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TO: House Judiciary Committee

FROM: Kansas Judicial Council

DATE: January 14, 2016

RE: Judicial Council Testimony on HB 2289 – Written Only

In May 2015, Representative Barker asked the Judicial Council to study House Bill 2289, a bill relating to the administrative hearing process to suspend a driver's license for alcohol and drug test failures and test refusals. The Judicial Council referred the study to its Criminal Law Advisory Committee.

The Criminal Law Advisory Committee's report, which was approved by the Judicial Council on December 4, 2015, is attached.

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON HOUSE BILL 2289**

DECEMBER 4, 2015

In May 2015, Representative John Barker asked the Judicial Council to study House Bill 2289, a bill relating to the administrative hearing process to suspend a driver's license for alcohol and drug test failures and test refusals. The Council referred the study to its Criminal Law Advisory Committee.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Criminal Law Advisory Committee are:

Stephen E. Robison, Chair, Member of Fleeson, Gooing, Coulson, & Kitch, LLC and Member of the Kansas Judicial Council; Wichita

Sen. Terry Bruce, Kansas State Senator and Practicing Attorney; Hutchinson

Sal Intagliata, Criminal Defense Attorney; Wichita

Ed Klumpp, Kansas Association of Chiefs of Police, Kansas Sheriffs Association, and Kansas Peace Officers Association; Tecumseh

Patrick M. Lewis, Criminal Defense Attorney; Olathe

Prof. Joel Meinecke, Retired Attorney; Topeka

Steven L. Opat, Geary County Attorney; Junction City

Hon. Cheryl A. Rios, District Court Judge in the Third Judicial District; Topeka

Nicole Romine, Assistant Attorney General; Goodland

Rep. John Rubin, Kansas State Representative, Attorney, and Retired Federal Administrative Law Judge; Shawnee

John Settle, Pawnee County Attorney; Larned

Ann Swegle, Sedgwick County Deputy District Attorney; Wichita

Kirk Thompson, Director of Kansas Bureau of Investigation; Topeka

Ron Wurtz, Retired Public Defender (Federal and Kansas); Topeka

BACKGROUND

The purpose of House Bill 2289 was to correct perceived unfairness in the administrative hearing process for driver's license suspensions. First, the bill would add an item to the list of elements that must be included in the certification prepared by a law enforcement officer when a driver refuses or fails a breath or blood alcohol test. The new item would require the officer to certify that, prior to stopping a person operating or attempting to operate a vehicle, an officer had reasonable grounds to believe the person was committing or had committed a crime or traffic infraction or was involved in an accident involving property damage or injury.

The bill would also modify some aspects of the administrative hearing process. Under current law, a licensee or licensee's attorney is allowed to review any video or audio tape record made of events. HB 2289 would add police reports to the list of items that may be reviewed. The bill would also expand the scope of license suspension hearings to include whether the law enforcement officer had reasonable grounds for the initial stop, and in cases of a breath test failure, whether the testing equipment was reliable.

The bill was apparently introduced partly in response to two Kansas appellate court decisions. In the first decision, *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 176 P.3d 938 (2008), the Kansas Supreme Court considered whether a driver could challenge the legality of a traffic stop during an administrative license suspension hearing. The Court held that the statute containing an exclusive list of the issues that could be raised during the administrative hearing did not authorize consideration of whether reasonable suspicion existed to support the traffic stop. *Martin*, 285 Kan. at 631-32. While the driver had successfully challenged the stop at the district court level, and the Supreme Court agreed that the stop was unconstitutional, the Court also held that the exclusionary rule did not apply in administrative driver's license suspension proceedings, so it upheld the license suspension. *Martin*, 285 Kan. at 639, 646.

The second appellate court decision that prompted H.B. 2289 was *Manzano v. Kansas Dept. Revenue*, 50 Kan. App. 2d 263, 324 P.3d 321 (2014), a Court of Appeals case in which the fairness of the administrative license suspension hearing process came under fire. The *Manzano* court held that a driver's due process rights were violated by a "sham" administrative hearing that did not provide a meaningful opportunity to present evidence, explore issues, or preserve issues for de novo review in the district court. The court also held that, because the administrative hearing was so circumscribed that the driver's due process rights were violated, the district court had not abused its discretion by setting aside the driver's license suspension as a remedy. *Manzano*, 50 Kan. App. 2d at 264.

HB 2289 was referred to House Judiciary where it was initially set for hearing, but the hearing was cancelled.

METHOD OF STUDY

The Committee met three times during the fall of 2015, twice in person and once by conference call, to review HB 2289. The Committee also heard from John Shultz, an attorney representing the Kansas Department of Revenue, who provided a copy of the written testimony he had prepared in anticipation of the legislative hearing that was cancelled. A copy of the bill is attached, beginning at page 17.

COMMITTEE DISCUSSION

The Committee began by discussing the overall perception of fairness of the driver's license administrative hearing process conducted by the Kansas Department of Revenue. Pursuant to Kansas' implied consent statute, K.S.A. 8-1001, any person who operates or attempts to operate a vehicle in the state is deemed to have given consent for blood, breath, or urine testing to determine the presence of alcohol or drugs. A driver who fails or refuses a test will likely be served with a pink DC-27 form, which is the officer's certification and notice of suspension required under K.S.A. 8-1002. Unless an administrative hearing is requested within 14 days, the individual's license will be automatically suspended.

The administrative hearing process has been described as being unfair, and a recent Court of Appeals opinion went so far as to call the administrative hearing it was reviewing a "sham." *Manzano v. Kansas Dept. of Revenue*, 50 Kan. App. 2d 263, 324 P.3d 321 (2014). One aspect of the process that has been criticized is the lack of access to law enforcement incident reports. Not only does the driver have to request and pay for the hearing, the driver has the burden to disprove the evidence against him, while being denied access to the police reports outlining that evidence.

The Department of Revenue argues that there is adequate due process at administrative hearings. However, there is no dispute that individuals usually lose their driver's licenses at the conclusion of the administrative hearing, generally keeping the license only if there is a problem with the process, such as if the police officer is unable to attend the hearing or made a mistake in the paperwork. The licensee can appeal the findings made during the administrative hearing to a district court, but that is expensive and typically only benefits licensees who need to delay the process.

The Committee began review of HB 2289 by discussing the police report issue. K.S.A. 8-1020(f) currently allows the licensee to review and obtain a copy of any video or audio tape record that is available of the events on which the administrative action is based. (See p. 21, lines 6 – 15). HB 2289 amends the section to add that the licensee may also review and obtain a copy of the police report. The Committee agreed that this is a matter of fundamental fairness, and there is no adequate reason to withhold from the licensee the police report which contains the factual contentions the licensee has the burden to disprove. The licensee can receive the police reports through discovery in the criminal DUI case, but the criminal case is often not even

filed yet when the civil administrative hearing on the license suspension takes place. The Department of Revenue was not opposed to licensees having access to police reports, but was concerned that this addition to the statute created another opportunity for licensees to delay the administrative proceeding. The Committee did not find this concern sufficient to outweigh the essential fairness of allowing the licensee to see the police report prior to the hearing, particularly when the licensee has the burden of disproving the report's contents. The Committee recommends the amendments to K.S.A. 8-1020(f) as set forth in HB 2289.

