represents a dramatic shift in public policy away from a self-regulatory type of model and into a more formal and centralized regulatory model. Historically, professions in Kansas have been regulated, at least in part, by members of the profession who serve on boards and commissions. The advantage of this model is that it allows people with experience in the profession to determine what the professional standards should be, whether someone has failed to meet the standards, and what discipline should be imposed for violating the standards. Sub. for HB 2618 removes much of that regulatory role from members of the profession and gives it to hearing officers in the Office of Administrative Hearings.

In addition, Sub. for HB 2618 replicates the formality and inefficiency of the court system within the Office of Administrative Hearings, even though due process does not require administrative hearings to be conducted like adversarial proceedings in district court. The Kansas Administrative Procedure Act is designed to provide an efficient way for a person to tell his or her side of the story to a decision-maker before a decision is made. By formalizing the system, Sub. for HB 2618 would create inefficiencies that would impact respondents as much or more than the agencies.

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An example of this inefficiency involves expert witnesses. Currently, expert witnesses are usually unnecessary in administrative proceedings because the agency heads are experts themselves. It is far more efficient to use experts as hearing officers than to require both parties to present expert or foundational testimony in order to educate independent hearing officers. Moreover, appellate courts have consistently upheld the theory that administrative agencies may rely on their own expertise in issuing decisions. *See, e.g., Hart v. Board of Healing Arts*, 27 Kan.App.2d 213, 2 P.3d 797 (Kan. App. 2000).

It appears that a primary concern is the appearance of a conflict of interest when the agency head serves as the hearing officer for matters being prosecuted by agency staff. However, the United States Supreme Court has reviewed this issue and found that procedures "...whereby the members of administrative agencies receive the results of investigations, approve the filing of charges or formal complaints instituting enforcement proceedings, and then participate in the ensuing hearings, violates neither the [federal] Administrative Procedure Act [citation omitted] nor due process of law." *Withrow, et al. v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). "Without a showing to the contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow*, Headnote 3.

Race to the Bottom

Sections 1 and 2 of the bill (page 1, line 21) were added via a floor amendment in the House of Representatives with little discussion. These sections require Kansas agencies to adopt the least restrictive interpretation of any state in the nation when we enforce a federal statute or rule.

In the area of securities law, there is significant interplay between state and federal law, and we adopt many federal rules by reference. In effect, Sections 1 and 2 put the job of protecting Kansas investors into the hands of whichever out-of-state official is the least inclined to protect them.

Attempt to Split Policy from Facts

Section 3 of the bill (page 2, line 17) allows a party or the hearing officer to send policy issues back to the agency head during the course of an administrative proceeding. We appreciate the attempt to preserve policy-making authority for the agency heads, but we note that Section 3 is not based upon any model language and we believe it is unworkable because it is nearly impossible to extract many of our policy decisions from the specific facts surrounding an issue. Section 3 creates a new way for litigants to slow down a final outcome by sending the case back and forth from the agency head to the hearing officer, and it invites additional litigation because it fails to draw any distinguishable line between fact and policy issues.

Burden of Proof

Section 6(b) of the bill (page 6, line 41) raises the burden of proof to a clear and convincing standard for "professional licensing disciplinary proceedings." We do not oppose raising the

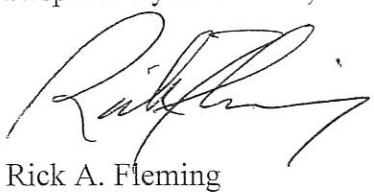
burden of proof for actions in which we seek to suspend or revoke an existing license because we recognize the important property right that is inherent in the license. However, I am not sure what is meant by "professional licensing disciplinary proceedings." Construed broadly, this could mean that the clear and convincing standard would apply in cases in which we intend to deny a license or impose a fine upon a licensee. We have the authority to fine unlicensed persons as well as licensed persons, and we believe it would be inappropriate to have different standards of proof for them. We also note that investors would face a preponderance of evidence standard if they bring a lawsuit for restitution, and we do not believe the burden of proof should be higher if we seek restitution on behalf of harmed investors.

Drastic Change is Unnecessary

The vast majority of administrative cases are never appealed, and most that are appealed are upheld by the courts, so there is scant evidence that agencies are routinely wielding authority in an inappropriate way. Occasionally, an agency makes a poor decision, but those decisions can be overturned in court, addressed by legislation, or the Governor can replace the agency head. There are already appropriate checks and balances in place, and a proposal to prohibit agency heads from serving as hearing officers would be an overreaction to any problem that may exist.

The Judicial Council is currently reviewing the Revised Model State Administrative Procedure Act. Sections 7(h) and 9 of Sub. for HB 2618 contain language from the new model act that clarifies the prohibition against ex parte communication and more clearly delineates the investigative and judicial functions of agencies. We do not oppose those provisions – in fact, we think those improvements to the Kansas Administrative Procedure Act would make the rest of the bill unnecessary – but we encourage this Committee to wait for the Judicial Council to finish its evaluation of the Revised Model State Administrative Procedure Act before adopting piecemeal changes.

Respectfully Submitted,



Rick A. Fleming
General Counsel

KANSAS
DEPARTMENT OF HEALTH
AND ENVIRONMENT

Kathleen Sebelius, Governor
Roderick L. Bremby, Secretary

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Testimony on Substitute for House Bill 2618
To
Senate Committee on Judiciary

Presented by
Yvonne C. Anderson, General Counsel
Kansas Department of Health and Environment

March 13, 2008

Chairman and members of the Committee, my name is Yvonne Anderson and I serve as General Counsel of the Kansas Department of Health and Environment (KDHE). Thank you for the opportunity to appear before you today regarding New Section 1 of Substitute for House Bill 2618. This section of the bill proposes the adoption of new legislation that would require a Kansas state agency, when interpreting or enforcing a federal regulation, statute or a national building or fire code, to apply a less restrictive interpretation when state officials in other states interpret the federal regulation, statute or code less restrictively, unless the less restrictive interpretation conflicts with Kansas statute, regulation, local ordinance or resolution.

It is not clear in the bill what is meant by "state official" or what form their interpretations must take to be considered. However, unless such interpretations are published policy of the state, or the subject of state or federal court decisions, they are not readily available. State agencies would be required to potentially research interpretations in all states and courts, a costly and time consuming analysis, before making even routine licensing or permitting decisions. Even then, a particular state's interpretation of a regulation may turn on a set of facts or conditions not remotely similar to those in Kansas and may be the subject of litigation.

KDHE administers numerous federal programs in its Division of Health and at least 18 federal programs in the Division of Environment. The interpretation of other state officials of federal regulations could be found to be inconsistent with federal guidelines. Federal agencies provide interpretive guidelines for federal regulations to insure uniformity in their implementation across state lines. To the extent that uniformity does not exist, parties resort to the courts for case specific interpretation of the federal statute or regulation. Interpretations may not be consistent across the federal circuits.

In conclusion, KDHE would request the Committee to consider removal of New Section I from the bill. Similar provisions were considered last year in House Bill 2024 and were not adopted.

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KANSAS

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ROBERT WALLER, CHIEF ADMINISTRATOR

KATHLEEN SEBELIUS, GOVERNOR

BOARD OF EMERGENCY MEDICAL SERVICES

Testimony

Date: March 13, 2008

To: Senate Judiciary Committee

From: Robert Waller, Chief Administrator

RE: 2008 HB 2618

As Chief Administrator of the Kansas Board of Emergency Medical Services, I would humbly request in passage and approval of 2008 HB 2618 that agencies be given the option of being able to conduct their own hearings when the presiding officer is the agency head, or one or more members of the agency head, or through the utilization of agency counsel.

> *Section (4)(a)..." There is created the office of administrative hearings within the department of administration, to be headed by a director appointed by the secretary of administration. The director shall be in the unclassified service under the Kansas civil service act...The office shall conduct adjudicative proceedings of any state agency which is specified in subsection (h) when requested by such agency. Only a person admitted to practice law in this state or a person directly supervised by a person admitted to practice law in this state may be employed as a presiding officer. The office may employ regular part-time personnel. Persons employed by the office shall be under the classified civil service...."*

Currently, the Board utilizes the Attorney General's office to conduct administrative hearings. There is no additional cost to the agency due to the A.G's office being our "hired" counsel. An example of this is the hearing to be conducted during the April 2008 Investigation Committee meeting. Although KBEMS may not conduct as many administrative hearings per year as other state agencies, as the Board has initiated a complete overview of all EMS statutes and rules and regulations, the possibilities of more hearings to be heard will take place. Correspondingly, KBEMS has not had an opportunity to request additional funding to finance hearings administered by OAH.

ıdments:

1. Section (4)(b) - Addition of agency heads to serve as hearing officers

2. Section (4)(h)(2) - Strike "emergency medical services council" from the bill. Such Council does not exist under KBEMS

Simply, members of the Senate Judiciary Committee, KBEMS would like to retain the option of being able to conduct its own hearings or utilize Attorney General attorneys at a minimum or no cost.

Thank you for your consideration.

KANSAS
FUNERAL DIRECTORS AND EMBALMERS ASSOCIATION

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March 13, 2008

To: Senate Judiciary Committee

From: Pam Scott, Executive Director

Re: Substitute for House Bill No. 2618

The Kansas Funeral Directors and Embalmers Association (KFDA) appreciates the opportunity to submit written testimony on Substitute for House Bill No. 2618. The KFDA opposes the amendment added to the bill which would require all state agencies, boards, and commissions to use the Office of Administrative Hearings for conducting adjudicative hearings under the Kansas Administrative Procedures Act after July 1, 2009.

The KFDA believes the agency head should be allowed to serve as presiding officer in hearings conducted before it. It is important that decisions relating to funeral service should be decided by members of the Kansas State Board of Mortuary Arts, who are knowledgeable and have experience in funeral service. They are appointed to use their professional judgment in determining what is in the best interest of the public and the profession. To take away the traditional responsibility of disciplining licensees out of the hands of regulatory boards would take away the very core of their responsibilities.

