

MINUTES OF THE HOUSE COMMITTEE ON TRANSPORTATION.

The meeting was called to order by Chairman Rex Crowell at 11:40 p.m. on April 28, 1993 in Room 519-S of the Capitol.

All members were present except: All Present

Committee staff present: Hank Avila, Legislative Research Department
Bruce Kinzie, Revisor of Statutes
Donna Luttjohann, Committee Secretary

Conferees appearing before the committee: Betty McBride, Director of Vehicles, Dept. of Revenue
James Keller, Attorney, Dept. of Revenue
Gene Johnson, Kansas ASAP Coordinator Assn.
Major John M. Douglass, Overland Park Police Department

Others attending: See attached list

Chairman Crowell opened the hearing on SB 435 concerning alcohol related offenses involving the driving or operating of vehicles. He asked Bruce Kinzie to briefly summarize the bill.

The Chairman recognized Betty McBride from the Department of Revenue as the first proponent of the bill to testify before the committee. See Attachment 1 for her written testimony.

James Keller, Department of Revenue, was recognized by the Chairman as the second proponent of the bill. After giving his testimony, he answered questions from the committee. See Attachment 2.

Chairman Crowell recognized Gene Johnson of the Kansas Community Alcohol Safety Project Coordinators Association to testify as a proponent of the bill. See Attachment 3.

Major Douglass of the Overland Park Police Department was recognized by the Chairman as a proponent of the bill. See Attachment 4.

The Chairman closed the hearing on SB 435.

Rep. King made a motion to amend SB 435 to cure any conflicts between it and HB 2355 which has been signed by the Governor. It was seconded by Rep. Wells. The motion carried.

Rep. King made the motion to pass the bill favorably out of committee. It was seconded by Rep. Wells. Rep. Dawson made a substitute motion to keep the language in Subsection (k) requiring that a hearing be held within 30 days of the date of the request for a hearing except that failure to hold the hearing within 30 days shall not be cause for dismissal absent a showing of prejudice. It was seconded by Rep. McKinney. The motion carried.

Rep. Smith made the motion to pass the bill favorably as amended. It was seconded by Rep. Reinhardt. The motion carried.

Chairman Crowell adjourned the meeting at 1:00 p.m. with no further meetings scheduled.

GUEST LIST

HOUSE TRANSPORTATION COMMITTEE

April 28, 1993

Name	Address	Representing
Betty McBride	Topeka	KDOR
James L. Keller	Topeka	KDOR
Paul Sant	Topeka	KDOR
Rosalie Thornburgh	Topeka	KDOT
Keneth A. McBride	PEORIA	ASSN OF KS.
Tom Whitaker	TOPEKA	KS Motor Carriers Assn
JOHN BOTTENBERG	TOPEKA	BOTTENBERG ASSOC
TERRY Magee	" "	KHP
Pam Somerville	TOPEKA	KS Motor Car Dir's Assn
Miss Susan Johnson	Shawnee, KS	Guest of Dennis McKinney
Helen Johnson	Topeka	Ko A.S.A.P. Assn
MAJ. John M. Douglass	Overland Park	Police Dept.

STATE OF KANSAS

Betty McBride, Director
Robert B. Docking State Office Building
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Department of Revenue
Division of Vehicles

To: Honorable Rex Crowell, Chairman, Members of the House
Transportation Committee

From: Betty McBride, Director of the Kansas Division of Vehicles

Date: April 28, 1993

RE: Senate Bill 435

Mr. Chairman, Members of the Committee,

I am Betty McBride, Director for the Kansas Division of Vehicles

I would like to this opportunity to thank thank this committee for allowing us to appear before you today to seek your support on behalf of the Department of Revenue, Division of Vehicles, for Senate Bill 435.

Passage of Senate Bill 435 will not change current law. But it will clarify and close loopholes which have recently caused decisions made at administrative hearings to be overturned.

If the Department of Revenue is to administer DUI laws passed by the Legislature, it is imperative that Senate Bill 435 be passed to ensure that the intent of the Legislature is accomplished.

Jim Keller, of the Department of Revenue's legal staff is here today to address further the Department's need for Senate Bill 435.