The most significant amendments in HB 2289 would change existing law to provide licensees with a meaningful opportunity to challenge the legality of the traffic stop. In *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 176 P.3d 938 (2008), the Kansas Supreme Court held that the licensee could not raise the issue of the stop, even if it was unconstitutional, because the statute containing an exclusive list of the issues that could be raised during the administrative hearing did not authorize consideration of whether reasonable suspicion existed to support the traffic stop. *Martin*, 285 Kan. at 631-32. Although the *Martin* case held that the constitutional issue can still be raised during the administrative hearing to preserve the issue for an appeal to the district court, the ability to do so is rendered virtually meaningless by the court's refusal to apply the exclusionary rule if the stop is in fact determined to have been unlawful. It has been argued that the statutory omission, combined with the holdings in the *Martin* case, negate 4th amendment protections and allow law enforcement to make stops for any reason or no reason. Although there is no constitutional right to obtain a driver's license, once it has been obtained, the licensee has a property right in the license that cannot be taken away without due process. Critics of the current law and its interpretation in *Martin* argue that the laws of the state should not encourage, or even tolerate, law enforcement officers to act outside the law.

Some Committee members, even though they agreed that amendments were necessary to allow a licensee to raise the issue of an unlawful stop, had serious concerns about way in which the statutory omission was addressed in HB 2289. There are multiple amendments in the bill directed at this issue. K.S.A. 8-1002(a)(1) and (a)(2) set forth the required contents of the officer's certification in the case of a test refusal and a test failure, respectively. The bill would amend both subsections to include another item that the officer would now have to certify: that "prior to stopping the person operating or attempting to operate a vehicle, a law enforcement officer had reasonable grounds to suspect the person was committing or had committed a crime or traffic infraction, or was involved in an accident resulting in property damage or injury." (See p. 17, lines 26-30; and p. 18, lines 5-9). The bill would add the same language to expand the scope of hearing on a test refusal (See p. 21, lines 41-43), breath test failure (See p. 22, lines 24-26), or blood test failure. (See p. 23, lines 4-6). Finally, the bill expands the topics about which a law enforcement officer can be questioned during an administrative hearing on a license suspension by adding the words, "and the reasons for stopping the driver" to K.S.A. 8-1020(g). (See p. 21, line 23).

A majority of the Committee agreed with the Department of Revenue representative's argument that amending the law enforcement officer's certification under K.S.A. 8-1002(a)(1) and (a)(2) to incorporate a pre-stop requirement of a crime, traffic infraction, or accident could

reasonably be construed as preventing the administrative license suspension of a driver who was stopped as a result of a DUI check-lane, an officer's community caretaking function or as a result of a welfare check. HB 2289 could also be construed to prevent the suspension of driver's licenses of certain young adults because there is no criminal sanction for drivers aged 18 to 21 who are caught driving with an alcohol level of less than .08.

In addition, the Committee was not in favor of administrative hearing officers considering the constitutional question of whether the stop was lawful. Making that change in the current law could have a negative impact on the administrative process, which is designed to be, and should remain, relatively straightforward and time-efficient. It is reasonable to predict that the number of hearings requested would increase, as would the length of the hearings. The agency would likely have to hire more employees to avoid unacceptable delays. It was also an important factor to the Committee that the State does not have an attorney present in administrative hearings who can object to aggressive or inappropriate questioning of the law enforcement officer. Both sides should be properly represented in the tribunal deciding this important issue. The Committee determined that the constitutionality of a stop is a complex matter that is better suited to determination in the district court.

After reaching a consensus, although not unanimity, on several issues dealing with review of the vehicle stop in administrative license suspensions, the Committee considered how HB 2289 could be amended to reflect its conclusions. The Committee had determined that the law should be changed to provide for a meaningful opportunity to challenge the stop, that the lawfulness of the stop should be determined at the district court level and not at the administrative hearing, and that HB 2289's "reasonable grounds to suspect" language should not be used. After extensive discussion, the Committee agreed to strike HB 2289's proposed language in K.S.A. 8-1002(a)(1) and (a)(2), which deals with the required contents of the law enforcement officer's certification, and to propose instead a new certification requirement that the test refusal or test failure occurred pursuant to a lawful encounter by law enforcement. Defined essentially as any encounter allowed under the Kansas or U.S. Constitutions, this language would incorporate lane-checks, welfare checks, or any other contacts that result from law enforcement's basic community caretaking functions. (See pp. 8 and 9).

Because the Committee determined that the lawfulness of a stop should not be decided in the administrative hearing, the Committee recommends striking HB 2289's proposed additions to K.S.A. 8-1020(h)(1), (h)(2), and (h)(3), that would have expanded the scope of a hearing on a test refusal, a breath test failure, and a blood test failure to include determination of whether the officer had "reasonable grounds to suspect" the driver had committed a crime or traffic infraction or had been involved in an accident. (See p. 12, lines 41-43; p. 13, lines 24-26; and p. 14, lines 4-6). For the same reason, the Committee recommends striking HB 2289's proposed additional language in K.S.A. 8-1020(g), which would have expanded the topics about which a law enforcement officer can be questioned during an administrative hearing on a license suspension to include the reasons the driver was stopped. (See p. 12, line 23). The Committee also recommends adding language to K.S.A. 8-1020(p), which deals with the district court's review when an administrative decision is appealed, to clarify that it is the district court

that should determine whether law enforcement's encounter with the licensee was lawful. (See p. 15, line 43). Finally, because the district court on appeal may now be reviewing not only the agency action, but a constitutional issue not considered at the administrative hearing, the Committee recommends conforming amendments to K.S.A. 8-1020 (p) and (q). (See p. 16, lines 1-4).

Finally, HB 2289 amends K.S.A. 8-1020(h)(2)(D) by expanding the scope of the hearing when a person has failed a breath test to include the reliability of the testing equipment used. (See p. 22, line 15). Under current law, the scope of the hearing includes whether the testing equipment was certified by KDHE, whether the person who operated the testing equipment was certified by KDHE, and whether the testing procedures used substantially complied with procedures set out by KDHE, but it does not include whether the testing equipment was reliable. See K.S.A. 8-1020(h)(2)(D) through (F).

In *Barnett v. Kansas Dept. of Revenue*, 44 Kan. App. 2d 498, 501, 238 P.3d 324 (2010), the Court of Appeals held that the statutory list of issues that may be decided in an administrative driver's license suspension hearing found at K.S.A. 8-1020(h)(2)(D) does not authorize consideration of whether testing equipment was "improperly" certified. The court noted that, under a previous version of the statute, a licensee could challenge the reliability of the testing equipment, but that was no longer true under the current version.

The change in the statute striking reliability and replacing it with certification as an issue that can be raised took place in 2001 as one small piece of a comprehensive effort to amend a number of DUI laws. See L. 2001, ch. 200, §§ 1 and 13. Although the legislative history mostly addresses the other changes that were made at the time, especially as to provisions relating to ignition interlock devices, there was some indication in the legislative testimony that changes were being proposed to the administrative driver's license suspension hearing process to address complaints from law enforcement officers about those hearings having become too protracted and to save the state time and money.