One reason we have heard for requiring the use of the Office of Administrative Hearings is that the agency head would have a conflict of interest in deciding a matter. We believe any perceived problems of conflict of interest can be minimized by prohibitions against ex parte communications. There are currently checks and balances in place to assure hearings are fair. Appeals are always available.

Requiring agencies and boards to use the Office of Administrative Hearings would increase the cost of holding such proceedings. First, they will have to compensate the Office of Administrative Hearings for their services. They will be required to use such outside hearing officers in every proceeding, no matter how routine.

Secondly, there will likely be the increased cost of hiring expert witnesses. I know that as regards hearings before the State Board of Mortuary Arts, expert witnesses are usually unnecessary because the agency head is an expert as regards funeral service. I am sure such is also the case with other regulatory agencies.

The cost of conducting administrative hearings will no doubt increase and could have the unfortunate consequence of increasing the cost of licensure. The agencies and boards will have to find some way to pay for the increase in costs.

It seems to us that the system currently in place has worked well and should not be changed.

Senate Judiciary
3-13-08
Attachment 19

Written testimony for the

Senate Judiciary Committee

House Bill 2618

March 13, 2008

John P. Smith
Administrator
Kansas Department of Credit Unions

The Kansas Department of Credit Unions through Kansas Administrative Rules 121-5-1 and 121-5-3 has adopted by reference certain federal regulations for determining deteriorating credit union conditions. For the Kansas Department of Credit Unions to determine if state officials in other states interpret federal regulations less restrictively as required by Section 1, House Committee Substitute for House Bill 2618 would create a delay in enforcing K.A.R. 121-5-1 and 121-5-3. During the delay additional deterioration in the credit union's financial condition may occur therefore exacerbating an existing unsafe and unsound condition.

As Administrator of the Kansas Department of Credit Unions I cannot support enactment of the House Committee Substitute for House Bill 2618.

KANSAS

KANSAS REAL ESTATE COMMISSION
SHERRY C. DIEL, EXECUTIVE DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

To: Chairperson Vratil and Members of the Senate Judiciary Committee
From: Sherry C. Diel, Executive Director, Kansas Real Estate Commission
Date: March 13, 2008
RE: Substitute for HB 2618

Introduction

The Kansas Real Estate Commission has a few concerns regarding the terminology used in HB 2618 that the Commission believes may have unintended consequences.

Agency Background

The Commission already sends the majority of its disciplinary cases to a hearing officer at the Office of Administrative Hearings to serve as the presiding officer. The Commission also strives to separate its investigatory, prosecutory and presiding officer functions in disciplinary matters by having a disciplinary committee that reviews all disciplinary matters to determine whether sufficient evidence exists that a licensee committed a violation of the license law, K.S.A. 58-3034 et seq., or the brokerage relationships in real estate transactions act, K.S.A. 58-30,101 et seq. The members of the disciplinary committee are: one current commissioner, one past commissioner, the executive director, the chief investigator, and outside disciplinary counsel. The current commissioner recuses himself or herself from any case that comes back before the Commission for consideration, whether it be due to a settlement, request for reconsideration, or the approximately 5% of disciplinary cases that are heard by the Commission because the facts are generally not disputed and a conference hearing format is appropriate.

The Commission requests the ability to continue to hear licensure cases because the commissioners have the professional expertise and experience to evaluate whether an applicant meets the qualifications for licensure. The Commission would incur increased litigation costs and expert witness fees if licensure cases are required to be heard by a hearing officer from the Office of Administrative Hearings.

Agency Concerns

The Commission's two main concerns regarding the proposed legislation are:

New Section 5, p. 6, lines 26-30. This section defines "adjudicative hearing" to include any proceeding that requires resolution of disputed facts. It is the Commission's understanding that this definition was intended to exclude licensure cases. Unfortunately, approximately 50% of our applicants that respond to our Prehearing Questionnaire state that they dispute the facts, although they are actually disputing the conclusions of law that the Commission made rather the finding of facts. Applicants often omit facts and want to submit additional facts at their hearing. Some believe that because there are additional facts that the Commission didn't consider when

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the application was originally reviewed, the facts are disputed. The Commission believes that although these applicants lack an understanding of the difference between factual determinations and conclusions of law, the Commission would be required to send these licensure cases to the Office of Administrative Hearings under the current legislation because one of the parties believes the facts are in dispute. The Commission believes that this concern could be rectified by including an exemption for licensure cases.

However, the use of the term "adjudicative hearing" concerns the Commission because the term "adjudicative proceeding" is used throughout the Administrative Procedure Act. For instance, K.S.A. 77-520 is the default statute. Under subsection (a), a proposed default order may be issued if a party fails to attend or participate in a prehearing conference, hearing or other stage of an "adjudicative proceeding". The Commission is concerned that use of the term "adjudicative hearing" on p. 6, lines 27-30 will have the unintended consequence of preventing the Commission from issuing a default order to persons in cases that involve undisputed questions of fact.

There are some other issues that the Commission would like to bring to the Committee's attention:

New Section 1, p. 1. This provision may have far-reaching effects for agencies that interpret and enforce federal statutes and regulations or national building or fire codes. It appears that Kansas would be required to lower its standards to the interpretation of any other state that interprets the statute, regulation, or code less restrictively than Kansas.

New Section 2, p. 1-2. Subsection (b) appears to establish provisions for an interlocutory "remand" of a case before final disposition on specified grounds including that a law changed after the agency made its decision or that new evidence exists that wasn't part of the agency record.

New Section 3, p. 2. This provision establishes a certification procedure for "policy" issues to an agency upon the presiding officer's own motion or the motion of any party when there are no established policies in statutes, rule and regulations or agency precedents which are determinative of such questions of policy. "Policy" issues are not defined. The Commission is concerned that the statute refers to "agency precedents" when it is the Commission's understanding that cases under the Kansas Administrative Procedures Act create no precedence for agency decisions. The provision also establishes no procedure if the parties disagree with the presiding officer's determination on a motion to certify a policy issue.

Thank you for consideration of our concerns. The executive director for the Commission could not be present to testify before your Committee because the hearing conflicted with the date and time of our March 13, 2008 Commission meeting. However, if you have any questions, please do not hesitate to contact Sherry Diel at 6-3411.

KANSAS

KATHLEEN SEBELIUS, GOVERNOR

OFFICE OF THE STATE BANK COMMISSIONER
J. Thomas Thull, Bank Commissioner

SENATE JUDICIARY COMMITTEE

March 13, 2008

Chairman Vratil and Members of the Committee:

The Office of the State Bank Commissioner (hereinafter "OSBC") submits this written testimony in opposition to Substitute for House Bill 2618. In an attempt to be clear and succinct, our testimony will highlight our particular concerns and comments regarding certain sections of the bill.

New Section 1.

New Section 1 appears to require all Kansas state agencies currently enforcing federal statutes, regulations, or national building or fire codes to research the enforcement of those same statutes or regulations by the other 49 states. The goal of this research will be to determine which state is the most lax in interpreting the federal provision. Once that is determined, unless there is a conflict with a Kansas statute, regulation or ordinance, the Kansas state agency must use that most lax standard in its own interpretation and enforcement of the federal law or regulation. Such a requirement is unworkable from a practical perspective, and would not seem to constitute good public policy. The requirement takes the power out of the hands of elected and appointed Kansas agency heads, and transfers that power to interpret federal provisions to whichever state has been most lax in its interpretation and enforcement. The time and expense of determining what out-of-state agencies are enforcing federal laws and regulations, and what their individual interpretations of those federal provisions are (and, to keep up with possible changes in interpretations over time) is unknown, but would certainly be substantial.

The OSBC regulates banks and other lenders who are subject to federal laws and regulations in addition to state laws and regulations. Our bank examiners routinely review bank operations to determine compliance with Federal laws and regulations, including but not limited to laws and regulations imposing restrictions on insider and affiliate transactions (23A and B of the Federal Reserve Act and the FRB's Regulation O), the Bank Secrecy Act, the Gramm-Leach-Bliley Act, Part 323 of the Federal Deposit Insurance Act concerning appraisals, and the Government Securities Act. Similarly, our consumer and mortgage lending examiners also interpret federal laws and regulations, including but not limited to the Truth in Lending Act, the FRB's Regulation Z, and the Real Estate Settlement Procedures Act to ensure that Kansas consumers receive appropriate disclosures regarding fees and terms of loans. To require the OSBC to either adopt its own mirror image law or regulation to the federal law, or to search out the least restrictive interpretation any other state has given the federal provision does not serve the citizens of Kansas. In fact, it would hamper the ability of our agency to protect the safe and sound operation of depository institutions, and to protect Kansas consumers obtaining mortgage and other consumer loans. To take away the discretion of an appointed or elected agency head to interpret federal laws and regulations, and to substitute whatever other state's appointed official has the most lax regulatory interpretation only results in a race to the bottom in terms of regulatory oversight.

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Section 2.

Section 2 of the bill amends the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions to incorporate the concepts found in New Section 1 of Substitute for HB 2618, and should be removed from the bill if the committee determines that New Section 1 should be removed.

Section 3.

Section 3 of the bill provides authority for the presiding officer to order certification of "policy issues" back to an agency. While the concept of agency input on policy questions is appealing, we have concerns with this section because there is no definition of what a "question of policy" or "policy issue" might be, and it is difficult to determine how the provision might be implemented from a practical perspective. If any party can request that the presiding officer certify a policy question, we are concerned there may be unnecessary procedural delays in the administrative hearing process.

Section 7.

The addition of subsection (h) to Section 7 of the Substitute bill (lines 5 through 15), should serve to relieve many of the concerns expressed by legislators, i.e., that the agency head is acting, or appearing to act, in the role of prosecutor and judge for hearings before the agency. These new sections in the bill make it clear that a person may not serve as presiding officer in any case where the person has participated in any state of an investigation or prosecution associated with the proceeding. Without question, these provisions are excellent principles that should be part of administrative law proceedings, and to which every agency should adhere.

