

SESSION OF 2009

**CONFERENCE COMMITTEE REPORT BRIEF  
SENATE BILL NO. 87**

As Agreed to March 30, 2009

**Brief\***

SB 87, as amended, would amend the Kansas Administrative Procedure Act (KAPA) and the Act for Judicial Review and Civil Enforcement of Agency Actions, commonly known as the Kansas Judicial Review Act (KJRA).

The bill would:

- Add a new section to KAPA to authorize the presiding officer to omit the name, address, or other contact information of an alleged victim of crime from any required notice, order, or public record when it is alleged that the health, safety or liberty of the alleged victim would be jeopardized by the disclosure of such information;
- Amend the Kansas Open Records Act to add to an existing exception the provision that a public agency would not be required to disclose the name, address, or other contact information of alleged victims of crime;
- Add a new provision to clarify the computation of time in KAPA actions;
- Delete the provision that changes the burden of proof for disputed issues of fact in occupational or professional license disciplinary proceedings;
- Exempt the State Court of Tax Appeals from KAPA;

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- Add a new provision to prohibit a person who has participated in an investigatory or prosecutorial capacity in connection with a proceeding, or who is supervised or directed by such a person, from acting as presiding officer or providing confidential legal or technical advice to a presiding officer in that proceeding;
- Authorize the presiding officer to determine the manner of service of process in the proceeding;
- Add a new provision to clarify that if the presiding officer is the agency head, the default order is a final order. If the presiding officer is not the agency head, the default order is an initial order;
- Clarify that a presiding officer may close parts of a hearing pursuant to a provision of law requiring confidentiality or expressly authorizing closure; and would clarify that any hearing under KAPA is not a meeting pursuant to the Kansas Open Meetings Act;
- Expand the prohibition on *ex parte* communications to any person who has served in an investigatory or prosecutorial capacity. *Ex parte* communications are prohibited communications where a party or witness to the action is communicating with the presiding officer during the pendency of the action without notice and opportunity for all parties to participate in the communication;
- Add a provision to clarify that the agency head is required to give due regard to the presiding officer's credibility determinations and is required to consider the record when reviewing findings of fact in the presiding officer's initial order;
- Require written findings of fact and conclusions of law in an order on reconsideration that alters a prior order;
- Clarify the agency would retain jurisdiction to consider a timely petition for reconsideration in a multiple party action

where one party files a petition for judicial review;

- Clarify that confidential internal communications would not be part of the official state agency record, while oral or written statements allowed by the presiding officer are part of the official state agency record;
- Clarify that a state agency may use summary proceedings if the agency, based on the investigation beyond the receipt of the allegations, believes in good faith that the allegations will be supported to the applicable standard of proof. The alleged failure to meet the standard of proof would not be subject to immediate judicial review or would not invalidate any later agency action.
- Provide that an order for summary proceeding would not take effect until after the time for requesting a hearing has expired;
- Clarify that the burden of proof remains with the party who sought the summary order and does not shift to the party requesting a hearing to prove that the summary order was entered in error;
- Change the name of the Act for Judicial Review and Civil Enforcement of Agency Actions to the Kansas Judicial Review Act (KJRA);
- Clarify that KJRA does not apply to agency actions concerning the civil commitment of sexually violent predators;
- Add a provision to authorize a court to relieve a petitioner of the requirement to exhaust administrative remedies prior to seeking judicial review if administrative remedies are inadequate or would result in irreparable harm;
- Prevent dismissal of an appeal for lack of jurisdiction when there is a defect in the petition for judicial review and would authorize such petition to be amended to include

the omitted information;

- Provide that substantial compliance with service requirements is sufficient service regarding a petition for judicial review;
- Authorize a party to raise an issue arising from agency action which the party could not reasonably know before the filing of the petition for judicial review;
- Add a provision that would require the reviewing court to consider the whole record; and
- Make technical amendments.

### **Conference Committee Action**

The Conference Committee adopted the House amendments to the bill with the following changes:

- Delete the provision that was intended to clarify that the burden of proof would be “clear and convincing evidence” for disputed issues and facts in an action to revoke, suspend, modify, annul, withdraw, amend or refuse to renew an individual’s occupational and professional license, but the increased burden of proof would not apply to emergency proceedings to protect the public interest;
- Add language to clarify that a state agency may use summary proceedings if the agency, based on the investigation beyond the receipt of the allegations, believes in good faith that the allegations will be supported to the applicable standard of proof. The alleged failure to meet the standard of proof would not be subject to immediate judicial review or would not invalidate any later agency action; and
- Add language to provide that an order for summary proceeding would not take effect until after the time for

requesting a hearing has expired.

## **Background**

The bill, as introduced, was recommended by the Kansas Judicial Council's Administrative Procedure Advisory Committee after a lengthy study. According to the Judicial Council, the bill is intended to strengthen the protections for fair and impartial adjudications without unduly sacrificing agency expertise or interfering with agency policy making responsibilities.

The proponents of the bill, as introduced, who presented testimony at the Senate Committee hearing were Hon. Steve Leben, Judge of the Court of Appeals on behalf of the Judicial Council Administrative Procedure Advisory Committee; Sandy Barnett, Executive Director, Kansas Coalition Against Sexual and Domestic Violence; and Robert Waller, Executive Director, Kansas Board of Emergency Medical Services.

The opponent of the bill, as introduced, who presented testimony at the Senate Committee hearing was Scott Hesse, Legal Counsel, Kansas Board of Healing Arts.

Trevor Wohlford, Kansas Court of Tax Appeals, provided neutral testimony to the Senate Committee. He asked the Committee to exempt the Kansas Court of Tax Appeals from the provision of the bill that requires the presiding officer who is not the "agency head" be staffed by the Office of Administrative Hearings.

The Senate Committee on Judiciary amended the bill to:

- Narrow the provisions of summary proceedings to authorize a state agency to use summary proceedings if:
  - The monetary amount at issue is not more than \$100;
  - The issue is denial of an application after the applicant has abandoned the application;

- The issue is denial of an application if the applicant has an opportunity for administrative review;
  - The matter is resolved solely on the basis of inspections, examinations, or tests; or
  - The issue has only trivial potential impact upon the affected parties.
- Amend the Kansas Open Records Act to add to an existing exception the provision that a public agency would not be required to disclose the name, address, or other contact information of an alleged victim of crime without requiring an allegation that disclosure of such information may jeopardize the health, safety, or liberty of the alleged victim; and
  - Make a technical amendment.

The House Judiciary Committee amended the bill to do the following:

- Exempt the State Court of Tax Appeals;
- Exempt the Board of Healing Arts from the clear and convincing burden of proof;
- Delete the summary proceedings provision;
- Provide that an order for summary proceeding could only take effect after the time for requesting a hearing has expired; and
- Make technical and clarifying changes.

According to the fiscal note on the bill, as introduced, SB 87 contains administrative and technical changes that would

have no fiscal effect.

KAPA; KJRA