Approved: 4-29-94
Date

MINUTES OF THE HOUSE COMMITTEE ON LABOR AND INDUSTRY.

The meeting was called to order by Chairman David Heinemann at 9:00 a.m. on March 10, 1994, in Room 526-S of the Capitol.

All members were present except: Representative Carmody (excused)
Representative Cornfield (excused)
Representative Packer (excused)

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Kay Scarlett, Committee Secretary

Conferees appearing before the committee:

Jacki Summerson, Manpower Temporary Services
Jeffrey A. Chanay, Entz & Chanay

Others attending: See attached list

Continuation of Hearing on SB 738 - Employment security law, benefit eligibility and disqualification conditions, certification period for fund solvency.

Jacki Summerson, Manpower Temporary Services, testified in support of SB 738 as amended by the Senate Commerce Committee. Many of their employees are sent on assignments that do not have a definite end date. It is their policy for all temporary employees that when their assignment has ended, they must call in and make themselves available for another job assignment. They sign a statement that they must call in for a new work assignment both on their employment application and on their orientation procedures.

The 1986 Court of Appeals decision regarding unemployment benefits for employees of temporary employment agencies reaffirmed a prior lower court decision. A third court decision was decided in August, 1993, in Shawnee County District Court. (A copy of that decision is included with her testimony.) The Court decision stated that "If the employer offers credible evidence that the employee did not call in or otherwise failed to report his/her availability for additional work, the burden to prove availability for work shifts to the claimant to establish eligibility. An employer should not be required to prove that specific work assignments were available until it has been established that the employee was available for work. The Court concludes that an employee's availability for work is the threshold question."

SB 738 was amended in the Senate Commerce Committee to conform with the District Court decision. This change does not affect the claimant's eligibility for unemployment benefits. The eleven exceptions for a claimant to draw unemployment benefits still apply. Manpower supports SB 738 as amended. (Attachment 1)

Jeffrey A. Chanay, Entz & Chanay, attorney for Manpower, appeared in support of SB 738 as amended by the Senate Commerce Committee. In a 1961 decision, the Kansas Supreme Court stated that the Kansas Unemployment Security Law is intended "to protect against involuntary unemployment - that is, to provide benefits for those who are unemployed through no fault of their own and who are willing, anxious and ready to support themselves and their families, and who are unemployed because of conditions over which they have no control." An unemployed person is eligible to receive benefits only if it is found that he is able to work, is available for work, and is making reasonable efforts to obtain work.

The Employment Security Board of Review did not appeal Judge Buchele's August, 1993, decision. The current language found in SB 738 codifies the test enunciated by Judge Buchele. Mr. Chanay stated that this is the fairest and most objective means of measuring eligibility for unemployment benefits, and asked that SB 738 be passed as amended by the Senate Commerce Committee. (Attachment 2)

MINUTES OF THE HOUSE COMMITTEE ON LABOR AND INDUSTRY, Room 526-S Statehouse, at 9:00 a.m. on March 10, 1994.

Representative Packer suggested an interim committee on temporary service agencies as they relate to Kansas Unemployment Security Law.

The Hearing on SB 738 will be continued on Wednesday, March 16.

Chairman Heinemann asked if the committee was in general agreement on SB 523 and asked for a motion. Representative Janice Pauls moved that SB 523 be passed out favorably. Representative Webb seconded, motion carried.

The meeting adjourned at 10:00 a.m. The next meeting is scheduled for March 15, 1994.