Finally, the OSBC still has concerns about removal of the ability of state agencies, boards and commissions, such as the State Banking Board, through "one or more of members of their agency head," to serve as the hearing officer for administrative proceedings before their respective agencies. To remove the ability of the agency head, or one or more members of the agency head, to serve as hearing officer will serve to reduce efficiency of the hearing process. Administrative procedures are designed to provide an efficient forum for resolving cases, and it is usually in the best interests of both sides to resolve issues in as timely a manner as possible. The State Banking Board is a nine-member board of individuals appointed by the Governor to serve three-year terms. Six of its members are in the banking or trust company profession, and the other three members are to represent the public at large. It is far more efficient to use these experts as hearing officers, than to require presentation by either party of foundational or expert testimony to the Office of Administrative Hearings. The case may involve complex issues that the Banking Board is most equipped to understand because they are members of the industry that is being regulated. As such, they bring with them a wealth of knowledge regarding financial laws, regulations and ethical standards in the banking industry to apply to a particular case. Requiring both the agency and the respondent in an administrative action to educate the hearing officer on the rules and standards of the regulated profession will certainly make the administrative hearing process less efficient and more costly for all parties involved.

For the above reasons, we urge the committee not to pass Substitute for House Bill 2618 in its current form.

Respectfully,

J. Thomas Thull

J. Thomas Thull
Bank Commissioner

22-2

KANSAS STATE BOARD OF TECHNICAL PROFESSIONS
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Written Testimony Submitted to
The Senate Judiciary Committee
March 13, 2008

The impact of HB 2618 on the Kansas State Board of Technical Professions could be significant. The legislature has granted statutory authority to KSBTP to safeguard the life, health, property and welfare of the public by regulating the practice of the technical professions of architecture, professional engineering, land surveying, landscape architecture, and geology. K.S.A. 74-7026 and K.S.A. 74-7039 both specifically state that KSBTP shall have the power to reprimand or otherwise discipline, suspend or revoke the license of any person who is found guilty of violations of the statutes and rules and regulations of the KSBTP, and has the power to levy fines and assess costs for such violations. Absent this statutory function, the purpose of the KSBTP may be greatly diminished.

Since its inception in 1976, the KSBTP has had only one disciplinary case challenged on appeal because of a perceived procedural problem with the Board's disciplinary hearing process. The hearing procedure was immediately repaired to avoid future concerns.

Fiscal Impact:

By not having the technical expertise of the board members on the hearing panels, the approach to the hearing process will change. The attorney representing the board will be required to present his material in a much different format, for a non-technical hearing officer. This process will require more detailed investigative reports and conclusions and the use of more expert witnesses at hearings. There is no way to estimate these costs at this time.

We estimate that the dollar effect on the agency would be an increase of at least $21,525 per year over current costs simply for the use of the administrative hearing officer. This figure is based on 15 hearings per year, allowing a minimum of 22 hours per hearing for the hearing officer in prep time, presiding at the hearing, and time to write orders. At $70 per hour the cost would be $23,100. At present, with three board members serving on a hearing panel, the cost for the same 15 hearings is $1575 for board member pay plus travel expenses. Additional expenditure authority would have to be requested.

Cecil Kingsley, P.E.
Chairperson
Kansas State Board of Technical Professions

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3-13-08
Attachment 23

KANSAS
PAROLE BOARD

Kathleen Sebelius, Governor
Libby Scott, Administrator
and ReEntry Liaison
www.dc.state.ks.us

Paul Feleciano, Chairperson
Robert Sanders, Member
Patricia Biggs, Member

MEMORANDUM

TO: SENATE JUDICIARY COMMITTEE, SENATOR VRATIL, CHAIRMAN

FROM: KANSAS PAROLE BOARD

DATE: MARCH 13, 2008

RE: **2008-SUB. HB 2618** – AS AMENDED BY HOUSE COMMITTEE OF THE WHOLE

INTRODUCTION

At this time, the Parole Board has concerns with Sub HB 2618. While we have attempted to solicit legal opinions regarding the impact on the Board due to the provisions contained within this bill, divergent opinions have emerged. Therefore, we are confused as to the full ramification of impact on the Board of the provisions of this bill. Two areas of identified concern, however, are discussed below.

Less Restrictive Interpretations: New Section 1 provides that if a Kansas state agency is interpreting or enforcing a federal regulation or a federal statute and if other states interpret that provision less restrictively, then such "...less restrictive interpretation shall be applicable in Kansas unless such less restrictive interpretation conflicts with a Kansas statute" (p. 1 lines 21-27).

The Kansas Parole Board expresses concerns with regard to this provision in that

a) there are 94 Federal district courts in this country and we are not aware of the decisions each has made with regard to "parole"
b) there are 49 other states in this country and we are unaware of the decisions regarding interpretation of federal district court decisions,
c) (c) "less restrictive interpretation" infers that restrictiveness is assessed from a particular perspective and we are unclear which perspective is desired by this policy.

For illustration purposes please consider the following scenario:

> The Kansas parole board is considering the parole suitability of an offender convicted of rape and kidnapping and sentenced to a term of 20-40 years. The Kansas parole board hears the offender on the matter of parole suitability but ascertains that the individual maintains attitudes supportive of re-victimization, doesn't accept responsibility for his crime, has an outcry of public opposition to his prison release and so on. The Board, therefore, (i.e., denies) parole for at least a 5 year duration. A neighboring state, on the other hand, has a similarly situated offender but that other state, following their interpretation of their federal district court decision, has determined that a 2 year pass is the maximum allowable pass (denial) period. This is clearly less restrictive from the incarcerated offender's perspective but may easily be viewed as more restrictive from the perspective of the victim of the crime. Therefore, we would request additional guidance with regard to the view through which the interpretation of "restrictiveness" should be constructed.

Adjudicative Hearings: 2008-Sub. HB 2618 relates to administrative procedure, whereby the less restrictive interpretation of federal regulations or statutes. This bill amends statutes inclusive of K.S.A. 2007 Supp. 75-37,121 related to administrative hearings. Prior to the proposed changes included in this bill, requirements related to adjudicative hearings applied only to those agencies and bodies dealing with administrative hearings. We interpret the provisions contained in this bill (see particularly p. 4, line 5) to expand the applicability of adjudicative hearings to all "...state agencies, boards, or commissions" with the explicit exclusion of the state board of tax appeals and the state corporation commission (p. 5 lines 37-39). Thus, the Parole Board anticipates being newly included under the provisions related to the conduct of adjudicative hearings.

Given that adjudicative hearings are defined as "...a hearing or proceeding requiring the resolution of disputed facts to formulate and issue a decision or order" (p. 6 lines 26-30), and if the parole board would under the provisions of this bill become an agency subject to adjudicative hearings, the Board would anticipate that each time there exists any disputed fact in relation to the hearing of an offender – whether that be in relation to a parole suitability hearing or in relation to a violation/revocation hearing where the offender disputes information introduced – we believe that the provisions of this bill would apply and an adjudicative hearing would have to be convened.

If these assumptions are correct, the volume of adjudicative hearings required for the parole board would be estimated to stand in the range of approximately 30% to 55% of all hearings held in a fiscal year. We are unclear as to the anticipated process of such hearings since the Parole Board is comprised of only three members and it is not uncommon for multiple members of the board to have participated in case review and research related a disputed element.

Some examples of frequently disputed items include but are not limited to:

- elements of an offense -- official version versus offender version at prison admission, versus offender version at parole board hearing, versus input received from treatment professionals most often in the case of sex offender treatment or substance abuse treatment,
- prior criminal history -- the "old" PSI serves as the primary reference document; prior to Kansas Sentencing Guidelines, I am unaware of any ability to object to the criminal history documented by the PSI writer. Frequently offenders object to one or more elements included – or sometimes simply do not remember – particular arrests or convictions,
- disciplinary convictions received within the facility – sometimes in the conduct of a parole suitability hearing, while discussing disciplinary record, an offender takes exception to a disciplinary report for which he was convicted within the facility – or takes exception to specific elements of such violation
- parole violation behaviors – during some parole violation final hearings, an offender may take exception to allegations alleged against him/her regarding conduct, behavior, or performance while on community supervision.

CONCLUSION

While uncertain, we believe that the provisions of Sub HB 2618 may have substantial impact on the operations of the Kansas Parole Board. We further believe that the impact may come through two sources:

a. The "less restrictive" interpretation
b. The inclusion of the Board within the provisions of Kansas administrative procedures act specifically as related to adjudicative hearings and the resolution of disputed facts.

KANSAS

The Kansas State Board of Mortuary Arts

Created August 1, 1907

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Thursday, March 13, 2008

To: Senate Judiciary Committee
Chairman Senator John Vratil

From: Mack Smith, Executive Secretary
Kansas State Board of Mortuary Arts

Re.: Substitute for House Bill 2618

The Kansas State Board of Mortuary Arts (KSBMA) appreciates the opportunity to submit written testimony for the Substitute for House Bill 2618. The KSBMA opposes the amendment added to the bill which would require all state agencies, boards and commissions to use the Office of Administrative Hearings (OAH) for conducting adjudicative hearings under the Kansas Administrative Procedures Act.

The KSBMA believes the agency head should be allowed to continue to serve as the presiding officer in hearings involving licensees or applicants for licensure. The KSBMA strongly believes in being allowed to use their expertise in these hearings. The KSBMA works with the Kansas Attorney General's Office with the current system in place. The five (5) member board has two members on their Investigative Committee and three (3) members on their hearing panel. The system currently in place has a complete separation of responsibilities. In the 28 years that I have worked for the board, we have not had any cases appealed to the district court–nor have we received any complaints from licensees or applicants for licensure regarding the process in place. Any perceived problems regarding conflict of interest or ex parte communication simply do not exist with the current hearing process utilized by the KSBMA.

Requiring the KSBMA to use the OAH would result in additional costs currently not budgeted–beginning with payment to the OAH for their services and having to use expert witnesses currently not necessary due to the background of the agency head. Increased costs could potentially lead to increased fees–as the budget of the KSBMA is generated entirely from fees paid by licensees or applicants for licensees.

The current system in place is working the way it should be. I ask the committee to not attempt to fix something that is not broken. Thank you for your consideration.

