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To: Senator Jeff King, Chairman
Members of the Senate Judiciary Committee

From: Callie Jill Denton
Executive Director

Date: February 1, 2016

Re: SB 360 concerning open meetings; relating to certain justifications for closing meetings;
amending K.S.A. 2015 Supp. 75-4319 (OPPOSE)

The Kansas Association for Justice (KsAJ) is a professional association of trial attorneys. KsAJ opposes SB 360.

We believe SB 360 would affect the public's access to meetings of the Workers Compensation and Employment Security Board Nominating Committee (Committee). The Committee makes recommendations regarding the nomination of workers compensation law judges and members of the Employment Security Board. The Committee has significant impact on Kansans that have workers compensation or unemployment claims. It is in the interests of the public and press that the Committee be fully compliant with KOMA.

Entities subject KOMA are required to hold all meetings open to the public with few exceptions, and make a reasonable effort to allow the general public to attend and listen to discussions. Kan. Stat. Ann. § 75-4318. On July 30, 2015, the Committee met and held interviews of candidates for an open administrative law judge position. The interviews were held in Executive Session, which we believe was in violation of KOMA.

SB 360 erodes KOMA's policy of transparency and would shield the work of the Committee and other entities subject to KOMA from the eyes of the public and press. On behalf of the members of KsAJ, I request the Senate Judiciary Committee's opposition to SB 360.

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Critics question fairness of Kansas' workers' compensation judge appointments

Committee composition, closed meetings focus of dissent

Posted: August 1, 2015 - 5:30pm

By Tim Carpenter

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Topeka attorney Frank Taff set aside time from his workday to watch a state committee interview four applicants and nominate a person to serve as administrative law judge in Topeka to handle labor disputes.

He was seeking insight into how the seven-member panel established in 2013 by Gov. Sam Brownback and the Kansas Legislature approached hiring one of 10 judges handling workers' compensation and unemployment cases. He was surprised the meeting was hosted by the Kansas Chamber of Commerce, an organization acknowledged for its lobbying acumen on behalf of business interests.

After settling into a seat in the Chamber of Commerce's office near the Capitol, Taff learned he would soon be leaving.

Interviews with all finalists would be conducted in executive session. Such privacy contrasts with the Kansas Supreme Court nominating commission, which interviews applicants in open meetings. The vacancy resulted from the committee's 6-1 vote in April against reappointment of Judge Brad Avery, the son of a former Kansas governor.

Eric Stafford, chairman of the Workers Compensation and Employment Security Boards Nominating Committee and a top lobbyist for the Chamber of Commerce, said guidance from the state attorney general empowered the committee to interview and evaluate candidates behind closed doors. The panel complies with state law by executing binding votes in public view, Stafford said.

"This comes from the attorney general's office of the state of Kansas. So, as stated earlier, that's why we are handling these in executive session," Stafford said.

Taff said the Kansas Open Meetings Act didn't reflect that position.

"I see nothing in there that permits these interviews to be conducted in executive session," he said. "I think the public has pretty much been kept in the dark."

"We're not doing anything in secret here," Stafford said. "We're not trying to cover anything up."

Fair or not?

Taff said he was frustrated with the committee's decision to make Avery, whom he called highly competent, their first ouster victim. It also claimed the selection system was purposefully distorted to favor Kansas employers and disenfranchise injured workers.

Previously, these administrative judges were chosen with equal input from employer and employee groups. The new law designated five slots on the committee for representation of employers and two seats to serve employee interests.

Committee member Harvey Sorensen, a Wichita attorney who often takes a lead during committee consideration of applicants, said critics of the process were mistaken.

"I think it's working fine," Sorensen said. "We don't have a set of standards that every one of us are required to adopt."

Each selection is forwarded for final approval by Kansas Department of Labor Secretary Lana

Gordon, a former Topeka member of the Kansas House.

In 2013, the Legislature and Brownback agreed to abandon the administrative judge selection process that pitted representatives of the state Chamber of Commerce against the AFL-CIO. It was an approach typically resulting in selection of middle-of-the-road judges.

The new structure allows the state Department of Labor, Chamber of Commerce, National Federation of Independent Businesses, Society for Human Resource Management and the Kansas Self-Insurers Association to each select a committee member. The labor secretary also designates a person to act on behalf of public employee groups. The final member is from AFL-CIO.

Foxes on guard

John Ostrowski, a Topeka lawyer and Kansas AFL-CIO lobbyist, said a tenet of any judicial system was avoidance of even appearance of impropriety.

"I don't think anybody can look at this committee and say this is a balanced selection process," Ostrowski said. "In representing injured workers, it certainly destroys their confidence in the system when they learn that the judge deciding the case is hired and fired by a coalition controlled by the chamber, insurance carriers and employers. The foxes are clearly guarding the hen house."

He said the committee's rejection of Avery was "clearly based on the perception that his rulings too often favored injured workers. It was not based on his job performance or any objective standard."

Jeff Cooper, a plaintiffs' attorney for injured workers also affiliated with the group Kansas Association for Justice, said lawyers were developing a lawsuit to challenge constitutionality of Kansas' system.

He said reforms adopted in 2011 during the Brownback administration weakened access to benefits for the injured and legislation in 2013 undermined integrity of administrative judges selections.

"If you control the judges, you control the results," Cooper said.

Decisions

Stafford said confidentiality of interviews and committee deliberations had to be kept private.

However, he chose to disclose in open session a problem with the committee's decision in April to appoint Robert Matthews to the Employment Security Board of Review.

"Some things have come up in the KBI background check that are concerning and would question judgment going forward," Stafford said.

After conclusion of a two-hour executive session Thursday to discuss a replacement for Avery, Sorensen offered a motion to select Britt Nichols, a contributor to Brownback's re-election campaign. Sorensen said his justification for favoring Nichols reflected comments he made during the closed portion of the meeting, but didn't repeat in public.

The vote was 2-4 against Nichols.

That prompted nomination of Julie Sample, who has been in the workers' compensation field since 1997. She served as a workers' compensation administrative law judge until 2003, authored 700 opinions as a member of the workers' compensation appeals board and handled workers' compensation cases in private practice since 2011.

She was approved 5-2.

Committee member Bruce Tunnell, executive director of the Kansas AFL-CIO, said Nichols would have prevailed had reporters with The Topeka Capital-Journal and The Wichita Eagle not been present. Tunnell cast the lone vote in favor of retaining Avery. He opposed Nichols, but backed Sample.

He said most committee members focused in closed session on whether potential judges would be "business friendly." Political ideology drives the process, he said.

"They claim it doesn't," said Tunnell, gesturing toward other committee members. "They want someone who's going to represent their best interests."

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