

## CHAPTER 147

Substitute for SENATE BILL No. 296

AN ACT relating to the Kansas department of agriculture; transferring powers and duties of the secretary of the department of health and environment to the secretary of agriculture; amending K.S.A. 65-688 and 74-560 and K.S.A. 2003 Supp. 74-567 and repealing the existing sections.

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

New Section 1. On and after October 1, 2004, the Kansas department of agriculture shall succeed to whatever right, title or interest the department of health and environment has acquired in any real property in this state concerning the functions transferred by this act or by 2004 Executive Reorganization Order No. 32, and the authority shall hold the same for and in the name of the state of Kansas. On and after October 1, 2004, whenever any statute, contract, deed or other document concerns the power or authority of the department of health and environment or the secretary of the department of health and environment concerning the functions transferred by this act or by 2004 Executive Reorganization Order No. 32 to acquire, hold or dispose of real property or any interest therein, the Kansas department of agriculture shall succeed to such power or authority.

New Sec. 2. Except as otherwise provided in this act, on October 1, 2004, officers and employees who, immediately prior to such date, were engaged in the performance of powers, duties or functions of the department of health and environment concerning food and food service which are transferred by this act or by 2004 Executive Reorganization Order No. 32, or who become a part of the Kansas department of agriculture, or the powers, duties and functions of which are transferred to the Kansas department of agriculture, and who, in the opinion of the secretary of the Kansas department of agriculture, are necessary to perform the powers, duties and functions of the Kansas department of agriculture, shall be transferred to, and shall become officers and employees of the Kansas department of agriculture.

New Sec. 3. On and after October 1, 2004, when any conflict arises as to the disposition of any power, function or duty or the unexpended balance of any appropriation as a result of any abolition, transfer, attachment or change made by or under authority of this act, such conflict shall be resolved by the governor, whose decision shall be final.

New Sec. 4. (a) On and after October 1, 2004, the Kansas department of agriculture shall serve as custodian for all agency records as defined by the Kansas open records act, related to those sections of chapter 36, article 5 and chapter 65, article 6, from which authority is transferred from the secretary of health and environment to the secretary of agriculture. The department of health and environment shall continue to serve as custodian as defined by the Kansas open records act for all agency records related to chapter 36, article 5 and chapter 65, article 6 generated prior to October 1, 2004. A request for records generated prior to October 1, 2004, pursuant to the Kansas open records act may be made to the Kansas department of agriculture and it will be forwarded to the department of health and environment upon receipt.

(b) The department of health and environment will immediately make available to the Kansas department of agriculture upon request any records, memoranda, writings, entries, prints, representations or combinations thereof of any act, transaction, occurrence or event of the department of health and environment related to those functions transferred to the secretary of agriculture.

New Sec. 5. (a) The balances of all funds or accounts thereof appropriated or reappropriated for the department of health and environment relating to the powers, duties and functions transferred by this act are hereby transferred within the state treasury to the Kansas department of agriculture and shall be used only for the purpose for which the appropriation was originally made. On and after October 1, 2004, all such balances shall be deposited in the food safety fee fund and may be used to carry out the responsibilities and duties of the division of food safety of the Kansas department of agriculture, as established by this act.

(b) There is hereby created the food safety fee fund. The Kansas department of agriculture shall remit all moneys received by or for it from

fees, charges or penalties to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the food safety fee fund. All expenditures from the food safety fee fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary of agriculture or by a person or persons designated by the secretary.

Sec. 6. K.S.A. 65-688 is hereby amended to read as follows: 65-688.

(a) As used in this section and K.S.A. 65-689, and amendments thereto:

(1) "Retail food store" means any establishment or section of an establishment where food and food products are offered to the consumer and intended for off-premises consumption. The term includes delicatessens that offer prepared food in bulk quantities only. The term does not include roadside markets that offer only fresh fruits and vegetables for sale, food service establishments or food and beverage vending machines, ~~or any plant which is registered by the department of agriculture under article 7 of chapter 65 of the Kansas Statutes Annotated or which is licensed by the department of agriculture under article 6a of chapter 65 of the Kansas Statutes Annotated.~~

(2) "Food processing plant" means a commercial operation that manufactures, packages, labels or stores food for human consumption and does not provide food directly to the consumer. "Food processing plant" shall not include any operation or individual beekeeper that produces or stores honey who does not process or offer the honey for sale at retail, ~~or any plant which is registered by the department of agriculture under article 7 of chapter 65 of the Kansas Statutes Annotated or which is licensed by the department of agriculture under article 6a of chapter 65 of the Kansas Statutes Annotated.~~

(3) "Food" means a raw, cooked or processed edible substance, ice, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption or chewing gum.

(4) "Secretary" means the secretary of ~~health and environment~~ agriculture.