Senate Judiciary
3-13-08
Attachment 25

Written Testimony before the
Senate Judiciary Committee
Regarding House Bill 2618
Thursday, March 13, 2008

Chairperson Vratil and Members of the Committee:

Thank you for the opportunity to share with the Committee a couple of concerns about House Bill 2618. I appreciate the opportunity to provide our analysis on this bill.

House Bill 2618, as amended, is a comprehensive bill concerning the Administrative Procedures Act and the Office of Administrative Hearings (OAH). We offer these observations:

First, New Section 1 of HB 2618 (page 1, line 21 *et seq*) would require a state agency enforcing or implementing a federal rule or regulation or national building code or industry safety standards to follow another state's interpretation of that code, rule or regulation if some other state's interpretation is less restrictive than that of Kansas (unless such interpretation would be contrary to Kansas law).

The second concern is that the bill would establish a new standard of judicial review of agency actions allowing the District Courts on review to consider evidence in the agency record that is contrary to the agency action taken. (Section 14(d), page 15, line 26)

With these significant factors in mind, I would like to address our specific concerns.

The imposition of other state's interpretations of federal, national or industry regulations or codes raises constitutional as well as practical concerns. In application, it would allow other states to dictate Kansas law. For example, Kansas may want to apply a stricter interpretation in the best interest of public health and safety, but could not do so if another state or states' interpretations were less restrictive. This part of the bill would allow other states to decide what is best for Kansans. As one example, the Department of Labor uses national industry codes to conduct boiler safety reviews by our Boiler Inspection Unit.

The provision requiring use of another state's interpretation does not apply, however, if such interpretation would be contrary to Kansas law or regulation. Since the only way that an agency in Kansas can enforce a federal national or industrial rule or code is to pass a regulation (law) adopting that regulation or code, any interpretation from another state that is different or required a different application, would be contrary to state law, and thus this section should not apply. To avoid confusion and costly litigation, we encourage you to delete this section.

Another concern is the plethora of other state's interpretations that would have to be checked every time a code or regulation is applied. Rather than having a definitive set of rules and interpretations that the public can rely on, the public would be caught up in a quagmire of interpretations. Arguably, this would apply to the legislative process as well. Each time the legislature sought to introduce and pass new legislation that incorporated a federal or national code or regulation, each state's interpretation of that code would need to be checked to assure that the new law was carrying out the legislature's intent.

The second concern involves the proposed change to the standard of review in administrative actions. We believe it would have a devastating effect upon administrative law in Kansas. Since adoption of the Kansas Act in 1985, the standard has always been that the court can only review

evidence from the record as a whole that tends to support the administrative decision. This has been an important distinction in the proper application of administrative law. It discourages the court on review from substituting its judgment for that of the administrative agency and reweighing the facts. Under the proposed change, the reviewing court will be able to consider any evidence from the record as a whole to include evidence that would support a contrary position.

This change, if allowed, would undermine the administrative law process. The purpose of administrative law and procedure is to provide an alternate forum that is quicker and less expensive than the judicial system on issues that require a special expertise or knowledge that an administrative agency may be more inclined to have. District courts have review authority which, by statute, allows for review on a limited basis. This review does not include a reweighing of the evidence by the district courts. If this were allowed, then judicial review would in fact become a de novo review, effectively reducing administrative hearings to a "practice run" and lengthening the judicial process rather than streamlining it.

From experience, we have observed district courts that are not that familiar with the administrative procedure reweigh the evidence to come out with a finding contrary to the agency finding. Currently, if the failure to consider evidence is compelling, it can be raised as an issue under abuse of discretion. This bill, if passed in its present form, would greatly undercut the finality of administrative decisions and in all probability increase the number of appellate level cases.

Interestingly, this proposed change was discussed by Steve Leben (now Judge Leben of the Kansas Court of Appeals) in his article in the June/July 1995 issue of the Journal of the Kansas Bar Association, *Challenging and Defending Agency Actions in Kansas.* Judge Leben was very critical of the Court's interpretation at that time, and while his intent in 1995 may have been to effectuate change, his article has been cited for years as the definitive authority that only supporting evidence in the "record as a whole" is to be considered on review. That article was written 13 years ago; the KAPA was 10 years old at that time. The current standard has been in effect for 23 years and has worked well to keep judicial review on the proper track. This proposed change is not in keeping with judicial economy, but rather opens the "floodgates" to retrials of administrative hearings and more litigation.

We encourage your consideration of our concerns regarding House Bill 2618 as it relates to imposing other state's interpretations of federal and national codes and regulations upon Kansas agencies and abandonment of the current well established standard of review for the Kansas Administrative Procedures Act.

Again, thank you for the opportunity to express my thoughts.

Respectfully submitted,

A.J. Kotich
Chief Counsel
Kansas Department of Labor

26-2

THE KANSAS BOARD OF VETERINARY EXAMINERS
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Senate Judiciary Hearing Testimony Opposing Sub. H.B. 2618

On behalf of the seven members of the State of Kansas Board of Veterinary Examiners, I would like to provide this written testimony opposing Sub. H.B. 2618 as it was amended and passed by the House. We have several concerns about the legislation as it now stands. In its current version the bill would strike lines 27 and 28 on page 3, which state "in which the presiding officer is not the agency head or one or more members of the agency head". We respectfully request you amend the bill to reinstate these lines.

If passed, the current version of this bill would strip away the regulatory and policy authority from the very officials who are held accountable for regulating veterinarians in Kansas. It would also increase costs to veterinarians, who in turn would have to pass on these additional costs to Kansas taxpayers who utilize their services.

Our board members frequently preside over hearings as well as pre-hearing matters. If we are required to pay a hearing officer for every hearing, pre-hearing conference and routine motion that is filed – as would be required under this bill – it will dramatically increase costs for our agency and, as a result, for licensees. Again, these costs in turn would be passed on to all Kansans who utilize veterinary services.

Administrative procedures are designed to provide an efficient forum for justly resolving cases. It is far more efficient to use experts as hearing officers than to require both parties to spend time and money to present expert or foundational testimony in order to educate independent hearing officers on the technical issues handled by our organizations.

The Kansas Board of Veterinary Examiners respectfully requests the bill be amended to reinstate lines 27 and 28 on page 3 of the bill. Retaining these two lines will allow the Board to retain the option to have Board members preside over hearings and pre-hearing matters. This will ensure Kansans receive just and proper consideration of their claims, while not promoting an adversarial – and costly – atmosphere in the hearings conducted by our Board.

Sincerely,

Verle D. Carlson

Verle D. Carlson, DVM, Kansas Board of Veterinary Examiners President

Senate Judiciary
3-13-08
Attachment 27

KANSAS

KATHLEEN SEBELIUS
GOVERNOR

STATE BOARD OF HEALING ARTS

LAWRENCE T. BUENING, JR.
EXECUTIVE DIRECTOR

MEMORANDUM

TO: Senate Committee on Judiciary

FROM: Lawrence T. Buening, Jr.
Executive Director

DATE: March 12, 2008

RE: Testimony on Substitute for House Bill No. 2618

Thank you for the opportunity to provide written testimony in opposition to Substitute for H.B. No. 2618 as passed by the House. As introduced, H.B. No. 2618 would only have amended two sections within the Kansas Act for Judicial Review and one section of the Kansas Administrative Procedure Act (KAPA). The only KAPA amendment required all agency decisions affecting a license to be supported by clear and convincing evidence. Substitute for H.B. No. 2618 with the amendments made by the House Committee of the Whole, however, provide numerous changes, several of which cause concerns. These concerns are as follows:

ISSUE 1: Mandatory Use of Office of Administrative Hearings (OAH).

There may be certain instances in which all parties to an administrative proceeding prefer to utilize the Board or a member of the Board rather than the OAH to conduct a formal hearing. Factors such as the additional time and expense involved may have a bearing on whether a hearing requiring resolution of disputed facts must be heard only by a person assigned by the OAH. Therefore, the current option within K.S.A. 77-514 for agency heads or one or more members thereof should be retained unless a party requests that the matter by assigned to OAH.

RECOMMENDATION: Amend Section 4(h) to read as indicated in the attached balloon amendment to allow utilization of OAH, but only require such for a formal hearing when requested by any party.

ISSUE 2: Use of Term "Adjudicative Hearings".

Amendments defining "adjudicative **hearings**" and inserting that term in several locations within KAPA seems both unnecessary and confusing. KAPA provides for four separate and distinct types of "adjudicative **proceedings**". These are: (a) Formal hearings (K.S.A. 77-513 through 77-532); (b) conference hearings (77-533 through 535);

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(c) emergency proceedings (77-536); and (d) summary proceedings (77-537 through 77-542). The term "adjudicative hearings" is not currently in any section of KAPA. Yet, Section 5(h) (page 6, lines 26-30) amends K.S.A. 77-502 by defining "adjudicative hearing" as one requiring resolution of disputed facts. This is precisely the purpose of formal hearings under existing language in KAPA. Section 4(h) (page 3, lines 23-28) requires all boards and commissions to utilize the office of administrative hearings for conducting "adjudicative hearings". The term "adjudicative hearings" is then used in the amendment to K.S.A. 2007 Supp. 77-514 (page 7, lines 15 and 22) in stating that a presiding officer assigned by the office of administrative hearings is required for all adjudicative hearings. The term is also added to K.S.A.77-551 (page 13, lines 23 and 30).

RECOMMENDATION: Delete the definition of and replace any reference to "adjudicative hearings" with "formal hearings" as indicated on the attached balloon amendment.

ISSUE 3: AMENDMENT TO K.S.A. 77-514.

Section 7(g) amends K.S.A. 77-514 at page 7, line 43 by adding the phrase: "Prior to July 1, 2009, as applicable," is unnecessary in light of the amendments made to subsection (a) on page 7, lines 10-24. The amendments to subsection (a) clearly require agencies to utilize a presiding officer assigned by OAH for all formal hearings after the dates stated and there is no need for this phrase.

RECOMMENDATION: Delete the phrase "Prior to July 1, 2009, as applicable," on page 7, line 43 as shown on the attached balloon amendment.

ISSUE 4: EFFECTIVE DATE.