GUEST LIST

COMMITTEE: HOUSE LABOR AND INDUSTRY DATE: 3-10-94

NAME	ADDRESS	COMPANY/ORGANIZATION
PAUL BICKNELL	TOPEKA	KDHR
ROBERT LEIKE	TOPEKA	KDHR
Linda Tiercie	Topeka	KDHR
Bill Layes	Topeka	KDHR
Sam Orozco	Topeka	KDHR
Jeff Chanay	Topeka	Entz & Chanay
Jackie Summerson	Topeka	Manpower
RAY SCHER	TOPEKA	SELF
Claude Lee	Topeka	KDHR
Terry Leatherman	Topeka	KCCI
Judy Ralston	Topeka	Security Benefit Grp
Anita Larson	Topeka	" " "
Christy Young	Topeka	Topeka Chamber of Com
TOM HANNA	~~KEY PERSONNEL TOPEKA~~	KEY PERSONNEL
DONALD SNODGRASS	Topeka ks	KFDA
Wayne Maichel	"	KS AFL-CIO
Jim McHaffie	Topeka	KS AFL-CIO
Lisa Unruh	Topeka	DOB
Bill Jarvis	Wichita	BOEING

MANPOWER®
TEMPORARY SERVICES

STATEMENT OF TESTIMONY
House Labor & Industry Committee

DATE: **March 10, 1994**

RE: **Senate Bill 738, relating to Kansas Employment Security Law**

FROM: **Jacki Summerson, Manpower Temporary Services (913/267-4060)**

My husband and I own and operate the Manpower Temporary Services franchise offices in Kansas. We have fifteen offices throughout the state. Our company is one of several employers in the State of Kansas that provide thousands of employment opportunities to people who are in the process of looking for permanent employment but need work or simply want limited employment. On the average, we employ approximately 2,000 people per week. In 1993, we sent out about 14,000 W-2s. About one third of our employees obtain a permanent job through their temporary job with us. Some of these people would otherwise be drawing unemployment benefits if we didn't provide them with work.

I am here to testify in favor of Senate Bill 738 as amended by the Senate Commerce Committee.

Many of our temporary employees are sent on assignments that do not have a definite end date. Maybe it is a special project that our customer wants help on until it is finished but they aren't sure exactly how long it will take. Or maybe it is a replacement for someone who is sick and the customer isn't sure exactly when their permanent employee will return to work. Our employees bring us a time ticket each week that records their hours worked during the prior week. Sometimes when they bring us their time ticket, we discover that the job assignment ended during the prior week. It is our policy for all temporary employees that if their assignment has ended, they must call in and make themselves available for another job assignment. They sign a statement that they must call in for new work assignments both on their employment application and on our orientation procedures. It is also printed in bold letters on our weekly time tickets that they turn in each week. For example, if an assignment ends on Tuesday, the employee can file for unemployment on Wednesday and we don't even get a chance to offer them another

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Emporia, Kansas 66801
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Manhattan, Kansas 66502
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(913) 776-1094

Junction City, Kansas 6644
838 A South Washington
(913) 762-5500

Lawrence, Kansas 66044
211 East 8th Street, Suite B
(913) 749-2800

Ottawa, Kansas 66067
407 South Main
(913) 242-1002

assignment. We keep a log of all employees who call in available and fill our job orders from that list of employees. I'd also like to point out that if an employee does call in, and we do not have another assignment for them or if the assignment is not comparable work at comparable pay, they are eligible for benefits.

I'd like to give a few "real" examples of cases that we have had. We had an employee who completed a three month assignment with us and did not call in to make themselves available for another assignment. They then took a permanent job with another employer. After six months, the employee was laid off from the permanent job and filed for unemployment benefits. We got an unemployment claim for this person 6 months after he originally left our employment. With the additional clause about if comparable work is available, we would have to try to determine which jobs we had available 6 months ago when the person completed their assignment with us and did not attempt to get another assignment. Our records are not computerized. We keep all of our records manually. Our job orders change hour by hour as we get calls from our customers. To try to reconstruct which jobs were available *if the claimant had called in six months ago* is very time consuming and is difficult to do.

On the one hand, the Department treats us like a full-time employer. For example, most companies have a policy that employees must call in if they can't make it to work. If an employee does not report to work for a full-time employer, they would assume that the employee had abandoned their job. Why should we be treated any differently? Again, if they were unable to report to work because of one of the eleven exceptions (family emergency, etc.), they would qualify for benefits.

