

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 A.M. on March 14, 2006 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Audrey Dunkel, Kansas Legislative Research Department
Kathie Sparks, Kansas Legislative Research Department
Helen Pedigo, Revisor of Statutes
Jackie Lunn, Committee Secretary

Conferees appearing before the committee:

Others attending:

See attached list.

Chairperson Brownlee stated the Committee would be taking action on:

HB 2658-Gift certificates, restrictions

SB 516-Fairness in public construction contract act

HB 2772-Employment relationship between owner-operators and licensed motor carrier operators for employment security law purposes

SB 531-Misclassification of employees as independent contractors to avoid withholding income tax; investigations by departments of revenue and labor.

Chairperson Brownlee called the Committee's attention to the **HB 2658**. The Chair introduced Brian Brown, Deputy Attorney General, to explain the impact of putting something in the the Kansas Consumer Protection Act. Mr. Brown stated under the notes from 1973 on K.S.A. 56-36 which is the enforcement section of the KCPA, The notes read the purpose of this division is to encourage enforcement of the act by a consumer acting as his own private attorney general. It enables consumers to bring their own action. In 1973 the penalty was set at \$2,000.00. He believes any consumer acting on their own, any county attorney, or any assistant attorney general could bring an action under the KCPA for a violation of gift certificate act and get up to a \$10,000.00 fine today. The actual amount would be up to the discretion of the judge. There is a provision where the losing party pays all attorney's fees.

Chairperson Brownlee opened the discussion on **HB 2658** with the Committee. Senator Emler entered the discussion referring the Committee to the Proposed Amendment dated March 13, 2006. (Attachment 1) Senator Emler stated on Page 2, the new (g) is language he asked Helen to include as an option for the penalty. He also stated, after hearing Deputy Attorney General Brown the penalty under the KCPA would also address his concerns with the bill. The discussion continued on the penalty for violation of the bill.

Senator Jordan made a motion to put this bill under the KCPA. Senator Kelly seconded. Motion carried.

The discussion continued concerning the award of attorney fees. Senator Emler expressed that the \$10,000.00 was too high and another option would be leave it up to the Court to decide. He stated his issue with the attorney fees was taken care of when the bill was put under the KCPA.

Senator Kelly made a motion to leave it up to the Courts to decide on the amount of penalty and not add the additional language in the new (g) to the amendment. Seconded by Senator Reitz. Motion carried.

Senator Emler made a motion to move the bill out favorable as a substitute bill. Senator Reitz seconded.

Senator Wysesong asked that Representative Huff give his opinion on passing this bill out as a substitute bill.

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Representative Huff stated he has worked hard on the bill and would like for his name to be on it. There was discussion with the Committee regarding making it a substitute bill.

Senator Brownlee called for a vote on the motion to pass out favorably as a substitute bill. Motion failed.

Senator Jordan made a motion to pass the bill out favorably as amended. Senator Schodorf seconded. Motion carried.

Next Chairperson Brownlee called the Committee's attention to **SB 516**. Chairperson Brownlee stated that one of the remaining questions on the bill, deals with the heavy contractors, and referred the Committee to the Proposed Amendments; Actual and Conceptual Amendments dated March 13, 2006, (Attachment 2) and Exemption from Kansas Prompt Pay Act, dated March 13, 2006. (Attachment 3) Chairperson recognized Senator Jordan who stated in the Actual and Conceptual Amendments he preferred "Conceptual Option 1" over "Conceptual Option 2".

Senator Jordan made a motion to adopt option 1 on page 1 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. Senator Emler 2nd.

Chairperson Brownlee opened the floor for discussion on the motion. Senator Kelly entered into the discussion stating maybe they could leave the heavy constructors out of the bill this year and come back next year and look at the issue with new information and add them back in if need be. Senator Brownlee stated she felt if they left them out they would be unable to put them back in. Senator Brownlee also stated she had understood from Corey Peterson, Associated General Contractors of Kansas, his membership did not have a problem with leaving the heavy constructors in. Senator Barone entered into the discussion indicating maybe the heavy constructors should not be included. The discussion continued on the Federal law regulations. Senator Jordan stated that the intention is that any project that receives Federal money probably falls under Federal law and will be exempted from this act. The Committee discussed the differences between Option 1 and Option 2 in the proposed amendment.

Chairperson Brownlee called for a vote on the motion on the floor to adopt option 1 on page 1 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. Motion carried with one no vote from Senator Wysong.