Section 17 of the bill would make it effective on publication in the Kansas Register. There does not seem to be any reason for this. In fact, it will place a burden on those agencies and commissions that have not included the additional expenses involved in utilizing the office of administrative hearings during FY2008.

RECOMMENDATION: Amend Section 17 to have the act become effective upon publication in the statute book, as indicated on the attached balloon amendment.

ISSUE 5: CLEAR AND CONVINCING STANDARD.

Section 6 of the bill at page 6, line 41 through page 7, line 1 amends K.S.A. 77-512 to require that disputed issues of fact in occupational or professional licensing disciplinary proceedings against an individual shall be by clear and convincing evidence. KAPA has not specified what the burden of proof must be in specific types of administrative proceedings. However, the courts have had occasion to define "clear and convincing". Since this amendment does not actually define clear and convincing, it appears that agencies would still rely on court interpretation of this standard when rendering decisions in professional licensing disciplinary proceedings. Basically, this means that clear and

convincing goes to the quality of the evidence rather than the quantum of proof and that the preponderance of evidence must be evidence that is clear and convincing. Supreme Court Rule 211(f) establishes the clear and convincing standard for attorney discipline so utilization of this standard in other professional licensing disciplinary proceedings seems appropriate.

RECOMMENDATION: None.

There are also some concerns that the bill creates confusion and contradictions relating to certain provisions of the Healing Arts Act. The Legislature has created a statutory scheme that places the duty and responsibility on the Board itself to make findings and determinations in certain instances. There are numerous statutory provisions that specifically require this. Examples include K.S.A. 65-2836(c) that provides a license must be revoked or an application for a license denied "unless a 2/3 majority of the board members present and voting on such application determine by clear and convincing evidence that such person will not pose a threat to the public…and that such person has been sufficiently rehabilitated to warrant the public trust". K.S.A. 65-2836(i) specifies those persons that may determine whether reasonable suspicion exists that a licensee has the inability to practice with reasonable skill and safety to patients and provides that the "determination shall be made by a majority vote of the entity which reviewed the investigative information". K.S.A. 65-2837(a)(1) and (2) provide that the applicable standard of care is to be "determined by the board". K.S.A. 65-2839a(b) states that "[A]ny member of the board…may administer oaths or affirmation, examination witnesses and receive such evidence" in determining whether a Board subpoena should be revoked, limited or modified. The Board is also required to revoke, limit or modify a subpoena "if in its opinion the evidence required does not relate to practices which may be grounds for disciplinary action…". K.S.A. 65-2846 states that costs may be assessed in an administrative proceedings "in such proportion as the board may determine upon consideration of all relevant circumstances…". K.S.A. 65-28a07(b) requires that a temporary license for a physician assistant may be extended only "upon a majority vote of the members of the board". Requiring a person assigned by OAH to make these factual determinations during the course of a formal hearing may conflict with these provisions and add an unnecessary layer to the administrative process.

During FY2006, Board members were appointed as presiding officers to conduct formal hearings in 20 cases. The OAH was appointed and served as presiding officer in six cases. In FY2007, one or more Board members were appointed to serve as a presiding officer in 21 cases and the OAH was appointed as presiding officer in seven matters.

In FY2006 and 2007, exclusive of one extremely large case, the average payment per case to the OAH for serving as presiding officer in 12 cases was $297.50. Based on the experience from FY2006 and FY2007, OAH would serve as presiding officer in approximately 20 additional formal hearings each year for which the Board or one or more of its members previously served as presiding office. Therefore, the Board would incur approximately $6,000 each fiscal year in additional expenses for services of a presiding officer alone.

Substitute for HOUSE BILL No. 2618

By Committee on Judiciary

2-27

AN ACT concerning administrative procedure; **[relating to interpretation of federal statutes, regulations and national codes;]** amending K.S.A. 77-502, 77-512, 77-516, 77-525, 77-526, **[77-619,]** 77-620 and 77-621 and K.S.A. 2007 Supp. 75-37,121, 77-514, 77-527 and 77-551 and repealing the existing sections; also repealing K.S.A. 2007 Supp. 74-599, K.S.A. 2003 Supp. 77-514, as amended by section 39 of chapter 145 of the 2004 Session Laws of Kansas, and K.S.A. 77-551, as amended by section 43 of chapter 145 of the 2004 Session Laws of Kansas.

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

[New Section 1. In the event a Kansas state agency is interpreting or enforcing a federal regulation, a federal statute or a national building or fire code and such regulation, statute or code is interpreted less restrictively by state officials in other states, such less restrictive interpretation shall be applicable in Kansas unless such less restrictive interpretation conflicts with a Kansas statute, regulation or local ordinance or resolution.

[Sec. 2. K.S.A. 77-619 is hereby amended to read as follows: 77-619. (a) The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

[(1) Improper constitution as a decision-making body; or improper motive or grounds for disqualification, of those taking the agency action; or

[(2) unlawfulness of procedure or of decision-making process*; or*

[*(3) interpretations in other states when a party is claiming the application of section 1, and amendments thereto.*

[(b) The court may remand a matter to the agency, before final disposition of a petition for judicial review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

[(1) The agency was required to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

[(2) the court finds that (A) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered until after the agency action, and (B) the interests of justice would be served by remand to the agency;

[(3) the agency improperly excluded or omitted evidence from the record; or

[(4) a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

New Section 1. **[3.]** The presiding officer from the office of administrative hearings, on such presiding officer's own motion or the motion of any party, may order certification of policy issues to an agency of this state when it appears to the presiding officer that there are involved in the proceeding before such presiding officer questions of policy which may be determinative of the proceeding then pending and it appears to the presiding officer that there are no established policies in statutes, rules and regulations or agency precedents which are determinative of such questions of policy.

Sec. ~~2.~~ **[4.]** K.S.A. 2007 Supp. 75-37,121 is hereby amended to read as follows: 75-37,121. (a) There is created the office of administrative hearings within the department of administration, to be headed by a director appointed by the secretary of administration. The director shall be in the unclassified service under the Kansas civil service act.

(b) The office may employ or contract with presiding officers, court reporters and other support personnel as necessary to conduct proceedings required by the Kansas administrative procedure act for adjudicative proceedings of the state agencies, boards and commissions specified in subsection (h). The office shall conduct adjudicative proceedings of any state agency which is specified in subsection (h) when requested by such agency. Only a person admitted to practice law in this state or a person directly supervised by a person admitted to practice law in this state may be employed as a presiding officer. The office may employ regular part-time personnel. Persons employed by the office shall be under the classified civil service.

(c) If the office cannot furnish one of its presiding officers within 60 days in response to a requesting agency's request, the director shall designate in writing a full-time employee of an agency other than the requesting agency to serve as presiding officer for the proceeding, but only with the consent of the employing agency. The designee must possess the same qualifications required of presiding officers employed by the office.

(d) The director may furnish presiding officers on a contract basis to any governmental entity to conduct any proceeding other than a proceeding as provided in subsection (h).

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

(1) To establish procedures for agencies to request and for the director to assign presiding officers. An agency may neither select nor reject any individual presiding officer for any proceeding except in accordance with the Kansas administrative procedure act;

2) to establish procedures and adopt forms, consistent with the Kansas administrative procedure act, the model rules of procedure, and other provisions of law, to govern presiding officers; and

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

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

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

h) *Except as provided in subsection (j),* the following state agencies, boards and commissions may or, upon request by a party, shall utilize the office of administrative hearings for conducting formal ~~adjudicative~~ hearings, ~~*as defined in K.S.A. 77-502, and amendments thereto,*~~ under the Kansas administrative procedures *procedure* act [in which the presiding officer is not the agency head or one or more members of the agency head:]

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(1) On and after July 1, 2005: Department of social and rehabilitation services, juvenile justice authority, department on aging, department of health and environment, Kansas public employees retirement system, Kansas water office, Kansas animal health department and Kansas insurance department.

(2) On and after July 1, 2006: Emergency medical services board, emergency medical services council, Kansas health policy authority and Kansas human rights commission.

(3) On and after July 1, 2007: Kansas lottery, Kansas racing and gaming commission, state treasurer, pooled money investment board, *and* Kansas department of wildlife and parks ~~and state board of tax appeals~~.

(4) On and after July 1, 2008: Department of human resources, ~~state corporation commission,~~ state conservation commission, agricultural labor relations board, department of administration, department of revenue, board of adult care home administrators, Kansas state grain inspection department, board of accountancy and Kansas wheat commission.

(5) On and after July 1, 2009, all other ~~Kansas administrative procedure act hearings~~ *state agencies, boards or commissions* not mentioned in subsections (1), (2), (3) and (4).

(i) (1) ~~Effective July 1, 2005, any presiding officer in agencies specified in subsection (h)(1) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551 and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of~~

~~administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under the laws of this state which had accrued to or vested in such personnel prior to the effective date of this section. Such person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment had occurred.~~

~~(2) Effective July 1, 2006, any presiding officer in agencies specified in subsection (h)(2) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551 and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under the laws of this state which had accrued to or vested in such personnel prior to the effective date of this section. Such person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment had occurred.~~

~~(3) Effective July 1, 2007, any presiding officer in agencies specified in subsection (h)(3) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551 and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under the laws of this state which had accrued to or vested in such personnel prior to the effective date of this section. Such person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment had occurred.~~

~~(4)~~ Effective July 1, 2008, any full-time presiding officer in agencies specified in subsection (h)(4) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551 and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under the laws of this state which had accrued to or vested in such personnel prior to the effective date of this section. Such person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment had occurred.

~~(5)~~ *(2)* Effective July 1, 2009, any full-time presiding officer in agencies specified in subsection (h)(5) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551, and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under the laws of this state which had accrued to or vested in such personnel prior to the effective date of this section. Such person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment occurred.

(j) Except as provided in K.S.A. 77-551, and amendments thereto, the provisions of this section shall not apply to the state board of tax appeals and the state corporation commission.

Sec. ~~3.~~ **[5.]** K.S.A. 77-502 is hereby amended to read as follows: 77-502. As used in this act:

(a) "State agency" means any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and legislative branches of state government and political subdivisions of the state, which is authorized by law to administer, enforce or interpret any law of this state.