To address another concern the committee had regarding an employee who completed a temporary assignment who was making $9 an hour and was offered another assignment at $4 an hour. First of all, we couldn't do that since minimum wage is $4.25 an hour. But to continue the example, the employee could refuse the work because it is not comparable work at comparable pay and could receive unemployment benefits. This change is not effecting this part of the law at all. We have even had referees tell us that a job making 25 cents an hour less than the previous job is not considered comparable work at comparable pay.

I'd also like to address the example given yesterday about someone who was laid off from Boeing and then took a job with Manpower. If they took a two week assignment and then did not call in available the next day, they would be denied benefits. This is no different than if they had gone to work for Cessna for two weeks and decided they didn't like the work and quit. They would lose their benefits under current law in this case too.

From our experience, if a referee is basing his decision on the employer's word versus the employee's word, they rule in favor of the employee 99 times out of 100. Even on issues

of misconduct, if we don't have a witness with us, they rule in favor of the employee. A written statement from a witness is not sufficient.

Let me give another example. In a recent unemployment hearing we were asked by a referee about jobs being available. In this example, we had 12 jobs available on this particular day in this particular office. Then we were then asked how many employees called in available for work on that day. There were 15 who had called in available. We were then asked how we could guarantee that the employee would have received a job if he had called in. Having this additional clause creates so many "what if" scenarios we could go on and on. It actually turns the eligibility question into a two-pronged question. First, did the employee call in? Second, if the employee did not call in, was comparable work available if he had called in? Further, would he have gotten the work if he had called in? *Let's keep in mind that the original intent of unemployment benefits was for those who become unemployed through no fault of their own.* It was not intended to subsidize people who are not attempting to find work. Some employers in this room will remember when claimants had to obtain three signatures each week from employers where they had applied for work and were not hired. This is no longer required.

A Court of Appeals decision regarding unemployment benefits for employees of temporary employment contractors was decided in July of 1986. It reaffirmed a prior decision of the Sedgwick County District Court in 1973. A third Court decision regarding unemployment benefits for employees of temporary employment contractors was decided in August of 1993 (Topeka Services, Inc. vs. Employment Security Board of Review). A copy of the decision is attached for your review.

> The Court decision stated "..If the employer offers credible evidence that the employee did not call in or otherwise failed to report his/her availability for additional work, the burden to prove availability for work shifts to the claimant to establish eligibility. An employer should not be required to prove that specific work assignments were available until it has been established that the employee was available for work. The Court concludes that an employee's availability for work is the threshold question.."

Senate Bill 738 was amended in the Senate Commerce Committee to make it agree with the Court decision. This change does not affect the claimant's eligibility for unemployment benefits. The eleven exceptions still apply. If an employee has a problem that prevents them from working such as a personal emergency, hazardous working conditions, no transportation, or if they accept better work, they will still receive unemployment benefits.

I attended the Employment Advisory Security Council meeting and I'd like to address the results of that meeting. A subcommittee initially made the recommendation to insert the clause *as it is currently amended in the proposed legislation.* The clause regarding

"...when comparable work is available..." was added at the meeting with a vote of 6-4-1. It was not a unanimous vote by any means.

We have had to hire a full time employee who does nothing but deal with unemployment claims paper work. We pay hundreds of thousands of dollars in unemployment taxes every year. Once again, let's remember that the original purpose of unemployment was to assist those who lose their jobs through no fault of their own. If an employee calls us for work and either we don't have another assignment or if the assignment isn't comparable work, they **can** qualify for unemployment benefits. We ask that the bill be passed in its current form as amended by the Senate Commerce Committee.