(b) In order to reimburse the state of Kansas for inspections by the secretary of ~~health and environment~~ agriculture of retail food stores and food processing plants, the secretary of ~~health and environment~~ agriculture shall adopt rules and regulations establishing a graduated inspection fee schedule to cover all of the cost of inspection of retail food stores and food processing plants which shall not exceed \$200 per calendar year for each retail food store and food processing plant location. Whenever the secretary determines that the total amount of revenue derived from the fees collected pursuant to this section are insufficient to carry out the purposes for which the fees are collected, the secretary may amend such rules and regulations to increase the amount of the fee or fees, except that the amount of any fee shall not exceed the maximum amount authorized by this subsection. Whenever the amount of fees collected pursuant to this subsection provides revenue in excess of the amount necessary to carry out the purposes for which such fees are collected, it shall be the duty of the secretary to decrease the amount of the fees prescribed for retail food stores or food processing plants by amending the rules and regulations which fix the fees, as the case may be.

(c) All moneys received as fees under this section shall be remitted to the state treasurer at least monthly. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the food ~~inspection~~ safety fee fund.

(d) The secretary of ~~health and environment~~ agriculture shall adopt rules and regulations necessary to carry out the provisions of this section.

New Sec. 7. The secretary of agriculture and the secretary of health and environment shall provide for a mechanism for ongoing communication and access between the division of food safety, as established by this act, and the bureau of epidemiology at the department of health and environment. In exercising their respective authorities under K.S.A. 36-501 et seq., and amendments thereto, the secretary of agriculture and the secretary of health and environment shall apply consistent standards, policies, protocols and procedures in the licensing, inspection and regulation of food service establishments, taking into account the relative risk posed by such establishments to public health and food safety.

New Sec. 8. (a) There is hereby established within and as a part of

the Kansas department of agriculture, the division of food safety. The secretary of agriculture shall appoint a director of such division and such director shall be in the classified service of the Kansas civil service act.

(b) The secretary of agriculture may organize the division of food safety in the manner the secretary deems most efficient, so long as the same is not in conflict with the provisions of this act or with the provisions of law, and the secretary may establish policies governing the transaction of business of the division of food safety within the department.

Sec. 9. K.S.A. 2003 Supp. 74-567 is hereby amended to read as follows: 74-567. (a) The state board of agriculture shall have such powers, duties and functions as prescribed by this section. The board shall serve in an advisory capacity to the governor and the secretary to review and make recommendations on department legislative initiatives and proposed rules and regulations or proposed revised rules and regulations prior to the submission of such rules and regulations to the secretary of administration pursuant to K.S.A. 77-420, and amendments thereto, other than rules and regulations pertaining to personnel matters of the department ~~and~~ rules and regulations of the division of water resources *and rules and regulations of the division of food safety*. The board shall not have any powers, duties or functions concerning the day-to-day operations of the *Kansas* department of agriculture.

(b) The board shall serve in an advisory capacity to the agriculture products development division of the department of commerce. The board shall advise the division on issues and concerns relating to agriculture products development and marketing.

(c) The agriculture products development division of the department of commerce shall report to the board, at not less than two meetings of such board each year, on the activities and functions of the division.

New Sec. 10. (a) The Kansas department of agriculture shall create a statistically based random selection of not less than 1,000 retail food stores which shall be inspected, documented and evaluated as a transferred programs baseline. The department shall include the results of the baseline inspections in the report required on January 31, 2006, in section 11, and amendments thereto.

(b) On February 1, 2005, the Kansas department of agriculture shall report to the legislature the status of the baseline inspection program using 359 randomly selected retail food stores from subsection (a).

New Sec. 11. Not later than January 31, 2005, and January 31, 2006, the Kansas department of agriculture shall report to the house and senate committees on agriculture on the status of the transition. Such report shall be prepared in cooperation with the department of health and environment. The report shall include the steps taken to ensure that food safety resources are targeted at identifying, preventing and eliminating those concerns that constitute the greatest risk to public health and food safety. The report shall also include a description of what steps have been taken to engage stakeholders in the transition and in deciding what actions would tend to improve food safety.

New Sec. 12. (a) Any person or entity who shall violate any of the provisions of this act and amendments thereto or the rules and regulations adopted, may incur a civil penalty in an amount not more than \$1,000 per violation, and in the case of a continuing violation every day such violation continues may be deemed a separate violation. Such civil penalty may be assessed in addition to any other penalty provided by law. Any civil penalty assessed pursuant to this subsection is subject to review in accordance with the act for judicial review and civil enforcement of agency actions.

(b) Any person or entity who shall violate any of the provisions of this act and amendments thereto or the rules and regulations adopted, in an intentional and reckless manner shall be guilty of a class A, nonperson misdemeanor.

(c) Any food misbranded or adulterated or containing or suspected of containing any substance or substances injurious to public health or which is offered or exposed for sale in violation of any of the provisions of this act and amendments thereto shall be subject to seizure in place until such time that the final disposition of the food has been determined by sampling and analysis. Within 30 days of seizure in place, upon verification that the suspected food was misbranded, adulterated or contains a substance or substances that may be injurious to public health the secretary of agriculture shall issue an order establishing measures to prevent

further contamination or the threat to public health. The opportunity for hearing pursuant to the Kansas administrative procedure act shall be provided upon issuance of the order. The secretary of agriculture may order the destruction of contaminated food if no alternative assures that further contamination of health hazards are averted, and may be imposed in addition to any other penalty established by law. The district courts of the state of Kansas shall have jurisdiction to restrain violations of this act by injunction.