(b) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the state agency is vested by any provision of law.

(c) "License" means a franchise, permit, certification, approval, registration, charter or similar form of authorization required by law for a person to engage in a profession or occupation.

(d) "Order" means a state agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interest of one or more specific persons.

(e) "Party to state agency proceedings," or "party" in context so indicating, means:

(1) A person to whom an order is specifically directed; or

(2) a person named as a party to a state agency proceeding or allowed to intervene as a party in the proceeding.

(f) "Person" means an individual, partnership, corporation, association, political subdivision or unit thereof or public or private organization or entity of any character, and includes another state agency.

(g) "Political subdivision" means political or taxing subdivisions of the state, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups or administrative units thereof, receiving or expending and supported in whole or in part by public funds.

Sec. ~~4.~~ **[6.]** K.S.A. 77-512 is hereby amended to read as follows: 77-512. *(a)* A state agency may not revoke, suspend, modify, annul, withdraw, refuse to renew, or amend a license unless the state agency first gives notice and an opportunity for a hearing in accordance with this act. This section does not preclude a state agency from ~~(a)~~ *(1)* taking immediate action to protect the public interest in accordance with K.S.A. 77-536, and amendments thereto, or ~~(b)~~ *(2)* adopting rules and regulations, otherwise within the scope of its authority, pertaining to a class of licensees, including rules and regulations affecting the existing licenses of a class of licensees.

(b) Unless otherwise provided by law, the burden of proof for disputed issues of fact in occupational or professional licensing disciplinary proceedings against an individual shall be by clear and convincing evidence.

Sec. ~~5.~~ **[7.]** K.S.A. 2007 Supp. 77-514 is hereby amended to read as follows: 77-514. ~~(a) For agencies listed in subsection (h) of K.S.A. 75-37,121, and amendments thereto, the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings shall be the presiding officer. For all other agencies, the agency head, one or more members of the agency head, a presiding officer assigned by the office of administrative hearings, or, unless prohibited by K.S.A. 77-551, and amendments thereto, one or more other persons designated by the agency head shall be the presiding officer.~~ *(a) (1) Notwithstanding any other provision of law to the contrary, on and after July 1, 2008, through June 30, 2009, for agencies listed in subsections (h)(1), (h)(2), (h)(3) and (h)(4) of K.S.A. 75-37,121, and amendments thereto, a presiding officer assigned by the office of administrative hearings shall be the presiding officer for all ~~adjudicative~~ formal hearings. The presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 77-527, and amendments thereto.*

(2) Notwithstanding any other provision of law to the contrary, except as provided in K.S.A. 77-551, and amendments thereto, on and after July 1, 2009, for all state agencies, a presiding officer assigned by the office of administrative hearings shall be the presiding officer for all ~~adjudicative~~ formal hearings. The presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 77-527, and amendments thereto.

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest.

Deleted: *(h) "Adjudicative hearing" means any hearing or proceeding requiring resolution of disputed facts to formulate and issue a decision or order. Notwithstanding the use of any other term, if the hearing or proceeding requires resolution of disputed facts it shall be deemed an adjudicative hearing.¶*

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(c) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(d) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

(f) If the office of administrative hearings cannot provide a presiding officer, a state agency may enter into agreements with another state agency to provide presiding officers to conduct proceedings under this act.

(g) *As applicable,* notwithstanding any quorum requirements, if the agency head of a professional or occupational licensing agency is a body of individuals, the agency head, unless prohibited by law, may designate one or more members of the agency head to serve as presiding officer and to render a final order in the proceeding.

Deleted: *Prior to July 1, 2009, a*

(h) Except as otherwise provided by law, in any proceeding under this act, a person shall not be eligible to act as presiding officer, and shall not provide confidential legal or technical advice to a presiding officer in the proceeding, if such person:

(1) Has participated in any stage of an investigation or prosecution associated with the proceeding or a proceeding arising out of the same event or transaction;

(2) is supervised or directed by a person who would be disqualified under paragraph (1); or

(3) has participated in an investigatory or prosecutorial capacity in the creation of a summary order as part of another stage of the proceeding.

Sec. ~~6.~~ **[8.]** K.S.A. 77-516 is hereby amended to read as follows: 77-516. The presiding officer designated to conduct the hearing may conduct a prehearing conference. If the conference is conducted:

(a) *Prior to July 1, 2009, as applicable,* the state agency may assign a presiding officer, *if such agency is not required to use a presiding office from the office of administrative hearings,* for the prehearing conference, exercising the same discretion as is provided by K.S.A. 77-514, and amendments thereto, concerning the selection of a presiding officer for a hearing.

(b) The presiding officer for the prehearing conference shall set the time and place of the conference and give reasonable notice to all parties and to all persons who have filed written petitions to intervene in the matter.

(c) The notice shall include:

(1) The names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(2) the name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the state agency;

(3) the official file or other reference number, the name of the proceeding and a general description of the subject matter;

(4) a statement of the time, place and nature of the prehearing conference;

(5) a statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

(6) the name, official title, mailing address and telephone number of the presiding officer for the prehearing conference;

(7) a statement that at the prehearing conference the proceeding, without further notice, may be converted into a conference hearing or a summary proceeding for disposition of the matter as provided by this act; and

(8) a statement that a party who fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding may be held in default under this act.

(d) The notice may include any other matters that the presiding officer considers desirable to expedite the proceedings.

Sec. ~~7.~~ **[9.]** K.S.A. 77-525 is hereby amended to read as follows: 77-525. (a) A presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding while the proceeding is pending, with any party or

participant, with any person who has a direct or indirect interest in the outcome of the proceeding or with any person who *has served in an investigatory or prosecutorial capacity or* presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) A member of a multimember panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not:

(1) Receive *ex parte* communications of a type that the presiding officer would be prohibited from receiving; or

(2) furnish, augment, diminish or modify the evidence in the record.

(c) Unless required for the disposition of *ex parte* matters specifically authorized by statute, no party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may directly or indirectly communicate in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer unless notice and an opportunity are given all parties to participate in the communication.

(d) If, before serving as presiding officer in an adjudicative proceeding, a person receives an *ex parte* communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) A presiding officer who receives an *ex parte* communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications and a memorandum stating the substance of all oral communications received, all responses made and the identity of each person from whom the presiding officer received an *ex parte* communication and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the *ex parte* communication must be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(f) If necessary to eliminate the effect of an *ex parte* communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The state agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each state agency, by rule and regulation, may provide for appropriate sanctions, including default, for any violations of this section.

(h) This section shall not apply to adjudicative proceedings before:

(1) The state corporation commission. Such proceedings shall be subject to the provisions of K.S.A. 77-545*, and amendments thereto*;

(2) the commissioner of insurance concerning any rate, or any rule, regulation or practice pertaining to the rates over which the commissioner has jurisdiction or adjudicative proceedings held pursuant to the Kansas insurance holding companies act. Such proceedings shall be subject to the provisions of K.S.A. 77-546*, and amendments thereto*; and

(3) the director of taxation. Such proceedings shall be subject to the provisions of K.S.A. 77-548*, and amendments thereto*.

Sec. ~~8.~~ **[10.]** K.S.A. 77-526 is hereby amended to read as follows: 77-526. (a) *Except as provided in K.S.A. 77-514, and amendments thereto,* if the presiding officer is the agency head or designated in accordance with subsection (g) of K.S.A. 77-514, and amendments thereto, the presiding officer shall render a final order.

(b) *Except as provided in K.S.A. 77-514, and amendments thereto,* if the presiding officer is neither the agency head nor designated in accordance with subsection (g) of K.S.A. 77-514, and amendments thereto, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 77-527 and amendments thereto.

(c) A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language

that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration, administrative review or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order. If the presiding officer has been designated in accordance with subsection (g) of K.S.A. 77-514, and amendments thereto, the final order shall so state. Any final order, for which a petition for reconsideration is not a prerequisite for seeking judicial review, and any initial order, for which further administrative review is not available, shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.

(d) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

(e) If a substitute presiding officer is appointed pursuant to K.S.A. 77-514 and amendments thereto, the substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(f) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order or initial order pursuant to this section shall be rendered in writing and served within 30 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown. If extended for good cause, such good cause shall be set forth in writing on or before expiration of the 30 days.

(h) The presiding officer shall cause copies of the order to be served on each party and, if the order is an initial order, on the agency head in the manner prescribed by K.S.A. 77-531 and amendments thereto.

(i) Notwithstanding the other provisions of this section, if the presiding officer in a hearing before the state corporation commission is not the agency head, the presiding officer shall not render an initial order but shall make written findings and recommendations to the commission. The commission shall render and serve a final order within 60 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown. If extended for good cause, such good cause shall be set forth in writing on or before expiration of the 60 days.

Sec. ~~9.~~ **[11.]** K.S.A. 2007 Supp. 77-527 is hereby amended to read as follows: 77-527. (a) The agency head, upon its own motion may, and upon petition by any party or when required by law shall, review an initial order, except to the extent that:

(1) A provision of law precludes or limits state agency review of the initial order; or

(2) the agency head (A) determines to review some but not all issues, or not to exercise any review, (B) delegates its authority to review the initial order to one or more persons, unless such delegation is expressly prohibited by law, or (C) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by rule and regulation of the state agency, within 15 days after service of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 15 days after its service. If the agency head determines not to review an initial order in response to a petition for review, the agency head shall, within 20 days after filing of the petition for review, serve on each party an order stating that review will not be exercised.

(c) The petition for review shall state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

(d) In reviewing an initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice

to all parties. *In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.*

(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the agency head or designee may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(h) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of K.S.A. 77-526, and amendments thereto.

(i) The agency head shall cause copies of the final order or order remanding the matter for further proceedings to be served on each party in the manner prescribed by K.S.A. 77-531, and amendments thereto.

(j) Unless a petition for reconsideration is a prerequisite for seeking judicial review, a final order under this section shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.