Thank you again for allowing us this time from your busy schedule.

HOUSE TRANSPORTATION
Attachment 1
4/28/93

MEMORANDUM

TO: The Honorable Rex Crowell, Chairman
House Transportation Committee

FROM: Jame G. Keller, Attorney
Kansas Department of Revenue

DATE: April 28, 1993

SUBJECT: Senate Bill No. 435

I appreciate the opportunity to appear before you today with regard to Senate Bill No. 435.

This bill addresses several issues concerning the Implied Consent Law which have arisen as a result of recent court decisions. None of the proposed changes in the statute will change the manner in which this statute is administered. All the changes are to clarify existing provisions in light of recent court decisions. These amendments to K.S.A. 8-1001 and 8-1002 are essential if the Division of Vehicles is to continue to effectively administer this act. I will attempt to explain each of the proposed changes.

Page 4, lines 34-35:

This language is consistent with prior court decisions and is identical to that found in the uniform commercial driver's license act at K.S.A. 8-2,126(b).

Many prior appellate decisions in Kansas have emphasized the distinction between the criminal DUI statute and the implied consent law, which is civil and administrative in nature. The only sanction under the implied consent law for either refusal to submit to a test to determine alcohol content or for failure of a test is a driver's license suspension or suspension and restriction. The Kansas courts have repeatedly construed such actions to be in furtherance of the State's interest "to foster safety by temporarily removing from public thoroughfares those licensees who have exhibited dangerous behavior." *State v. Maze*, 16 Kan. App. 2d 527, 535 (1992). Such action "serves a vastly different governmental purpose from criminal

punishment." *Maze, supra*. Statutes which only take away driving privileges have been referred to as civil and have not been strictly construed "because no criminal penalties are imposed." *State v. Walden*, 15 Kan. App. 2d 139, 141 (1990).

In *State v. Adee*, 241 Kan. 825, 829 (1987), the Kansas Supreme Court, in construing K.S.A. 8-1001, stated the appropriate rule of construction:

Where a statute is designed to protect the public, the language must be construed in the light of the legislative intent and purpose and is entitled to broad interpretation so that its public purpose may be fully carried out.

In *Schowengerdt v. Kansas Dept. of Revenue*, 14 Kan. App. 2d 147, 148-49 (1989), the Kansas Court of Appeals followed the rule set out in *Adee*:

The Department, however, asserts that the Kansas implied consent law is to be liberally construed to effectuate its obvious purpose of protecting the safety and welfare of the motoring public.

* * * *

The Department correctly points out the rules of statutory construction as noted in *State v. Adee*, 241 Kan. at 829.

In *State v. Kelly*, 14 Kan. App. 2d 182 (1990), a criminal DUI case, an issue arose concerning the notices that are required to be given a person who is requested to submit to an alcohol test. In that case, which involved criminal sanctions, the Kansas Court of Appeals determined that the notice provision should be strictly construed as a penal statute. However, in a later case, not involving criminal sanctions, *Meigs v. Kansas Dept. of Revenue*, 16 Kan. App. 2d 537 (1992), the Kansas Court of Appeals chose to apply the decision in *Kelly* and determined that the rule of strict construction should apply even where the only sanction involved is the suspension of driving privileges. Upon review by the Kansas Supreme Court, the issue of strict construction was not addressed. The court said that it was not necessary to determine whether the statute should be strictly or liberally construed to decide the case.

The effect of the Kansas Court of Appeals decision in *Meigs* is to promote arguments in many administrative hearings and district court of appeals that suspensions under the Kansas Implied Consent Law should be thrown out for what might be best described as "technicalities." The proposed statutory language will merely clarify the existing standard set out in the decision by the Kansas Supreme Court in *State v. Adee*.

Page 6. in paragraphs (d) and (e) and page 9. paragraph (o):

A recent district court decision held that the present notice of suspension does not provide adequate notice of the date of suspension and that the provisions of K.S.A. 60-206 apply to the computation of time for suspension, "absent a statute specifically determining time computation for a particular time period in such a manner as to render reference to K.S.A. 60-206 unnecessary."