While the Committee recognized that certification of testing equipment does not necessarily equate to reliability, the Committee found that adding reliability to the list of issues that could be raised would unduly expand administrative license suspension hearings. Furthermore, although KDHE only inspects and certifies the agencies that operate testing equipment on an annual basis, KDHE regulations require that testing equipment be checked weekly for quality control. See K.A.R. 28-32-9(b)(5) and (c). Given that the legislature made a policy decision in 2001 to strike reliability of the testing equipment from the list of issues that can be raised, the Committee saw no reason to recommend a reversal of that policy. Accordingly, the Committee recommends deleting the amendment at page 13, line 15.

CONCLUSION

The Committee found that some statutory amendments are needed to address the fairness of administrative driver's license suspension hearings. It agreed with two aspects of HB 2289: (1) as a matter of fundamental fairness, licensees should be allowed to obtain copies of police reports before an administrative driver's license suspension hearing, and (2) licensees should be allowed a meaningful opportunity to challenge the legality of a traffic stop, which the Committee determined should be decided by the district court and not the administrative hearing officer. As to the second point, the Committee believes that its proposed balloon amendments to HB 2289 (beginning at p. 8) will better accomplish the goal of allowing such challenges without unintended consequences.

Attachment I

Session of 2015

HOUSE BILL No. 2289

By Committee on Judiciary

2-10

1 AN ACT concerning driving; related to driving under the influence of
2 alcohol or drugs; test refusal or failure; suspension of license;
3 administrative hearing; procedure; amending K.S.A. 2014 Supp. 8-
4 1002 and 8-1020 and repealing the existing sections. 5

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

7 Section 1. K.S.A. 2014 Supp. 8-1002 is hereby amended to read as
8 follows: 8-1002. (a) Whenever a test is requested pursuant to this act and
9 results in either a test failure or test refusal, a law enforcement officer's
10 certification shall be prepared. If the person had been driving a
11 commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments
12 thereto, a separate certification pursuant to K.S.A. 8-2,145, and
13 amendments thereto, shall be prepared in addition to any certification
14 required by this section. The certification required by this section shall be
15 signed by one or more officers to certify:

16 (1) With regard to a test refusal, that: (A) There existed reasonable
17 grounds to believe the person was operating or attempting to operate a
18 vehicle while under the influence of alcohol or drugs, or both, or to believe
19 that the person had been driving a commercial motor vehicle, as defined in
20 K.S.A. 8-2,128, and amendments thereto, or is under 21 years of age while
21 having alcohol or other drugs in such person's system; (B) the person had
22 been placed under arrest, was in custody or had been involved in a vehicle
23 accident or collision; (C) a law enforcement officer had presented the
24 person with the oral and written notice required by K.S.A. 8-1001, and
25 amendments thereto; and (D) the person refused to submit to and complete
26 a test as requested by a law enforcement officer; and (E) ~~prior to stopping~~
27 ~~the person operating or attempting to operate a vehicle, a law~~
28 ~~enforcement officer had reasonable grounds to suspect the person was~~
29 ~~committing or had committed a crime or traffic infraction, or was involved~~
30 ~~in an accident resulting in property damage or injury.~~

31 (2) With regard to a test failure, that: (A) There existed reasonable
32 grounds to believe the person was operating a vehicle while under the
33 influence of alcohol or drugs, or both, or to believe that the person had
34 been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128,
35 and amendments thereto, or is under 21 years of age while having alcohol
36 or other drugs in such person's system; (B) the person had been placed

The test refusal occurred pursuant to a lawful encounter by law enforcement. For purposes of this section, a lawful encounter is any encounter permissible under Section 15 of the Kansas bill of rights and the fourth amendment to the United States constitution relating to unreasonable searches and seizures.

1 under arrest, was in custody or had been involved in a vehicle accident or
 2 collision; (C) a law enforcement officer had presented the person with the
 3 oral and written notice required by K.S.A. 8-1001, and amendments
 4 thereto; and (D) the result of the test showed that the person had an alcohol
 5 concentration of .08 or greater in such person's blood or breath; and (E)
 6 ~~prior to stopping the person operating or attempting to operate a vehicle,~~
 7 ~~a law enforcement officer had reasonable grounds to suspect the person~~
 8 ~~was committing or had committed a crime or traffic infraction, or was~~
 9 ~~involved in an accident resulting in property damage or injury.~~

10 (3) With regard to failure of a breath test, in addition to those matters
 11 required to be certified under subsection (a)(2), that: (A) The testing
 12 equipment used was certified by the Kansas department of health and
 13 environment; (B) the testing procedures used were in accordance with the
 14 requirements set out by the Kansas department of health and environment;
 15 and (C) the person who operated the testing equipment was certified by the
 16 Kansas department of health and environment to operate such equipment.

17 (b) For purposes of this section, certification shall be complete upon
 18 signing, and no additional acts of oath, affirmation, acknowledgment or
 19 proof of execution shall be required. The signed certification or a copy or
 20 photostatic reproduction thereof shall be admissible in evidence in all
 21 proceedings brought pursuant to this act, and receipt of any such
 22 certification, copy or reproduction shall accord the department authority to
 23 proceed as set forth herein. Any person who signs a certification submitted
 24 to the division knowing it contains a false statement is guilty of a class B
 25 nonperson misdemeanor.

26 (c) When the officer directing administration of the testing determines
 27 that a person has refused a test and the criteria of subsection (a)(1) have
 28 been met or determines that a person has failed a test and the criteria of
 29 subsection (a)(2) have been met, the officer shall serve upon the person
 30 notice of suspension of driving privileges pursuant to K.S.A. 8-1014, and
 31 amendments thereto. If the determination is made while the person is still
 32 in custody, service shall be made in person by the officer on behalf of the
 33 division of vehicles. In cases where a test failure is established by a
 34 subsequent analysis of a breath, blood or urine sample, the officer shall
 35 serve notice of such suspension in person or by another designated officer
 36 or by mailing the notice to the person at the address provided at the time of
 37 the test.

38 (d) In addition to the information required by subsection (a), the law
 39 enforcement officer's certification and notice of suspension shall contain
 40 the following information: (1) The person's name, driver's license number
 41 and current address; (2) the reason and statutory grounds for the
 42 suspension; (3) the date notice is being served and a statement that the
 43 effective date of the suspension shall be the 30th day after the date of

The test failure occurred pursuant to a lawful encounter by law enforcement. For purposes of this section, a lawful encounter is any encounter permissible under Section 15 of the Kansas bill of rights and the fourth amendment to the United States constitution relating to unreasonable searches and seizures.

1 service; (4) the right of the person to request an administrative hearing;
2 and (5) the procedure the person must follow to request an administrative
3 hearing. The law enforcement officer's certification and notice of
4 suspension shall also inform the person that all correspondence will be
5 mailed to the person at the address contained in the law enforcement
6 officer's certification and notice of suspension unless the person notifies
7 the division in writing of a different address or change of address. The
8 address provided will be considered a change of address for purposes of
9 K.S.A. 8-248, and amendments thereto, if the address furnished is different
10 from that on file with the division.