New Sec. 13. The secretary of agriculture is hereby authorized and empowered to contract with the governing body of any county for the enforcement of all or any portion of the rules and regulations established under this act. Any county entering into a contract with the secretary to enforce such rules and regulations shall act as an agent of the secretary in carrying out such duties. Any inspection of any premises by officers, employees or agents of any such county, and any notice of noncompliance issued as a result of any such inspection, shall have the same force and effect as if such had been done by the secretary. For the purposes of carrying out the provisions of this act, the secretary of agriculture or the secretary's agent or the county or district attorney or their agents may enter any premises at any reasonable time, in order:

- (a) To have access for the purpose of inspecting any premises, products or equipment subject to this act; or
- (b) to inspect or sample food actually or reported to be adulterated or a threat to public health; or
- (c) to inspect or investigate complaints of violations of this act; or
- (d) to sample products.

Should the secretary of agriculture, the secretary's agent or the county or district attorney or their agents be denied access to any premises where such access was sought for the purposes authorized, the secretary of agriculture or the county or district attorney may apply to any court of competent jurisdiction for a search warrant authorizing access to such premises for such purposes. The court may upon such application, issue the search warrant for the purposes requested.

The enforcement of the criminal provisions of this act shall be the duty of, and shall be implemented by, the county or district attorneys of the various counties or districts. In the event a county or district attorney refuses to act, the attorney general shall so act. The secretary of agriculture is charged with the duty of enforcing all other provisions of this act.

New Sec. 14. (a) The secretary of agriculture may deny, suspend, revoke or modify the provisions of any license issued under this act, if the secretary finds, after notice and hearing, that the applicant or licensee has:

- (1) Been convicted of or pleaded guilty to a violation of this act or any rule and regulation promulgated thereunder;
- (2) failed to comply with any provision or requirement of this act or any rule and regulation adopted thereunder;
- (3) interfered with or prevented the secretary or any authorized representative of the secretary from the performance of that person's job duties regarding any inspection or the administration of the provisions of this act; or

(4) denied the secretary or any authorized representative of the secretary access to any premises required to be inspected under the provisions of this act.

(b) Before any license shall be suspended, modified, revoked or denied renewal, the secretary shall inform the applicant or licensee of the date and place of hearing upon such proposed revocation, denial or suspension.

(c) The licensee or applicant may appeal from the decision and order, in accordance with provisions of the act for judicial review and civil enforcement of agency actions.

Sec. 15. K.S.A. 74-560 is hereby amended to read as follows: 74-560. (a) On and after the effective date of this act, in order to reorganize the administration, planning and regulation of the state's agriculture industry there is hereby established within the executive branch of government the Kansas department of agriculture, which shall be administered under the direction and supervision of a secretary of agriculture.

(b) ~~The state board of agriculture, established pursuant to K.S.A. 74-562, shall nominate three individuals to the governor for the appointment as secretary of agriculture. The governor either shall select and appoint~~

~~a person nominated to be secretary or shall reject the nominations and request the board to nominate three new individuals for the appointment as secretary. Upon receipt of any such request for the nomination of three new individuals, the board shall nominate three new individuals for the appointment as secretary in the same manner~~ *The secretary shall be appointed by the governor.* The ~~nominees~~ *secretary* shall have a demonstrated executive and administrative ability to discharge the duties of the office of secretary. Every appointed secretary of agriculture shall be appointed subject to confirmation by the senate as provided in K.S.A. 75-4315b, and amendments thereto. The secretary shall be a member of the governor's cabinet. The secretary shall serve at the pleasure of the governor. The secretary shall be in the unclassified service under the Kansas civil service act and shall receive an annual salary to be fixed by the governor. The acting secretary of agriculture who is serving as the secretary on the effective date of this act shall be the secretary of agriculture as established by this act, shall serve at the pleasure of the governor and shall be subject to confirmation by the senate as provided in K.S.A. 75-4315b, and amendments thereto. Any action of the Senate taken prior to the effective date of this act which confirms an individual as the secretary of agriculture is hereby validated and shall constitute confirmation by the Senate of such individual as secretary of agriculture under this section.

(c) The secretary shall organize an annual public informational meeting. The meeting shall take place in each congressional district on a rotating basis.

(d) The provisions of the Kansas governmental operations accountability law apply to the Kansas department of agriculture, and the department is subject to audit, review and evaluation under such law.

New Sec. 16. Notwithstanding the provisions of K.S.A. 77-514, and amendments thereto, on and after July 1, 2004, with respect to hearings pursuant to K.S.A. 65-6a18 et seq., and amendments thereto, before the secretary of agriculture in accordance with the Kansas administrative procedure act, a hearing officer from the office of administrative hearings shall be the presiding officer unless the party requests that the matter, for which a hearing has been scheduled or for which a right to a hearing exists, be heard by a hearing officer appointed by the secretary.

Sec. 17. K.S.A. 65-688 and 74-560 and K.S.A. 2003 Supp. 74-567 are hereby repealed.

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

Approved May 17, 2004.

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