The proposed changes in paragraphs (d) and (e) and the language in new paragraph (o) are specifically intended to meet the objections set out in this district court decision. If the district court decision is upheld by the Kansas Court of Appeals, every notice of suspension presently in use throughout the state under the implied consent law could be determined to be invalid.

Page 7. lines 1-6:

This change is an attempt to make the statute mesh with commonly used police procedures. Many law enforcement agencies require the certifications required under K.S.A. 8-1002 to be reviewed by a supervising officer before being forwarded to the Division, since the Division is required to dismiss the certification if certain statutory requirements are not met.

Coupled with the decision in *Meigs*, arguments are presently made, under the present language in K.S.A. 8-1002(e), that if the officer who arrested and served the person with the copy of the certification and notice is not the one who actually mails the certification in the mail, then the entire procedure is voided. Conversely, if the officer who served the person does not return to duty in time to mail the certification in five days, then it is argued that the entire procedure is void for that failure, although there may

be no effect on the licensee's right to a hearing or any effect on the proceeding in any other way.

The proposed changes merely remove the requirement that the officer who served the notice of suspension and copy of certification on the licensee be the one who actually mails the certification to the Division of Vehicles.

Page 8, line 43 to page 9, line 10:

Coupled with the strict construction language in the *Meigs* decision by the Kansas Court of Appeals, arguments are commonly made that any failure to hold an administrative hearing within 30 days of the request entitles the licensee to dismissal of the administrative action. This occurs although the present statutory language specifically provides that if the Division is unable to hold a hearing within 30 days the temporary driving privileges issued to the licensee are to be extended until the date set for hearing.

With the number of administrative hearing requests received by the Division, requests for documents by licensees and their attorneys prior to hearings, limitations on access to hearing sites, and other factors, it is not uncommon for administrative hearings to be held beyond 30 days from the hearing request. In such cases, temporary driving privileges are extended until the date set for hearing. Upon appeal, licensees often argue that dismissal is required, based upon *Meigs*, or that the Division is required to provide evidence that it was unable to hold the hearing within 30 days. One district court has expressed an opinion that the clerk that sets administrative hearings should be required to appear before the court to testify why she was unable to set the hearing within 30 days. Obviously, if the clerk who sets hearings is spending time testifying rather than setting hearings, further delays will result.

To avoid all of these technicalities, the proposed language will omit the 30 day language and simply require the Division to extend any temporary driving privileges until the date set for hearing. The proposed change will merely eliminate these technical issues and will not cause any change in the present procedures of the Division.

Page 9, paragraph (n):

In *State v. Lovett*, 17 Kan. App. 2d 450 (1992), the Kansas Court of Appeals reviewed a conviction for driving while suspended in which the underlying suspension was based upon a suspension under K.S.A. 8-1002 for refusing to submit to a test to determine alcohol content. The issue hinged upon whether the licensee, after an administrative hearing, had been given proper notice of the result of the hearing.

The court, the prosecutor and the defense attorney all appear to have focused their attention on the wrong statute, K.S.A. 8-255(d), in deciding that proper notice of the decision at the administrative hearing was not given. However, the proposed language in new paragraph (n) is based upon another portion of the decision. In arriving at its decision the Kansas Court of Appeals stated:

There is no specific procedure mandated to govern these administrative hearings. We hold, therefore, that such a proceeding is governed by the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.* (at 17 Kan. App. 2d 455)

In fact, K.S.A. 8-1002(g) sets out procedures for requesting administrative hearings, procedures for requesting subpoenas, requirements for the venue for hearings, and requirements for sending notices of hearing. K.S.A. 8-1002(h) sets out the issues which can be raised in a hearing on a test refusal in (h)(1) and for a test failure in (h)(2). K.S.A. 8-1002(i) sets out procedures for providing evidence of the certification of the testing device and of the person conducting the testing in hearings and upon court review. K.S.A. 8-1002(j) sets out procedures for providing evidence of blood test results. K.S.A. 8-1002(k) sets out what actions the administrative hearing officer can take as a result of the hearing. K.S.A. 8-255(d) and (e) provide further rules about holding hearings, administering oaths at hearings, witness fees, etc.