11 (e) If a person refuses a test or if a person is still in custody when it is
12 determined that the person has failed a test, the officer shall take any
13 license in the possession of the person and, if the license is not expired,
14 suspended, revoked or canceled, shall issue a temporary license effective
15 until the 30th day after the date of service set out in the law enforcement
16 officer's certification and notice of suspension. If the test failure is
17 established by a subsequent analysis of a breath or blood sample, the
18 temporary license shall be served together with the copy of the law
19 enforcement officer's certification and notice of suspension. A temporary
20 license issued pursuant to this subsection shall bear the same restrictions
21 and limitations as the license for which it was exchanged. Within seven
22 days after the date of service of a copy of the law enforcement officer's
23 certification and notice of suspension the officer's certification and notice
24 of suspension, along with any licenses taken, shall be forwarded to the
25 division.

26 (f) Upon receipt of the law enforcement officer's certification, the
27 division shall review the certification to determine that it meets the
28 requirements of subsection (a). Upon so determining, the division shall
29 proceed to suspend the person's driving privileges in accordance with the
30 notice of suspension previously served. If the requirements of subsection
31 (a) are not met, the division shall dismiss the administrative proceeding
32 and return any license surrendered by the person.

33 (g) The division shall prepare and distribute forms for use by law
34 enforcement officers in giving the notice required by this section.

35 (h) The provisions of K.S.A. 60-206, and amendments thereto,
36 regarding the computation of time shall be applicable in determining the
37 effective date of suspension set out in subsection (d).

38 Sec. 2. K.S.A. 2014 Supp. 8-1020 is hereby amended to read as
39 follows: 8-1020. (a) Any licensee served with an officer's certification and
40 notice of suspension pursuant to K.S.A. 8-1002, and amendments thereto,
41 may request an administrative hearing. Such request may be made either
42 by:

43 (1) mailing a written request which is postmarked 14 days after

1 service of notice; or

2 (2) transmitting a written request by electronic facsimile which is
3 received by the division within 14 days after service of notice.

4 (b) If the licensee makes a timely request for an administrative
5 hearing and makes a timely payment of the required hearing fee, any
6 temporary license issued pursuant to K.S.A. 8-1002, and amendments
7 thereto, shall remain in effect until the 30th day after the effective date of
8 the decision made by the division.

9 (c) If the licensee fails to make a timely request for an administrative
10 hearing together with the required hearing fee, the licensee's driving
11 privileges shall be suspended or suspended and then restricted in
12 accordance with the notice of suspension served pursuant to K.S.A. 8-
13 1002, and amendments thereto.

14 (d) (1) Upon receipt of a timely request for a hearing together with
15 the required hearing fee, the division shall forthwith set the matter for
16 hearing before a representative of the director and provide notice of the
17 extension of temporary driving privileges. The hearing shall be held by
18 telephone conference call unless the hearing request includes a request that
19 the hearing be held in person before a representative of the director. The
20 officer's certification and notice of suspension shall inform the licensee of
21 the availability of a hearing before a representative of the director. Except
22 for a hearing conducted by telephone conference call, the hearing shall be
23 conducted in the county where the arrest occurred or a county adjacent
24 thereto.

25 (2) The division shall charge a fee of \$50 for a hearing, to be paid
26 within the time period for making a timely request for a hearing, whether
27 held by telephone or in person, to be applied by the division for
28 administrative costs to conduct the hearing. The division shall remit all
29 hearing fees to the state treasurer in accordance with the provisions of
30 K.S.A. 75-4215, and amendments thereto. Upon receipt of each such
31 remittance, the state treasurer shall deposit the entire amount in the state
32 treasury to the credit of the division of vehicles operating fund. The
33 hearing fee established in this section shall be the only fee collected or
34 moneys in the nature of a fee collected for such hearing. Such fee shall
35 only be established by an act of the legislature and no other authority is
36 established by law or otherwise to collect a fee.

37 (e) Except as provided in subsection (f), prehearing discovery shall be
38 limited to the following documents, which shall be provided to the
39 licensee or the licensee's attorney no later than seven days prior to the date
40 of hearing:

41 (1) The officer's certification and notice of suspension;

42 (2) in the case of a breath or blood test failure, copies of documents
43 indicating the result of any evidentiary breath or blood test administered at

1 the request of a law enforcement officer;
2 (3) in the case of a breath test failure, a copy of the affidavit showing
3 certification of the officer and the instrument; and
4 (4) in the case of a breath test failure, a copy of the Kansas
5 department of health and environment testing protocol checklist.
6 (f) At or prior to the time the notice of hearing is sent, the division
7 shall issue an order allowing the licensee or the licensee's attorney to
8 review any *police report* and video or audio tape record made of the
9 events upon which the administrative action is based. Such review shall
10 take place at a reasonable time designated by the law enforcement agency
11 and shall be made at the location where the *police report* or video or audio
12 tape is kept. The licensee may obtain a copy of any such *police report* and
13 video or audio tape upon request and upon payment of a reasonable fee to
14 the law enforcement agency, not to exceed \$25 per tape or \$.25 per page
15 of *police report*.
16 (g) Witnesses at the hearing shall be limited to the licensee, to any
17 law enforcement officer who signed the certification form and to one other
18 witness who was present at the time of the issuance of the certification and
19 called by the licensee. The presence of the certifying officer or officers
20 shall not be required, unless requested by the licensee at the time of
21 making the request for the hearing. The examination of a law enforcement
22 officer shall be restricted to the factual circumstances relied upon in the
23 officer's certification ~~and the reason for stopping the driver.~~
24 (h) (1) If the officer certifies that the person refused the test, the scope
25 of the hearing shall be limited to whether:
26 (A) A law enforcement officer had reasonable grounds to believe the
27 person was operating or attempting to operate a vehicle while under the
28 influence of alcohol or drugs, or both, or had been driving a commercial
29 motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto,
30 while having alcohol or other drugs in such person's system or was under
31 the age of 21 years and was operating or attempting to operate a vehicle
32 while having alcohol or other drugs in such person's system;
33 (B) the person was in custody or arrested or was involved in a vehicle
34 accident or collision resulting in property damage, personal injury or
35 death;
36 (C) a law enforcement officer had presented the person with the oral
37 and written notice required by K.S.A. 8-1001, and amendments thereto;
38 and
39 (D) the person refused to submit to and complete a test as requested
40 by a law enforcement officer; and
41 ~~(E) a law enforcement officer had reasonable grounds to suspect the~~
42 ~~person was committing or had committed a crime or traffic infraction, or~~
43 ~~was involved in an accident resulting in property damage or injury.~~

1 (2) If the officer certifies that the person failed a breath test, the scope
2 of the hearing shall be limited to whether:

3 (A) A law enforcement officer had reasonable grounds to believe the
4 person was operating a vehicle while under the influence of alcohol or
5 drugs, or both, or had been driving a commercial motor vehicle, as defined
6 in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other
7 drugs in such person's system or was under the age of 21 years and was
8 operating or attempting to operate a vehicle while having alcohol or other
9 drugs in such person's system;

10 (B) the person was in custody or arrested or was involved in a vehicle
11 accident or collision resulting in property damage, personal injury or
12 death;

13 (C) a law enforcement officer had presented the person with the oral
14 and written notice required by K.S.A. 8-1001, and amendments thereto;

15 (D) the testing equipment used was ~~reliable and~~ certified by the
16 Kansas department of health and environment;

17 (E) the person who operated the testing equipment was certified by
18 the Kansas department of health and environment;

19 (F) the testing procedures used substantially complied with the
20 procedures set out by the Kansas department of health and environment;

21 (G) the test result determined that the person had an alcohol
22 concentration of .08 or greater in such person's breath; and