Sec. ~~10.~~ **[12.]** K.S.A. 2007 Supp. 77-551 is hereby amended to read as follows: 77-551. ~~(a) Except as provided in subsection (b), in all hearings of any state agency specified in subsection (h) of K.S.A. 75-37,121, and amendments thereto, that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings.~~ *(a) (1) Notwithstanding any other provision of law to the contrary, except as provided in subsection (b), on and after July 1, 2008, through June 30, 2009, in all ~~adjudicative~~ formal hearings of any state agency specified in subsections (h)(1), (h)(2), (h)(3) and (h)(4) of K.S.A. 75-37,121, and amendments thereto, that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be a presiding officer assigned by the office of administrative hearings.*

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(2) Notwithstanding any other provision of law to the contrary, except as provided in subsection (b), on and after July 1, 2009, in all ~~adjudicative~~ formal hearings of any state agency that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be a presiding officer assigned by the office of administrative hearings.

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(b) *(1)* The provisions of this section shall not apply to the employment security law, pursuant to K.S.A. 44-701 et seq., and amendments thereto, or article 5 of chapter 44, and amendments thereto, except K.S.A. 44-532 and 44-5,120, and amendments thereto, concerning the workers compensation act.

(2) Notwithstanding any other provision of law to the contrary, in all hearings of the state board of tax appeals and the state corporation commission that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be the agency head or one or more members of the agency head. If the agency head or one or more members of the agency head is not the presiding officer, an officer assigned by the office of administrative hearings shall serve as the presiding officer.

(c) ~~Notwithstanding~~ *Subject to the provisions of* subsection (a) the agency head or one or more members of the agency who will serve as a presiding officer may designate any other

person to serve as a presiding officer to determine procedural matters that may arise prior to the hearing on the merits, including but not limited to conducting prehearing conferences pursuant to K.S.A. 77-516 and 77-517 and amendments thereto.

(d) This section shall be part of and supplemental to the Kansas administrative procedure act.

Sec. ~~11.~~ **[13.]** K.S.A. 77-620 is hereby amended to read as follows: 77-620. (a) Within 30 days after service of the petition for judicial review, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action,; other documents identified by the agency as having been considered by it before its action and used as a basis for its action*; any materials concerning a hearing conducted by, or initial order issued by, the office of administrative hearings related to the agency action;* and any other material required by law as the agency record for the type of agency action at issue, subject to the provisions of this section.

(b) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (c). Unless otherwise ordered by the court, the cost of the preparation of the transcript shall be paid by the appellant.

(c) By stipulation of all parties to the judicial review proceedings, the record may be shortened, summarized or organized.

(d) The court may tax the cost of preparing transcripts and copies for the record against a party who unreasonably refuses to stipulate to shorten, summarize or organize the record.

(e) Additions to the record pursuant to K.S.A. 77-619*, and amendments thereto,* shall be made as ordered by the court.

(f) The court may require or permit subsequent corrections or additions to the record.

Sec. ~~12.~~ **[14.]** K.S.A. 77-621 is hereby amended to read as follows: 77-621. (a) Except to the extent that this act or another statute provides otherwise:

(1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and

(2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines any one or more of the following:

(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) *For purposes of this section, "in light of the record as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.*

(e) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error.

Sec. ~~13.~~ **[15.]** On and after July 1, 2009, K.S.A. 77-551, as amended by section 43 of chapter 145 of the 2004 Session Laws of Kansas, and K.S.A. 2003 Supp. 77-514, as amended by section 39 of chapter 145 of the 2004 Session Laws of Kansas are hereby repealed.

Sec. ~~14.~~ **[16.]** K.S.A. 77-502, 77-512, 77-516, 77-525, 77-526, **[77-619,]** 77-620 and 77-621 and K.S.A. 2007 Supp. 74-599, 75-37,121, 77-514, 77-527 and 77-551 are hereby repealed.

Sec. ~~15.~~ **[17.]** This act shall take effect and be in force from and after its publication in the ~~Kansas register~~ statute book.

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28-13

AIA Kansas
A Chapter of The American Institute of Architects

March 13, 2008

TO: Senate Judiciary Committee

FROM: Trudy Aron, Executive Director

RE: Opposition to HB 2618

Senator Vratil and Members of the Committee The American Institute of Architects in Kansas opposes HB 2618 that requires the Kansas State Board of Technical Professions to use an administrative hearing officers, stripping the Board of their responsibilities in hearing matters before it.

AIA Kansas is a statewide association of architects and intern architects. Our 700 members are currently designing the facilities we will use into the future. That is why our members are designing these facilities to leave a lighter carbon footprint on our environment.

Currently the Kansas State Board of Technical Professions (KSBTP) uses board members to conduct hearings. This process has the built in advantage of having experienced practitioners on the panels. HB 2618 mandates the use of administrative hearing officers without background or expertise in the technical professions – architects, engineers, landscape architects, land surveyors and geologists. This means that KSBTP will need to hire experts to testify on the merits in a discipline case. This will substantially increase the cost to the KSBTP and to those regulated by the Board.

Only once in 32 years had the KSBTP had a disciplinary case challenged on appeal because of a perceived procedural problem with the Board's disciplinary hearing process. The hearing procedure was immediately repaired to avoid future concerns. We believe this, alone, shows that the methods employed by the Kansas State Board of Technical Professions are sound and fair. We see no reason for changing the current process that works well. And, we see no reason our members should pay for additional costs for disciplinary cases this change will cause.

We ask that you remove the Kansas State Board of Technical Professions from the requirements in HB 2618. Thank you for your consideration.

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Topeka, Kansas 66603-3758
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Facsimile: 785-357-6450

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3-13-08
Attachment 29

ΓHLEEN SEBELIUS
Governor

PHYLLIS GILMORE
Executive Director

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BEHAVIORAL SCIENCES REGULATORY BOARD

SENATE TESTIMONY
JUDICIARY COMMITTEE
March 13, 2008

HB 2618

Chairman Vratil and Committee Members:

Thank you for the opportunity to submit written testimony in opposition to HB 2618. I am Phyllis Gilmore the Executive Director of the Kansas Behavioral Sciences Regulatory Board (BSRB).

The BSRB is the licensing board for most of the state's mental health professionals; the doctoral level psychologists, the master level psychologists, the clinical psychotherapists, the bachelor, master and clinical level social workers, the master and clinical level professional counselors, and the master and clinical level marriage and family therapists. Additionally, some of the drug and alcohol counselors are registered with the board, although most of them are certified with SRS at the present time.

The board understands the committee's desire to improve the integrity of Administrative Hearings in Kansas. However, It feels this bill, in Sec. [4.] (h), by having the office of administrative hearings conduct all adjudicative hearings of boards and agencies under K.S.A. 77-502, has some unintended consequences; while some other provisions in the bill do enhance the current process.

The cost of hearings would increase for the board due to paying for the services of the hearing officer, expert witnesses, and a transcript of the proceeding if the board wishes to review the decision. It also appears the process would most likely become lengthier and therefore less efficient.

Currently, there is minimal cost to the board for conducting a hearing. The cost of a court reporter is our main expense since the board members receive minimal compensation for their time. ($35.00 per day)

General Counsel and Litigation Counsel for the BSRB are both provided by the Attorney General's Office. Both attorneys are very conscientious about not having communication between the investigative board members and the adjudicative board members. The attorneys do not communicate about specific cases, nor do board members who are involved in either the investigative process or the adjudicative process of the same case. We also use a third attorney for the Attorney General's Office for pre-hearing motions. Great effort is made by all to conduct fair and impartial hearings. Recently, we have had two decisions of the complaint review committee changed by hearing decisions.

Additional benefit is gained when board members serve as the hearing panel; the decision is made by three people rather than one and one of those is usually in the same profession as the respondent. That professional member is able to understand and give insight into the subtleties of the issues.

Again, while the board believes it understands and appreciates the purpose of the bill it would respectfully request its passage from the committee with an adverse recommendation. If it is passed out of committee favorable, then the Behavioral Sciences Regulatory Board requests exclusion related to New Section 1. and Section [4.] (h).

Respectfully submitted,

Phyllis Gilmore
Executive Director

Senate Judiciary
3-13-08
Attachment 30

KANSAS
HIGHWAY PATROL

Kathleen Sebelius, Governor
Terry L. Maple, Superintendent

www.kansashighwaypatrol.org

Written Testimony on House Bill 2618
Senate Judiciary Committee

Prepared by
CAPT Dan Meyer
Kansas Highway Patrol

March 13, 2008

The Kansas Highway Patrol is presenting this written testimony to express its concern regarding House Bill 2618. This bill relates to the interpretation of federal regulations by Kansas regulatory agencies.

House Bill 2618 requires all state agencies that interpret or enforce federal regulations that are interpreted less restrictively by other states, to use the less restrictive interpretations in Kansas. As it relates to motor carrier enforcement and safety, this will drop the standard employed in Kansas to the lowest level enforced in any other state. The Federal Motor Carrier Safety Administration (FMCSA) is currently reviewing enforcement interpretations in some states because they may be incompatible with the Federal Motor Carrier Safety Regulations (FMCSRs). This bill would require the State of Kansas to adopt the less restrictive interpretations applied in those states and potentially bring a finding of incompatibility from FMCSA, both in Kansas and in those states. Additionally, some states have grandfathering provisions that are allowed. If we were to adopt these provisions, this could also potentially lead to a finding of incompatibility with FMCSA requirements.

If FMCSA were to make a determination that this bill is incompatible with federal regulations, this incompatibility could result in the state being restricted from participating in eligible Motor Carrier Safety Assistance Program (MCSAP) funding and additional grants that have been awarded. For the current fiscal year of 2008, this figure is approximately six million dollars. The funding would have to be replaced by the legislature or could adversely impact 51 current employees along with current projects funded through additional grants.

The MCSAP program reaches far beyond the funding issues, into the safety of the citizens of Kansas. The state MCSAP program has worked, since it's inception in 1983, to bring Commercial Motor Vehicles in compliance, through enforcement, with the safety regulations. This enforcement includes the driver, in areas of licensing, drug and alcohol violations, and fatigue issues through the hours of service. The vehicle component of the inspection process includes safety violations that directly contribute to CMV collisions. With the aid of the MCSAP program, the authorized inspectors have the capability to place the CMV and/or the driver out of service for these most serious violations, until such time that the items can be brought into safe operation status. The MCSAP program has continually strived to improve the motor carrier safety of companies operating in and through the state of Kansas.