Chairperson Brownlee called the Committee's attention to the Conceptual-Payment balloon on page 2 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. Chairperson Brownlee explained this is the issue of the 30 day payment and when there are extenuating circumstances it can be extended 15 more days, making payment due within 45 days.

Senator Kelley made a motion to adopt the balloon on the Conceptual-Payment on page 2 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. Senator Schodorf seconded. Motion carried.

Chairperson Brownlee called the Committee's attention to page 3 of the Proposed Amendment, Actual and Conceptual Amendments dated March 13, 2006. She called on Helen Pedigo from the Revisors Office to explain the Conceptual-Early In on page 3. Ms. Pedigo stated this was at the request of Senator Wysong and addresses the contractors that are early in on the job. Senator Wysong feels they should receive their money earlier. A discussion followed with the Committee. Ms. Pedigo stated this language came from Missouri statute. Senator Emler stated that he feels that (c) is open to interpretation and litigation. He suggest changes with the language to pin down who makes the determination.

Chairperson Brownlee made a motion to change language in (c) of the Conceptual-Early In for it to read: "Nothing in this act should prevent early release of retainage for early in and early out subcontractors if under the determination of the owner of the contract it is determined that the performance has been completed". Senator Barone seconded. Motion carried.

Chairperson Brownlee called the attention of the Committee to the Proposed Amendment, Exemption from

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Kansas Prompt Pay Act dated March 13, 2006. Ms. Pedigo explained the amendment stating section 8 applies to goods and services. Upon the conclusion of her explanation there was discussion with the committee regarding striking the language “any construction services” from section 8, (e). The Committee agreed that the language “any construction services” should not be stricken.

Senator Emler moved to adopt the Exemption for Prompt Pay Act amendment except not striking the language in Section 8, (e) any construction services. Senator Reitz seconded. Motion carried.

Senator Reitz made a motion to pass SB 516 out favorably as amended. Senator Emler seconded. Motion carried.

Chairperson Brownlee called the Committee’s attention to SB 531. Chairperson Brownlee called on Kathie Sparks from Legislative Research to review her memorandum regarding failing to pay Withholding and Unemployment Taxes by misclassification of employees which was requested at an earlier meeting by Senator Wagle. (Attachment 4) Ms. Sparks stated that the IRS can enforce penalties if an employer does not make required tax deposits on time, if the deposits are less than the required amount, or if the filer fails to use the Electronic Federal Tax Payment system when required. Penalties do not apply if any failure to make proper and timely deposit was due to reasonable cause and not willful neglect. She also stated the Kansas Department of Revenue can assess penalties and interest. Any person who with fraudulent intent fails to pay any tax or make, render, or sign any return or supply any information within the time required by or under the provision of the act, will be assessed a penalty plus interest. She also stated any person who willfully signs a fraudulent return will be guilty of a felony. She stated the Kansas Department of Labor has statutory authority for penalty and interest under the Employment Security Law. In closing Ms. Sparks stated there are already heavy penalties on the books for those who don’t pay withholding taxes knowingly and intentionally.

Upon the conclusion of Ms. Sparks explanation there was discussion with the Committee. The penalties were discussed and the procedures. Senator Wagle entered the discussion and believes there are plenty of laws and penalties on the books. The only thing she feels is needed with this bill is the option for the Department of Revenue to share information with the Department of Labor and work together investigating the fraudulent claims.

Chairperson Brownlee called the Committee’s attention to HB 2772 stating maybe the Committee could add language to this bill giving the Department of Revenue the permission to share information with the Department of Labor and investigate the cases together. There was further language to take some of the language from SB 531 into HB 2772. Secretary Wagon entered the discussion and stated the most important part of the bill is to be able for Department of Revenue to share information with the Department of Labor. Secretary Wagon further stated they could do better investigations if they could share information. Secretary Garner entered the discussion stating the penalties are low and he would like the Committee to consider increasing them. Jim Bartle with the Department of Revenue entered the discussion stating that they have a problem getting their cases prosecuted and therefore don’t refer them anymore because they are not getting prosecuted. Secretary Wagon entered the discussing referring the Committee to the bill last year were the Department of Revenue asked for an Assistant Attorney General so they could prosecute these cases. She also stated, if you want to treat it as a crime you need someone to prosecute and the Department of Revenue does not have that ability. Chairperson Brownlee asked Secretary Garner to bring a recommendation on what their penalties should be increased to.

Chairperson Brownlee adjourned the meeting at 9:30 a.m. with the next scheduled meeting on March 21, 2006 at 8:30 a.m. in room 123S.