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWELVE

TOPEKA SERVICE, INC., d/b/a MANPOWER TEMPORARY SERVICES, Petitioner, v. STATE OF KANSAS EMPLOYMENT SECURITY BOARD OF REVIEW and MARTINA L. GARNER, Respondents.	Case No. 92-CV-1326
TOPEKA SERVICE, INC. d/b/a MANPOWER TEMPORARY SERVICES, Petitioner, v. STATE OF KANSAS EMPLOYMENT SECURITY BOARD OF REVIEW and JUDY K. MCNULTY, Respondents.	Case No. 92-CV-1329
TOPEKA SERVICES, INC., d/b/a MANPOWER TEMPORARY SERVICES, Petitioner, v. STATE OF KANSAS EMPLOYMENT SECURITY BOARD OR REVIEW and LARRY J. QUALL, Respondents.	Case No. 92-CV-1331

ORDER ON APPEAL

This is an appeal from an Administrative Decision made by the Kansas Employment Security Board of Review in three separate cases which contain a common issue of law. These cases have been consolidated by agreement before this Court for a decision.

The Court has reviewed the briefs submitted by counsel and the case of Manpower, Inc. v. Kansas Employment Security Board of Review, 11 Kan. App. 2d 382, 724 P.2d, 690 (1986). The syllabus from this case states the following rule of law:

> "The failure of an employee of a temporary employment contractor to report for work when assignments are available constitutes leaving work voluntarily without good cause attributable to the claimant's employment under K.S.A. 1985 Supp. 44-710(c)(2)(a). Under such circumstances, unemployment benefits paid the claimant shall not be charged to the account of the base period employer."
> Kan. App. 2d 382 (emphasis added)

The agency's decision and its argument here is that for Petitioner (Manpower, Inc.) to avoid charge to its experience rating it must prove that it could offer comparable work assignments at comparable pay to Respondents upon their completion of a given job assignment. It is the Petitioner's position that it should not be required to make this proof in those cases where the employee has not reported for work in accordance with the employment contract. In Manpower v. Employment Security, supra, Manpower offered evidence that there was comparable work available. Therefore, the Court in that case did not specifically address the question whether or not available work is a necessary element which the employer must prove to avoid having its account charged.

In the cases before the Court, there is unrebutted evidence sufficient to establish a fact, prima facie, that the employees did not call in their availability for work following conclusion of a given job assignment.

Completion of a given work assignment does not amount to termination of the claimant's employment. Manpower v. Employment Security, supra at 389. An employee who subsequently fails to report for work has indicated an unwillingness to work. Manpower v. Employment Security, supra at 387. An employee who has reported for work but work is not available is involuntarily unemployed. And, an employee who fails to call in or report to work is voluntarily unemployed. These principles are consistent with the Kansas Employment Security Law (K.S.A. 44-702 et. seq.)

Applying the foregoing principles to the issue presented by the three cases before the Court compels the conclusion that if the employer offers credible evidence that the employee did not call in or otherwise failed to report his/her availability for additional work, the burden to prove availability for work shifts to the claimant to establish eligibility. An employer should not be required to prove that specific work assignments were available until it has been established that the employee was available for work. The Court concludes that an employee's availability for work is a threshold question to be determined in a hearing on an application for unemployment benefits. Whether or not the employer has work available is secondary and is a moot question if the employee has not reported for work.

The Court finds that the Respondent State of Kansas Employment

Security Board of Review erred in its decisions in the above referenced cases as the Hearing Officer made findings regarding availability for work when it had been established by prima facie evidence that the employee did not call in his/her availability or report to work as required in their employment contract.

IT IS THEREFORE THE CONCLUSION AND ORDER OF THIS COURT that the decision in these cases should be and are hereby reversed. These cases are remanded to the Respondent agency for rehearing in accordance with this opinion.

IT IS SO ORDERED.

Entered this 13th day of August, 1993 at Topeka, Kansas.