23 (H) the person was operating or attempting to operate a vehicle; ~~and~~
24 ~~(I) a law enforcement officer had reasonable grounds to suspect the~~
25 ~~person was committing or had committed a crime or traffic infraction, or~~
26 ~~was involved in an accident resulting in property damage or injury.~~

27 (3) If the officer certifies that the person failed a blood test, the scope
28 of the hearing shall be limited to whether:

29 (A) A law enforcement officer had reasonable grounds to believe the
30 person was operating a vehicle while under the influence of alcohol or
31 drugs, or both, or had been driving a commercial motor vehicle, as defined
32 in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other
33 drugs in such person's system or was under the age of 21 years and was
34 operating or attempting to operate a vehicle while having alcohol or other
35 drugs in such person's system;

36 (B) the person was in custody or arrested or was involved in a vehicle
37 accident or collision resulting in property damage, personal injury or
38 death;

39 (C) a law enforcement officer had presented the person with the oral
40 and written notice required by K.S.A. 8-1001, and amendments thereto;

41 (D) the testing equipment used was reliable;

42 (E) the person who operated the testing equipment was qualified;

43 (F) the testing procedures used were reliable;

- 1 (G) the test result determined that the person had an alcohol and
2 concentration of .08 or greater in such person's blood; and
3 (H) the person was operating or attempting to operate a vehicle; *and*
4 ~~(I) a law enforcement officer had reasonable grounds to suspect the~~
5 ~~person was committing or had committed a crime or traffic infraction, or~~
6 ~~was involved in an accident resulting in property damage or injury.~~
7 (i) At a hearing pursuant to this section, or upon court review of an
8 order entered at such a hearing, an affidavit of the custodian of records at
9 the Kansas department of health and environment stating that the breath
10 testing device was certified and the operator of such device was certified
11 on the date of the test shall be admissible into evidence in the same
12 manner and with the same force and effect as if the certifying officer or
13 employee of the Kansas department of health and environment had
14 testified in person. A certified operator of a breath testing device shall be
15 competent to testify regarding the proper procedures to be used in
16 conducting the test.
17 (j) At a hearing pursuant to this section, or upon court review of an
18 order entered at such a hearing, in which the report of blood test results
19 have been prepared by the Kansas bureau of investigation or other forensic
20 laboratory of a state or local law enforcement agency are to be introduced
21 as evidence, the report, or a copy of the report, of the findings of the
22 forensic examiner shall be admissible into evidence in the same manner
23 and with the same force and effect as if the forensic examiner who
24 performed such examination, analysis, comparison or identification and
25 prepared the report thereon had testified in person.
26 (k) At the hearing, the licensee has the burden of proof by a
27 preponderance of the evidence to show that the facts set out in the officer's
28 certification are false or insufficient and that the order suspending or
29 suspending and restricting the licensee's driving privileges should be
30 dismissed.
31 (l) Evidence at the hearing shall be limited to the following:
32 (1) The documents set out in subsection (e);
33 (2) the testimony of the licensee;
34 (3) the testimony of any certifying officer;
35 (4) the testimony of any witness present at the time of the issuance of
36 the certification and called by the licensee;
37 (5) any affidavits submitted from other witnesses;
38 (6) any documents submitted by the licensee to show the existence of
39 a medical condition, as described in K.S.A. 8-1001, and amendments
40 thereto; and
41 (7) any video or audio tape record of the events upon which the
42 administrative action is based.
43 (m) After the hearing, the representative of the director shall enter an

1 order affirming the order of suspension or suspension and restriction of
2 driving privileges or for good cause appearing therefor, dismiss the
3 administrative action. If the representative of the director enters an order
4 affirming the order of suspension or suspension and restriction of driving
5 privileges, the suspension or suspension and restriction shall begin on the
6 30th day after the effective date of the order of suspension or suspension
7 and restriction. If the person whose privileges are suspended is a
8 nonresident licensee, the license of the person shall be forwarded to the
9 appropriate licensing authority in the person's state of residence if the
10 result at the hearing is adverse to such person or if no timely request for a
11 hearing is received.

12 (n) The representative of the director may issue an order at the close
13 of the hearing or may take the matter under advisement and issue a hearing
14 order at a later date. If the order is made at the close of the hearing, the
15 licensee or the licensee's attorney shall be served with a copy of the order
16 by the representative of the director. If the matter is taken under
17 advisement or if the hearing was by telephone conference call, the licensee
18 and any attorney who appeared at the administrative hearing upon behalf
19 of the licensee each shall be served with a copy of the hearing order by
20 mail. Any law enforcement officer who appeared at the hearing also may
21 be mailed a copy of the hearing order. The effective date of the hearing
22 order shall be the date upon which the hearing order is served, whether
23 served in person or by mail.

24 (o) The licensee may file a petition for review of the hearing order
25 pursuant to K.S.A. 8-259, and amendments thereto. Upon filing a petition
26 for review, the licensee shall serve the secretary of revenue with a copy of
27 the petition and summons. Upon receipt of a copy of the petition for
28 review by the secretary, the temporary license issued pursuant to
29 subsection (b) shall be extended until the decision on the petition for
30 review is final.

31 (p) Such review shall be in accordance with this section and the
32 Kansas judicial review act. To the extent that this section and any other
33 provision of law conflicts, this section shall prevail. The petition for
34 review shall be filed within 14 days after the effective date of the order.
35 Venue of the action for review is the county where the person was arrested
36 or the accident occurred, or, if the hearing was not conducted by telephone
37 conference call, the county where the administrative proceeding was held.
38 The action for review shall be by trial de novo to the court and the
39 evidentiary restrictions of subsection (l) shall not apply to the trial de
40 novo. The court shall take testimony, examine the facts of the case and
41 determine whether the petitioner is entitled to driving privileges or
42 whether the petitioner's driving privileges are subject to suspension or
43 suspension and restriction under the provisions of this act. If the court

The court shall also determine the lawfulness of the law enforcement encounter pursuant to subsections a(1)(e), and a(2)(e).

1 finds that the grounds for ~~action by the agency~~ have been met, the court
2 shall ~~affirm the agency action~~.

3 (q) Upon review, the licensee shall have the burden to show that the
4 decision of the agency should be set aside.

5 (r) Notwithstanding the requirement to issue a temporary license in
6 K.S.A. 8-1002, and amendments thereto, and the requirements to extend
7 the temporary license in this section, any such temporary driving
8 privileges are subject to restriction, suspension, revocation or cancellation
9 as provided in K.S.A. 8-1014, and amendments thereto, or for other cause.

10 (s) Upon motion by a party, or on the court's own motion, the court
11 may enter an order restricting the driving privileges allowed by the
12 temporary license provided for in K.S.A. 8-1002, and amendments thereto,
13 and in this section. The temporary license also shall be subject to
14 restriction, suspension, revocation or cancellation, as set out in K.S.A. 8-
15 1014, and amendments thereto, or for other cause.

16 (t) The facts found by the hearing officer or by the district court upon
17 a petition for review shall be independent of the determination of the same
18 or similar facts in the adjudication of any criminal charges arising out of
19 the same occurrence. The disposition of those criminal charges shall not
20 affect the suspension or suspension and restriction to be imposed under
21 this section.