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If the determination of incompatibility were to occur, the state's funding through the MCSAP grant could be suspended until such time that the incompatible law were modified to bring the state in compliance with federal regulations.

The MCSAP program has experienced success in the encouragement of safe operation of motor carriers and is supported by the industry that is subject to the regulations.

We remain available to address any questions or concerns you may have.

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KANSAS

KANSAS DENTAL BOARD

KATHLEEN SEBELIUS, GOVERNOR

Testimony re: substitute **HB 2618**
Senate Judiciary Committee
Presented by Betty Wright
March 13, 2008

Chairman and Members of the Committee:

My name is Betty Wright, and I am the Executive Director of the Kansas Dental Board. The Board consists of nine members: six dentists, two hygienists and one public member. The mission of the Dental Board is to protect the public through licensure and regulation of the dental profession.

The Kansas Dental Board opposes changes in the Kansas Administrative Procedures act that deny the board the ability to adjudicate its' own hearings. Although the Board voluntarily uses the Office of Administrative Hearings for evidentiary hearings, the board normally hears new licensure cases, in which the board had discretion to review negative information regarding new licensees. The bill presented would remove this option for the Dental Board. The Board opposes this bill.

I will be glad to address your questions.

Sincerely,

Betty Wright

Betty Wright
Executive Director
Kansas State Dental Board.

Senate Judiciary
3-13-08
Attachment 3.2

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on Sub. HB 2618
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
March 13, 2008

The Department of Corrections opposes Substitute HB 2618. HB 2618 is opposed by the Department because it would require the Department to conduct its administrative hearings regarding inmate discipline, segregation, mental health transfers, forcible administration of psychotropic medications, and release revocations pursuant to the Kansas Administrative Procedure Act. Additionally, the Department's interpretation of federal law would have to conform to the least restrictive interpretation of federal law adopted by any other state.

Virtually every aspect of the Department's management of inmates and releasees is governed by federal law. The federal Civil Rights Act, 42 U.S.C. § 1983, requires state corrections officials to comply with the United States Constitution, federal statutes and treaties. The interpretation and adjudication of federal law is provided by 94 federal District Courts and 12 Circuit Courts of Appeal throughout the nation. The multitude of federal jurisdictions can give rise to widely differing interpretations of federal law causing vastly different policies and regulations being adopted by state correctional departments.

Federal law interpreted and applied by the federal courts relative to correctional operations include 1st Amendment issues pertaining to religion and the regulation of publications and other communications; 4th Amendment issues of search and seizure, 5th Amendment issues pertaining to self incrimination and due process, 8th Amendment issues pertaining to conditions of confinement including medical care, health and safety as well as federal statutory provisions such as the Prison Litigation Reform Act and the Religious Land Use and Institutionalized Persons Act. Due to the wide variety of federal law applicable to correctional operations and the diverse courts called upon to interpret and apply federal law, conflicting judicial decisions and correctional policies arise.

The Kansas Department of Corrections utilizes its connections with other state correctional departments, national correctional organizations, and federal agencies such as the National Institute of Corrections to adopt the best practices employed throughout the nation. However, the Kansas Department of Corrections also embraces the role of being a national leader in the

corrections field when it believes that it should adopt polices for a more effective and efficient management of offenders for the protection of Kansans. The Kansas Department of Corrections leadership role in the field of corrections despite less restrictive polices of other states and the Federal Bureau of Prisons was evident in the Department's adoption of inmate privileges and incentives and application of those policies to sex offenders needing sex offender treatment. Kansas was at the forefront in requiring sex offenders to participate in treatment and admit responsibility for their deviant behavior without a grant of immunity from prosecution. The Department's policies were upheld by the United States Supreme Court despite the Federal Bureau of Prisons having a less restrictive approach.

Federal Courts have in the past interpreted federal law as requiring less restrictive rules providing for "erotic" material reading rooms in prisons for non sex offender inmates and payment of federal minimum wages to inmates pursuant to the Fair Labor Standards Act. The Kansas Department of Corrections believes such less restrictive rules are unacceptable and inappropriate for Kansas correctional facilities and would oppose such interpretations in litigation in any court having jurisdiction over Kansas correctional facilities.

Various state correction departments have different rules regarding the length of time an inmate may be held in disciplinary segregation. Some state correctional departments permit conjugal visits. Again, the Kansas Department of Corrections believes that it should be able to evaluate such operations in light of its needs and experience rather than adoption of a less restrictive measure adopted by another state.

The Department also opposes HB 2618 regarding state agencies and boards falling within the scope of the bill. Under current law, the hearings conducted by the Department and the Kansas Parole Board do not fall within the purview of the Administrative Procedure Act. HB 2618 would require the Department and the Parole Board to conduct their hearings pursuant to the Administrative Procedure Act. HB 2618 defines the scope of agencies and boards covered as those defined by K.S.A. 77-502 which includes all state agencies, while deleting limiting language on page 4 of the bill which under current law restricts application of the Administrative Procedure Act to hearings conducted pursuant to the Kansas Administrative Procedure Act. HB 2618 would require the thousands of hearings conducted annually by the Department to be conducted pursuant to the Administrative Procedure Act using hearing officers from the Office of Administrative Hearings. The cost of utilizing hearing officers from the Office of Administrative Hearings for all of the Department's disciplinary, administrative segregation, mental health transfers, medication hearings and supervision revocation hearings would be prohibitive.

KANSAS
DEPARTMENT ON AGING

Kathleen Sebelius, Governor
Kathy Greenlee, Secretary

www.agingkansas.org

Testimony on Substitute for House Bill 2618

Senate Committee on Judiciary

Joann E. Corpstein, Chief Counsel
Kansas Department on Aging

March 13, 2008

Chairman and members of the Committee, my name is Joann Corpstein, Chief Counsel for the Kansas Department on Aging (KDOA). Thank you for the opportunity to appear before you today regarding Substitute for House Bill 2618.

New Section 1 of this bill proposes the adoption of new legislation that would require a Kansas state agency, when interpreting or enforcing a federal regulation, statute or a national building or fire code, to apply a less restrictive interpretation when state officials in other states interpret the federal regulation, statute or code less restrictively, unless the less restrictive interpretation conflicts with Kansas statute, regulation, local ordinance or resolution.

KDOA is responsible for several federal programs such as the Medicare and Medicaid survey and certification of nursing homes, the nursing home reimbursement program, the home and community based frail elderly waiver, and PACE programs. These programs consist of literally hundreds of federal regulations and statutes. KDOA routinely interprets and enforces these federal regulations and statutes. A nationwide comparative analysis would need to be undertaken before decisions could be made or actions taken. Such analysis would be time consuming, expensive and unnecessarily cause a delay in routine decisions and actions.

This raises the basic question of who qualifies as a "state official". Is a nurse surveyor in another state a "state official"? What qualifies as another state's "interpretation"? Are we to consider published policy issuance and does it include state regulations as well? What guidance are we to use in determining what is "less restrictive"? Are we expected to make frequent open records requests of all other states to see if they have an "interpretation" on a federal regulation or statute? Knowing who qualifies as a "state official" of another state; what qualifies as an "interpretation" and what "less restrictive" means is imperative since Section 2 of this bill at lines 38 and 39, there is a provision that allows a reviewing district court to receive evidence on issues regarding "interpretations in other states when a party is claiming the application of section 1 . . .".

New Section 1 implies that any other state's "less restrictive" "interpretation" of federal regulations and statutes is always best for Kansas. When interpreting, enforcing or otherwise applying federal statutes and regulations KDOA should first look to the statutes and regulations themselves and then to the interpretive guidance issued by the federal oversight agency for the Medicaid and Medicare program, U. S. Health and Human Services, Centers for Medicare and Medicaid (CMS) and then apply them to the specific set of facts before us.

In conclusion, KDOA requests the Committee to consider removal of New Section 1 and Lines 38 and 39 from Section 2.

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Senate Judiciary
3-13-08
Attachment 34

Kansas Department of

Social and Rehabilitation Services

Don Jordan, Secretary

Senate Judiciary Committee
March 13, 2008

Substitute for House Bill No. 2618

Legal Division

John Badger, General Counsel

For Additional Information Contact:
Patrick Woods, Director of Governmental Affairs
Docking State Office Building, 6th Floor North
(785) 296-3271

Senate Judiciary
3-13-08
Attachment 35

Substitute for House Bill No. 2618

Senate Judiciary Committee
March 13, 2008

Chairman Vratil and members of the Committee, thank you for the opportunity to present written testimony on Substitute for House Bill No. 2618.

SRS has concerns about New Section 1 of this bill, particularly with regard to how it would be interpreted and implemented. A literal reading of the language in this section would appear to require an initial comprehensive review of all other states' interpretations of federal statutes, regulations, national building codes and fire codes in order to determine if they are more or less restrictive than the interpretations Kansas is using. This same type of review would then likely have to continue on an ongoing basis in order to keep abreast of constantly changing federal laws, regulations and codes, and/or changes in how other states interpret them.

These reviews would be made even more complex because of the difficulty in determining specifically what is meant by "less restrictive interpretation" and "interpreted less restrictively." In an agency such as SRS, most regulations and policies are aimed at establishing eligibility requirements for various types of public assistance. A less restrictive interpretation could well mean a liberalization or lessening of eligibility requirements which may result in increases in the number of individuals eligible for public assistance and other services, as well as increases in the dollar amounts they receive. This could potentially result in a significant increase in budgetary expenditures.

Even if thorough reviews of how other states are interpreting federal laws, regulations and codes are conducted initially and on an ongoing basis, Kansas policies would always be subject to challenge. If something is missed in one of these reviews, or another state changes its interpretation before Kansas can react to modify its policy, the Kansas policy could be determined to be invalid and forced to change. Given this ongoing uncertainty, it would be difficult to plan and budget appropriately even in the short term.

For these reasons, it is respectfully requested that New Section 1 be removed from Substitute for House Bill No. 2618.

Thank you for your consideration.

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