James P. Buchele
District Judge
Division Twelve

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Order was deposited in the United States mail, postage prepaid, on this 13th day of August, 1993, addressed to:

James R. McEntire
Employment Security Board of Review
1430 SW Topeka, 3rd Floor
Topeka, Kansas 66612-1879

Jeffrey A. Chanay
Attorney at Law
3300 SW Van Buren
Topeka, Kansas 66611

Allis E. Sanford
Allis E. Sanford
Administrative Assistant
Division Twelve

MEMORANDUM

TO: House Labor and Industry Committee

FROM: Jeffrey A. Chanay, Entz & Chanay

RE: Kansas Employment Security Law/Senate Bill 738

DATE: March 9, 1994

Since its initial passage in 1937, the Kansas Employment Security Law has been intended to address the problem of economic insecurity due to unemployment. Indeed, the State public policy, as set forth in K.S.A. 44-702, provides:

> As a guide to the interpretation and application of this Act, the public policy of this state is declared to be as follows: Economic insecurity, due to unemployment, is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature . . . .

The Kansas Supreme Court has stated the law is intended "to protect against involuntary unemployment - that is, to provide benefits for those who are unemployed through no fault of their own and who are willing, anxious and ready to support themselves and their families, and who are unemployed because of conditions over which they have no control." Clark v. Board of Review Employment Security Division, 187 Kan. 695,698 (1961). An unemployed person is eligible to receive benefits only if it is found that he is able to work, is available for work, and is making reasonable efforts to obtain work. Id.

On behalf of Topeka Services, Inc. and Wichita Services, Inc., the Manpower franchisees for most of the State of Kansas, it is requested that Senate Bill 738, as amended by the Senate Commerce Committee, be recommended favorably for passage by the House Labor and Industry Committee.

For many years, both Topeka Services, Inc. and Wichita Services, Inc. have been involved in disputes with the Department of Human Resources concerning the proper elements of proof in determining benefit disqualifications in situations where an employee completes a temporary job assignment and contrary to the employment agreement, fails to make themself available for an additional job assignment. The Manpower franchisees have taken the position that an employee is disqualified from receiving benefits if the individual left work voluntarily without good cause attributable

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to the work or the employer at the conclusion of one job assignment and fails to return to work on the next succeeding day to request an additional job assignment. The Department of Human Resources, on the other hand, have taken the position that a temporary employment agency must not only show that the employee left work without good cause attributable to the work or the employer, but must also show that comparable work at comparable pay would have been made available to the claimant had the claimant actually sought additional work. In the Topeka Services, Inc. v. Employment Security Board of Review case, Shawnee County District Judge James Buchele held:

> Applying the foregoing principles to the issue presented by the three cases before the Court compels the conclusion that if the employer offers credible evidence that the employee did not call in or otherwise failed to report his/her availability for additional work, the burden to prove availability for work shifts to the claimant to establish eligibility. An employer should not be required to prove that specific work assignments were available until it has been established that the employee was available for work. The Court concludes that an employee's availability for work is a threshold question to be determined in a hearing on an application for unemployment benefits. Whether or not the employer has work available is secondary and is a moot question if the employee has not reported for work.

The Employment Security Board of Review did not appeal Judge Buchele's decision and instead allowed the decision to become binding upon the parties. Thus, the law in Kansas, at least as between the parties to the litigation, is that the employer is not required to prove that specific or comparable work assignments were available until it has been established that the employee was available for work at the conclusion of the temporary assignment.

The original version of Senate Bill 738 had the phrase "and when comparable work is available" included in the proposed amendment to K.S.A. 44-706(a)(page 2, line 37). However, the Senate Commerce Committee struck this language as unfair and unworkable because it would have required temporary employers to prove that comparable work would have been available to a claimant if the claimant had actually returned to work when required. The current language found in Senate Bill 738 is the law and merely codifies the test enunciated by Judge Buchele. It is submitted that this test is the fairest and most objective means of measuring eligibility for unemployment benefits.

Thank you for your consideration of this matter, and my clients ask that the Committee report Senate Bill 738 favorably without further amendment.