22 (u) All notices affirming or canceling a suspension under this section,
23 all notices of a hearing held under this section and all issuances of
24 temporary driving privileges pursuant to this section shall be sent by first-
25 class mail and a United States post office certificate of mailing shall be
26 obtained therefor. All notices so mailed shall be deemed received three
27 days after mailing, except that this provision shall not apply to any
28 licensee where such application would result in a manifest injustice.

29 (v) The provisions of K.S.A. 60-206, and amendments thereto,
30 regarding the computation of time shall be applicable in determining the
31 time for requesting an administrative hearing as set out in subsection (a)
32 and to the time for filing a petition for review pursuant to subsection (o)
33 and K.S.A. 8-259, and amendments thereto.

34 Sec. 3. K.S.A. 2014 Supp. 8-1002 and 8-1020 are hereby repealed.

35 Sec. 4. This act shall take effect and be in force from and after its
36 publication in the statute book.

suspension or
restriction of the
license

suspension and
or restriction of
the license

HOUSE BILL No. 2289

By Committee on Judiciary

.2-10

1 AN ACT concerning driving; related to driving under the influence of
2 alcohol or drugs; test refusal or failure; suspension of license;
3 administrative hearing; procedure; amending K.S.A. 2014 Supp. 8-
4 1002 and 8-1020 and repealing the existing sections.
5

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

7 Section 1. K.S.A. 2014 Supp. 8-1002 is hereby amended to read as
8 follows: 8-1002. (a) Whenever a test is requested pursuant to this act and
9 results in either a test failure or test refusal, a law enforcement officer's
10 certification shall be prepared. If the person had been driving a
11 commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments
12 thereto, a separate certification pursuant to K.S.A. 8-2,145, and
13 amendments thereto, shall be prepared in addition to any certification
14 required by this section. The certification required by this section shall be
15 signed by one or more officers to certify:

16 (1) With regard to a test refusal, that: (A) There existed reasonable
17 grounds to believe the person was operating or attempting to operate a
18 vehicle while under the influence of alcohol or drugs, or both, or to believe
19 that the person had been driving a commercial motor vehicle, as defined in
20 K.S.A. 8-2,128, and amendments thereto, or is under 21 years of age while
21 having alcohol or other drugs in such person's system; (B) the person had
22 been placed under arrest, was in custody or had been involved in a vehicle
23 accident or collision; (C) a law enforcement officer had presented the
24 person with the oral and written notice required by K.S.A. 8-1001, and
25 amendments thereto; and (D) the person refused to submit to and complete
26 a test as requested by a law enforcement officer; and (E) prior to stopping
27 the person operating or attempting to operate a vehicle, a law
28 enforcement officer had reasonable grounds to suspect the person was
29 committing or had committed a crime or traffic infraction, or was involved
30 in an accident resulting in property damage or injury.

31 (2) With regard to a test failure, that: (A) There existed reasonable
32 grounds to believe the person was operating a vehicle while under the
33 influence of alcohol or drugs, or both, or to believe that the person had
34 been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128,
35 and amendments thereto, or is under 21 years of age while having alcohol
36 or other drugs in such person's system; (B) the person had been placed

1 under arrest, was in custody or had been involved in a vehicle accident or
2 collision; (C) a law enforcement officer had presented the person with the
3 oral and written notice required by K.S.A. 8-1001, and amendments
4 thereto; ~~and~~ (D) the result of the test showed that the person had an alcohol
5 concentration of .08 or greater in such person's blood or breath; *and (E)*
6 *prior to stopping the person operating or attempting to operate a vehicle,*
7 *a law enforcement officer had reasonable grounds to suspect the person*
8 *was committing or had committed a crime or traffic infraction, or was*
9 *involved in an accident resulting in property damage or injury.*

10 (3) With regard to failure of a breath test, in addition to those matters
11 required to be certified under subsection (a)(2), that: (A) The testing
12 equipment used was certified by the Kansas department of health and
13 environment; (B) the testing procedures used were in accordance with the
14 requirements set out by the Kansas department of health and environment;
15 and (C) the person who operated the testing equipment was certified by the
16 Kansas department of health and environment to operate such equipment.

17 (b) For purposes of this section, certification shall be complete upon
18 signing, and no additional acts of oath, affirmation, acknowledgment or
19 proof of execution shall be required. The signed certification or a copy or
20 photostatic reproduction thereof shall be admissible in evidence in all
21 proceedings brought pursuant to this act, and receipt of any such
22 certification, copy or reproduction shall accord the department authority to
23 proceed as set forth herein. Any person who signs a certification submitted
24 to the division knowing it contains a false statement is guilty of a class B
25 nonperson misdemeanor.

26 (c) When the officer directing administration of the testing determines
27 that a person has refused a test and the criteria of subsection (a)(1) have
28 been met or determines that a person has failed a test and the criteria of
29 subsection (a)(2) have been met, the officer shall serve upon the person
30 notice of suspension of driving privileges pursuant to K.S.A. 8-1014, and
31 amendments thereto. If the determination is made while the person is still
32 in custody, service shall be made in person by the officer on behalf of the
33 division of vehicles. In cases where a test failure is established by a
34 subsequent analysis of a breath, blood or urine sample, the officer shall
35 serve notice of such suspension in person or by another designated officer
36 or by mailing the notice to the person at the address provided at the time of
37 the test.

38 (d) In addition to the information required by subsection (a), the law
39 enforcement officer's certification and notice of suspension shall contain
40 the following information: (1) The person's name, driver's license number
41 and current address; (2) the reason and statutory grounds for the
42 suspension; (3) the date notice is being served and a statement that the
43 effective date of the suspension shall be the 30th day after the date of

1 service; (4) the right of the person to request an administrative hearing;
2 and (5) the procedure the person must follow to request an administrative
3 hearing. The law enforcement officer's certification and notice of
4 suspension shall also inform the person that all correspondence will be
5 mailed to the person at the address contained in the law enforcement
6 officer's certification and notice of suspension unless the person notifies
7 the division in writing of a different address or change of address. The
8 address provided will be considered a change of address for purposes of
9 K.S.A. 8-248, and amendments thereto, if the address furnished is different
10 from that on file with the division.

11 (e) If a person refuses a test or if a person is still in custody when it is
12 determined that the person has failed a test, the officer shall take any
13 license in the possession of the person and, if the license is not expired,
14 suspended, revoked or canceled, shall issue a temporary license effective
15 until the 30th day after the date of service set out in the law enforcement
16 officer's certification and notice of suspension. If the test failure is
17 established by a subsequent analysis of a breath or blood sample, the
18 temporary license shall be served together with the copy of the law
19 enforcement officer's certification and notice of suspension. A temporary
20 license issued pursuant to this subsection shall bear the same restrictions
21 and limitations as the license for which it was exchanged. Within seven
22 days after the date of service of a copy of the law enforcement officer's
23 certification and notice of suspension the officer's certification and notice
24 of suspension, along with any licenses taken, shall be forwarded to the
25 division.

26 (f) Upon receipt of the law enforcement officer's certification, the
27 division shall review the certification to determine that it meets the
28 requirements of subsection (a). Upon so determining, the division shall
29 proceed to suspend the person's driving privileges in accordance with the
30 notice of suspension previously served. If the requirements of subsection
31 (a) are not met, the division shall dismiss the administrative proceeding
32 and return any license surrendered by the person.