The Act for Judicial Review concerns the procedures for petitioning courts to review administrative proceedings and does not contain rules for the conduct of administrative proceedings. It is not possible for the Division to administer the Implied Consent Law by using the Act for Judicial Review.

The proposed language merely states that the procedures to be followed for administrative hearings under the implied consent law are those procedures set out in the act and the general provisions for hearings in K.S.A. 8-255, as applicable.

TESTIMONY

SENATE BILL 435
HOUSE TRANSPORTATION COMMITTEE
April 28, 1993

TO: Senator Rex Crowell, Chairperson
House Transportation Committee
Kansas State Legislature, Topeka, KS 66612

Mr. Chairman and Members of the Committee:

I represent the Kansas Community Alcohol Safety Action Project Coordinators Association. We are the organization that conducts the Pre-Sentence Evaluations on all those DUI offenders who have applied for Diversion or have been convicted of the charge of DUI in the State of Kansas. We will conduct evaluations in over 7,000 cases annually.

Our organization supports Senate Bill 435 as a very important piece of Legislation as far as the DUI programs throughout the State are concerned. We have found that swift and orderly suspension of one's driving privileges after an arrest for DUI is a positive deterrent for future unlawful acts of this nature. To the offender that means that the State of Kansas is sincere in it's efforts of being fair throughout the State for those people who fail to take the breath chemical test or have a blood/breath alcohol reading of .08% or above and lose their driving privileges as a result of that testing procedure.

In the past, because of some interpretation of the laws by hearing officers and Judges, it has become apparent that certain clean-up language is needed in the Statute in order to close up those loop holes for those individuals who seek ways "to beat the system". Most generally offenders who are trying to beat the system are those individuals who have serious problems with alcohol or drugs. By allowing them to beat the system, we are then giving them permission to drink and drive in the future. In the past decade we have come a long ways with our DUI law, as we have found that it is an excellent intervention procedure in saving Kansas citizen's lives. In addition, the law provides professional assistance for those offenders, who until the time of their arrest, did not realize that they had a serious problem with their drinking and driving.

Our organization, along with the Kansas Alcoholism and Drug Addiction Counselors Association, and the Kansas Alcohol and Drug Program Directors Association, hope this committees gives it's approval to this legislation in order to provide orderly suspension of driving privileges, in a uniform manner for all DUI offenders.

Thank you for your time and I will attempt to answer any questions.

Respectfully Submitted,


Gene Johnson

Legislative Liaison

Kansas Community Alcohol Safety Action Project Coordinators Association

HOUSE TRANSPORTATION
Attachment 3
4/28/93

TESTIMONY ON SENATE BILL 435

**TO THE MEMBERS OF THE
HOUSE TRANSPORTATION COMMITTEE**

**BY JOHN M. DOUGLASS
ASSISTANT CHIEF OF POLICE
OVERLAND PARK POLICE DEPARTMENT**

Mr. Chairman and Members of the Committee, I am here today to represent the City of Overland Park in requesting your support of Senate Bill 435.

As you have heard today, Senate Bill 435 is the closing of several loopholes or technicalities designed to perpetuate successful prosecution of DUI cases. I would like to offer a few brief comments.

First of all, I would like to tell you that the DUI Enforcement Legislation you have given us is alive and well. In the City of Overland Park, we have made approximately 1,400 DUI arrests last year.

Currently, nearly 95 percent of those arrests result in convictions. Clearly, this has had a positive effect on alcohol-related traffic fatalities. It has been so successful in this area that the defense

bar has now turned to the administrative hearing portion of the process as a place where DUI defendants can find relief from the hard penalties for violation of the DUI laws. The defense bar now uses this administrative hearing as a forum much broader in scope than its original intention.

Unlike court, where the officer is protected by competent legal counsel, the administrative hearing offers no such protection and the defense attorneys have been allowed almost free reign enforcing these cases to become a mirror-image of a criminal trial. If this practice is allowed to continue, or if the loopholes mentioned in this bill are allowed to remain open, the effectiveness of our DUI Enforcement policy will without question diminish.

It is the position of the City of Overland Park that Senate Bill 435 should be adopted.

John M. Douglass
Assistant Chief of Police

JMD:kw

HOUSE TRANSPORTATION
Attachment 4-2
4/28/93