

Approved: 4-28-93  
Date

## MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 8:15 a.m. on April 1, 1993 in Room 514-S of the Capitol.

All members were present except: Senators Petty and Feleciano (both excused)

Committee staff present: Michael Heim, Legislative Research Department  
Gordon Self, Revisor of Statutes  
Sue Krische, Committee Secretary

Conferees appearing before the committee:

James G. Keller, Department of Revenue

Others attending: See attached list

### HB 2355 - Alcohol-related offenses, .08.

Chairman Moran advised that HB 2355 was sent back to the Committee from the Senate Floor for reconsideration of the Department of Revenue amendments the Committee had previously added to the bill.

James Keller, Department of Revenue, told the Committee that the changes in statute proposed by the Division of Vehicles pertaining to the Implied Consent Law and outlined in his written testimony are necessitated by recent court decisions (Attachment 1). Senator Martin questioned whether some of the proposed amendments were not more substantive than technical. Senator Martin made a motion to refer HB 2355 to Interim study. Senator Bond seconded. Senator Ranson made a substitute motion to recommend HB 2355 favorably as amended by the Senate Committee of the Whole. Senator Harris seconded. Substitute motion failed. Senator Brady made a substitute motion to adjourn. Senator Parkinson seconded. Substitute motion failed. Back on the original motion, Senator Bond made a substitute motion to adjourn. Senator Martin seconded. Substitute motion carried.

Captain Bob Giffin, Kansas Highway Patrol, submitted written testimony in support of the change in BAC to .08 and addressing other issues related to the change in the law (Attachment 2).

The meeting was adjourned at 8:45 a.m.

## GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 4 - 1 - 95

[illegible]

## MEMORANDUM

**TO:** The Honorable Jerry Moran, Chairman  
Senate Judiciary Committee

**FROM:** James G. Keller, Attorney  
Kansas Department of Revenue

**DATE:** April 1, 1993

**SUBJECT:** House Bill No. 2355

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I appreciate the opportunity to again appear before you with regard to House Bill No. 2355.

The Kansas Department of Revenue has proposed some changes to the present statutory language in K.S.A. 8-1001 and 8-1002. These changes are being proposed as a result of the experience of the Division of Vehicles in attempting to administer the Kansas Implied Consent Law. Several recent court decisions have made it clear to the Division that some statutory changes are necessary if the Implied Consent Law is to remain effective. Several proposed changes have been made during this session which would assist in administering this law. The most recent proposal contains only those changes in statutory wording which the Division views as absolutely necessary if the legislature intends that the Implied Consent Law continue to be effective. None of the changes represents a departure from the present procedures used by the Division. All are in response to recent district or appellate court decisions.

1. A provision should be added to K.S.A. 8-1001 to state that the implied consent law should be liberally construed. Since it was first enacted, the courts have recognized that the purpose of the implied consent law was to protect the public. In *State v. Adee*, 241 Kan.

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825, 829 (1987), the Kansas Supreme Court stated that the implied consent law, as a statute designed to protect the public, was entitled to "broad interpretation so that its public purpose may be fully carried out." Other court decisions followed the *Adee* decision. However, a 1992 Kansas Court of Appeals decision held that the implied consent law should be strictly construed. Although the Kansas Supreme Court upon review said that it was unnecessary for the Court of Appeals to have reached that conclusion in order to decide the case, the language of the Kansas Court of Appeals decision is being used as a basis to argue that any error by a law enforcement officer requires dismissal of the administrative action on the person's license even if the error had no effect upon the suspension action.

The proposed language simply confirms that this law should be liberally construed as the Kansas Supreme Court stated in *Adee*. The wording is similar to that contained in the Commercial Driver's License Act.

2. A recent district court decision held that the notices of suspension provided by the Department of Revenue are unclear. The requirement that the suspension period begin 20 days after the date of service of the notice of suspension does not indicate whether weekends and holidays are included in the calculation. The court recommended that the legislature clarify the manner in which the suspension period is to be calculated.

The proposed language clarifies how the date of suspension is to be calculated and is not a change from the present procedures used by the Division.

3. Language should be added to the statute to make it clear that the requirement to forward the officer's certification to the Division of Vehicles within 5 days is directory rather than mandatory. The general rule in construing time requirements for administrative agencies is that such requirements are directory rather than mandatory except where the statute contains language setting out dismissal of the agency action as a consequence for failure to take an action within the statutory time period. In other words, time

constraints in a statute should be followed, but dismissal of the administrative proceeding is not required for failure to meet time guidelines unless prejudice is shown to the person affected by the administrative action. Nevertheless, some recent court rulings have resulted in dismissal of the administrative action on licenses under the Implied Consent Law if the certification was not forwarded within the five day period.

The proposed amendment would simply require that prejudice be shown to support a dismissal of the administrative action if the officer failed to send in the certification within the five day period.

4. The present statutory language contains a requirement that an administrative hearing be held within 30 days. The statute also states that if the Division is unable to hold the hearing within 30 days the temporary driving privileges are to be extended until the date set for the hearing. Although the statute specifically states what is to be done if the hearing is not held within 30 days, some courts have recently ruled that the failure to hold the hearing within 30 days requires dismissal of the administrative action.

The proposed change in the language of the statute will not change the present administrative procedures.

5. A recent published Kansas Court of Appeals decision held that there are no procedural statutes for administrative hearings under the Implied Consent Law. The decision went on to hold that the Act for Judicial Review of Agency Actions would therefore supply the administrative procedures for hearings. However, K.S.A. 8-255 and 8-1002 contain requirements for requesting administrative hearings, provisions relating to the issues at administrative hearings, and provisions relating to the conduct of the hearings themselves. The Act for Judicial Review contains the rules for appealing from agency decisions--not rules for conducting administrative hearings.

The proposed language would simply make it clear that the administrative procedures are those set out in K.S.A. 8-255 and 8-1002.

## SUMMARY OF TESTIMONY

Before the  
Senate Judiciary Committee

by the  
Kansas Highway Patrol  
(Captain Bob Giffin)

Appearing in Support of .08 BAC Legislation

April 1, 1993

Mr. Chairman and members of the Committee, the Kansas Highway Patrol supports provisions in House Bill #2355 lowering the blood alcohol concentration (BAC) for driving under the influence of alcohol and/or drugs from .10 to .08.

Several recent studies have indicated that all persons are impaired to some extent at .08 BAC. Other studies have shown that the higher the alcohol concentration, the greater the risk of involvement in a motor vehicle crash. These studies have indicated a clear health based rationale for a lower BAC standard.

By enacting .08 legislation, the Kansas legislature creates a greater deterrent to drunk driving by setting a tougher standard.

\* \* \* \* \*

House Bill #2355, on page 17, line 43, provides for a \$25.00 administrative fine to cover the KBI's laboratory costs for chemical analysis testing. The Patrol would bring to the Committee's attention that our agency also conducts chemical (breath) analysis testing. In 1992, 142 evidentiary breath tests with BAC's between .08 and .099 were conducted. Additionally, over 8,000 preliminary breath tests were administered with results below the .099 BAC level.

We believe there will be an increase in the number of evidentiary tests our agency performs if .04 legislation is enacted for persons under the age of 21. The Patrol supports any legislation that discourages underage drinking, however, we want the Committee to be aware of the fact that the Patrol will experience some increased costs associated with chemical testing specifically for persons under age 21.

\* \* \* \* \*

House Bill #2355 also establishes a new definition, "alcoholic beverage", combining K.S.A. 41-2719 (cereal malt beverage) with K.S.A. 41-804 (alcoholic liquor). This should make open container laws easier to understand and enforce.

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Attachment 2