33 (g) The division shall prepare and distribute forms for use by law
34 enforcement officers in giving the notice required by this section.

35 (h) The provisions of K.S.A. 60-206, and amendments thereto,
36 regarding the computation of time shall be applicable in determining the
37 effective date of suspension set out in subsection (d).

38 Sec. 2. K.S.A. 2014 Supp. 8-1020 is hereby amended to read as
39 follows: 8-1020. (a) Any licensee served with an officer's certification and
40 notice of suspension pursuant to K.S.A. 8-1002, and amendments thereto,
41 may request an administrative hearing. Such request may be made either
42 by:

43 (1) mailing a written request which is postmarked 14 days after

1 service of notice; or

2 (2) transmitting a written request by electronic facsimile which is
3 received by the division within 14 days after service of notice.

4 (b) If the licensee makes a timely request for an administrative
5 hearing and makes a timely payment of the required hearing fee, any
6 temporary license issued pursuant to K.S.A. 8-1002, and amendments
7 thereto, shall remain in effect until the 30th day after the effective date of
8 the decision made by the division.

9 (c) If the licensee fails to make a timely request for an administrative
10 hearing together with the required hearing fee, the licensee's driving
11 privileges shall be suspended or suspended and then restricted in
12 accordance with the notice of suspension served pursuant to K.S.A. 8-
13 1002, and amendments thereto.

14 (d) (1) Upon receipt of a timely request for a hearing together with
15 the required hearing fee, the division shall forthwith set the matter for
16 hearing before a representative of the director and provide notice of the
17 extension of temporary driving privileges. The hearing shall be held by
18 telephone conference call unless the hearing request includes a request that
19 the hearing be held in person before a representative of the director. The
20 officer's certification and notice of suspension shall inform the licensee of
21 the availability of a hearing before a representative of the director. Except
22 for a hearing conducted by telephone conference call, the hearing shall be
23 conducted in the county where the arrest occurred or a county adjacent
24 thereto.

25 (2) The division shall charge a fee of \$50 for a hearing, to be paid
26 within the time period for making a timely request for a hearing, whether
27 held by telephone or in person, to be applied by the division for
28 administrative costs to conduct the hearing. The division shall remit all
29 hearing fees to the state treasurer in accordance with the provisions of
30 K.S.A. 75-4215, and amendments thereto. Upon receipt of each such
31 remittance, the state treasurer shall deposit the entire amount in the state
32 treasury to the credit of the division of vehicles operating fund. The
33 hearing fee established in this section shall be the only fee collected or
34 moneys in the nature of a fee collected for such hearing. Such fee shall
35 only be established by an act of the legislature and no other authority is
36 established by law or otherwise to collect a fee.

37 (e) Except as provided in subsection (f), prehearing discovery shall be
38 limited to the following documents, which shall be provided to the
39 licensee or the licensee's attorney no later than seven days prior to the date
40 of hearing:

41 (1) The officer's certification and notice of suspension;

42 (2) in the case of a breath or blood test failure, copies of documents
43 indicating the result of any evidentiary breath or blood test administered at

- 1 the request of a law enforcement officer;
- 2 (3) in the case of a breath test failure, a copy of the affidavit showing
3 certification of the officer and the instrument; and
- 4 (4) in the case of a breath test failure, a copy of the Kansas
5 department of health and environment testing protocol checklist.
- 6 (f) At or prior to the time the notice of hearing is sent, the division
7 shall issue an order allowing the licensee or the licensee's attorney to
8 review any *police report and* video or audio tape record made of the
9 events upon which the administrative action is based. Such review shall
10 take place at a reasonable time designated by the law enforcement agency
11 and shall be made at the location where the *police report or* video or audio
12 tape is kept. The licensee may obtain a copy of any such *police report and*
13 video or audio tape upon request and upon payment of a reasonable fee to
14 the law enforcement agency, not to exceed \$25 per tape or \$.25 per page
15 of *police report*.
- 16 (g) Witnesses at the hearing shall be limited to the licensee, to any
17 law enforcement officer who signed the certification form and to one other
18 witness who was present at the time of the issuance of the certification and
19 called by the licensee. The presence of the certifying officer or officers
20 shall not be required, unless requested by the licensee at the time of
21 making the request for the hearing. The examination of a law enforcement
22 officer shall be restricted to the factual circumstances relied upon in the
23 officer's certification *and the reason for stopping the driver*.
- 24 (h) (1) If the officer certifies that the person refused the test, the scope
25 of the hearing shall be limited to whether:
- 26 (A) A law enforcement officer had reasonable grounds to believe the
27 person was operating or attempting to operate a vehicle while under the
28 influence of alcohol or drugs, or both, or had been driving a commercial
29 motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto,
30 while having alcohol or other drugs in such person's system or was under
31 the age of 21 years and was operating or attempting to operate a vehicle
32 while having alcohol or other drugs in such person's system;
- 33 (B) the person was in custody or arrested or was involved in a vehicle
34 accident or collision resulting in property damage, personal injury or
35 death;
- 36 (C) a law enforcement officer had presented the person with the oral
37 and written notice required by K.S.A. 8-1001, and amendments thereto;
38 ~~and~~
- 39 (D) the person refused to submit to and complete a test as requested
40 by a law enforcement officer; *and*
- 41 (E) *a law enforcement officer had reasonable grounds to suspect the*
42 *person was committing or had committed a crime or traffic infraction, or*
43 *was involved in an accident resulting in property damage or injury.*

- 1 (2) If the officer certifies that the person failed a breath test, the scope
2 of the hearing shall be limited to whether:
- 3 (A) A law enforcement officer had reasonable grounds to believe the
4 person was operating a vehicle while under the influence of alcohol or
5 drugs, or both, or had been driving a commercial motor vehicle, as defined
6 in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other
7 drugs in such person's system or was under the age of 21 years and was
8 operating or attempting to operate a vehicle while having alcohol or other
9 drugs in such person's system;
- 10 (B) the person was in custody or arrested or was involved in a vehicle
11 accident or collision resulting in property damage, personal injury or
12 death;
- 13 (C) a law enforcement officer had presented the person with the oral
14 and written notice required by K.S.A. 8-1001, and amendments thereto;
- 15 (D) the testing equipment used was *reliable and* certified by the
16 Kansas department of health and environment;
- 17 (E) the person who operated the testing equipment was certified by
18 the Kansas department of health and environment;
- 19 (F) the testing procedures used substantially complied with the
20 procedures set out by the Kansas department of health and environment;
- 21 (G) the test result determined that the person had an alcohol
22 concentration of .08 or greater in such person's breath; ~~and~~
- 23 (H) the person was operating or attempting to operate a vehicle; *and*
24 (I) *a law enforcement officer had reasonable grounds to suspect the*
25 *person was committing or had committed a crime or traffic infraction, or*
26 *was involved in an accident resulting in property damage or injury.*
- 27 (3) If the officer certifies that the person failed a blood test, the scope
28 of the hearing shall be limited to whether:
- 29 (A) A law enforcement officer had reasonable grounds to believe the
30 person was operating a vehicle while under the influence of alcohol or
31 drugs, or both, or had been driving a commercial motor vehicle, as defined
32 in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other
33 drugs in such person's system or was under the age of 21 years and was
34 operating or attempting to operate a vehicle while having alcohol or other
35 drugs in such person's system;
- 36 (B) the person was in custody or arrested or was involved in a vehicle
37 accident or collision resulting in property damage, personal injury or
38 death;
- 39 (C) a law enforcement officer had presented the person with the oral
40 and written notice required by K.S.A. 8-1001, and amendments thereto;
- 41 (D) the testing equipment used was reliable;
- 42 (E) the person who operated the testing equipment was qualified;
- 43 (F) the testing procedures used were reliable;

1 (G) the test result determined that the person had an alcohol
2 concentration of .08 or greater in such person's blood; and

3 (H) the person was operating or attempting to operate a vehicle; and

4 (I) *a law enforcement officer had reasonable grounds to suspect the*
5 *person was committing or had committed a crime or traffic infraction, or*
6 *was involved in an accident resulting in property damage or injury.*

7 (i) At a hearing pursuant to this section, or upon court review of an
8 order entered at such a hearing, an affidavit of the custodian of records at
9 the Kansas department of health and environment stating that the breath
10 testing device was certified and the operator of such device was certified
11 on the date of the test shall be admissible into evidence in the same
12 manner and with the same force and effect as if the certifying officer or
13 employee of the Kansas department of health and environment had
14 testified in person. A certified operator of a breath testing device shall be
15 competent to testify regarding the proper procedures to be used in
16 conducting the test.

17 (j) At a hearing pursuant to this section, or upon court review of an
18 order entered at such a hearing, in which the report of blood test results
19 have been prepared by the Kansas bureau of investigation or other forensic
20 laboratory of a state or local law enforcement agency are to be introduced
21 as evidence, the report, or a copy of the report, of the findings of the
22 forensic examiner shall be admissible into evidence in the same manner
23 and with the same force and effect as if the forensic examiner who
24 performed such examination, analysis, comparison or identification and
25 prepared the report thereon had testified in person.

26 (k) At the hearing, the licensee has the burden of proof by a
27 preponderance of the evidence to show that the facts set out in the officer's
28 certification are false or insufficient and that the order suspending or
29 suspending and restricting the licensee's driving privileges should be
30 dismissed.

31 (l) Evidence at the hearing shall be limited to the following:

32 (1) The documents set out in subsection (e);

33 (2) the testimony of the licensee;

34 (3) the testimony of any certifying officer;

35 (4) the testimony of any witness present at the time of the issuance of
36 the certification and called by the licensee;

37 (5) any affidavits submitted from other witnesses;

38 (6) any documents submitted by the licensee to show the existence of
39 a medical condition, as described in K.S.A. 8-1001, and amendments
40 thereto; and

41 (7) any video or audio tape record of the events upon which the
42 administrative action is based.

43 (m) After the hearing, the representative of the director shall enter an

1 order affirming the order of suspension or suspension and restriction of
2 driving privileges or for good cause appearing therefor, dismiss the
3 administrative action. If the representative of the director enters an order
4 affirming the order of suspension or suspension and restriction of driving
5 privileges, the suspension or suspension and restriction shall begin on the
6 30th day after the effective date of the order of suspension or suspension
7 and restriction. If the person whose privileges are suspended is a
8 nonresident licensee, the license of the person shall be forwarded to the
9 appropriate licensing authority in the person's state of residence if the
10 result at the hearing is adverse to such person or if no timely request for a
11 hearing is received.

12 (n) The representative of the director may issue an order at the close
13 of the hearing or may take the matter under advisement and issue a hearing
14 order at a later date. If the order is made at the close of the hearing, the
15 licensee or the licensee's attorney shall be served with a copy of the order
16 by the representative of the director. If the matter is taken under
17 advisement or if the hearing was by telephone conference call, the licensee
18 and any attorney who appeared at the administrative hearing upon behalf
19 of the licensee each shall be served with a copy of the hearing order by
20 mail. Any law enforcement officer who appeared at the hearing also may
21 be mailed a copy of the hearing order. The effective date of the hearing
22 order shall be the date upon which the hearing order is served, whether
23 served in person or by mail.

24 (o) The licensee may file a petition for review of the hearing order
25 pursuant to K.S.A. 8-259, and amendments thereto. Upon filing a petition
26 for review, the licensee shall serve the secretary of revenue with a copy of
27 the petition and summons. Upon receipt of a copy of the petition for
28 review by the secretary, the temporary license issued pursuant to
29 subsection (b) shall be extended until the decision on the petition for
30 review is final.

31 (p) Such review shall be in accordance with this section and the
32 Kansas judicial review act. To the extent that this section and any other
33 provision of law conflicts, this section shall prevail. The petition for
34 review shall be filed within 14 days after the effective date of the order.
35 Venue of the action for review is the county where the person was arrested
36 or the accident occurred, or, if the hearing was not conducted by telephone
37 conference call, the county where the administrative proceeding was held.
38 The action for review shall be by trial de novo to the court and the
39 evidentiary restrictions of subsection (l) shall not apply to the trial de
40 novo. The court shall take testimony, examine the facts of the case and
41 determine whether the petitioner is entitled to driving privileges or
42 whether the petitioner's driving privileges are subject to suspension or
43 suspension and restriction under the provisions of this act. If the court

1 finds that the grounds for action by the agency have been met, the court
2 shall affirm the agency action.

3 (q) Upon review, the licensee shall have the burden to show that the
4 decision of the agency should be set aside.

5 (r) Notwithstanding the requirement to issue a temporary license in
6 K.S.A. 8-1002, and amendments thereto, and the requirements to extend
7 the temporary license in this section, any such temporary driving
8 privileges are subject to restriction, suspension, revocation or cancellation
9 as provided in K.S.A. 8-1014, and amendments thereto, or for other cause.

10 (s) Upon motion by a party, or on the court's own motion, the court
11 may enter an order restricting the driving privileges allowed by the
12 temporary license provided for in K.S.A. 8-1002, and amendments thereto,
13 and in this section. The temporary license also shall be subject to
14 restriction, suspension, revocation or cancellation, as set out in K.S.A. 8-
15 1014, and amendments thereto, or for other cause.

16 (t) The facts found by the hearing officer or by the district court upon
17 a petition for review shall be independent of the determination of the same
18 or similar facts in the adjudication of any criminal charges arising out of
19 the same occurrence. The disposition of those criminal charges shall not
20 affect the suspension or suspension and restriction to be imposed under
21 this section.

22 (u) All notices affirming or canceling a suspension under this section,
23 all notices of a hearing held under this section and all issuances of
24 temporary driving privileges pursuant to this section shall be sent by first-
25 class mail and a United States post office certificate of mailing shall be
26 obtained therefor. All notices so mailed shall be deemed received three
27 days after mailing, except that this provision shall not apply to any
28 licensee where such application would result in a manifest injustice.

29 (v) The provisions of K.S.A. 60-206, and amendments thereto,
30 regarding the computation of time shall be applicable in determining the
31 time for requesting an administrative hearing as set out in subsection (a)
32 and to the time for filing a petition for review pursuant to subsection (o)
33 and K.S.A. 8-259, and amendments thereto.

34 Sec. 3. K.S.A. 2014 Supp. 8-1002 and 8-1020 are hereby repealed.

35 Sec. 4. This act shall take effect and be in force from and after its
36 publication in the statute book.