Approved: 2-18-94
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on February 17, 1994 in Room 123-S of the Capitol.

Members present: Senators Burke, Downey, Feleciano, Gooch, Harris, Hensley, Kerr, Petty, Ranson, Reynbolds, Salisbury, and Steffes

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Jim Wilson, Revisor of Statutes
Bob Nugent, Revisor of Statutes
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee: Bob Stacks, Director, Unemployment Insurance Division, Department of Human Resources
Tom Hanna, Key Temporary
Jeff Chanay, Manpower Temporary Services
Mark Rau, Manpower Temporary Services

Others attending: See attached list:

Hearing and possible action on SB 738--Employment security law, benefit eligibility and disqualification conditions, certification period for fund solvency

Bob Stacks, Director, Unemployment Insurance Division, Department of Human Resources, testified in support of the four amendments to the Employment Security Law contained within SB 738, see attachment 1.

Tom Hanna, Key Temporary, requested that "and when comparable work is available" be deleted from the amendment, on page 2, line 36. Temporary job assignees do not always contact Key Temporary when their temporary assignments are completed. In many cases they go directly to sign up for unemployment compensation when, in fact, the agency continually has openings, see attachment 2.

Jeffrey A. Chanay, an attorney representing Topeka Services, Inc. and Wichita Services, Inc. which are Manpower franchisees, testified in support of deleting "and when comparable work is available" from the amendment on page 2, line 36. He stated the Manpower franchisees 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 himself available for an additional job assignment. Judge Buchele cited in the Topeka Services, Inc., v. Employment Security Board of Review case, that 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 concluded 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, see attachment 3. He reported the Advisory Council voted 6-4-1 on the amendments.

Mark S. Rau, Area Manager for Manpower Temporary Services, testified if "and when comparable work is available" on page 2, line 36 of SB 738 is deleted, Manpower Temporary Services could support the bill, see attachment 4.

The hearing on SB 738 was closed.

Bob Stacks explained, in response to questioning, that if a comparable job is not available, it is a non-charge to the employer. The unemployment benefits come out of the trust fund but are not charged to the employer.

Senator Ranson moved and Senator Harris seconded to strike "and when comparable work is

available" from SB 738, on page 2, line 36. The motion carried on a voice vote .

Senator Kerr moved and Senator Burke seconded to recommend SB 738, as amended, favorably for passage. The motion carried on a roll call vote.

Senator Steffes moved and Senator Gooch seconded to adopt the minutes of February 16, 1994. The motion carried on a voice vote.

The Chairman announced, at the request of a Committee member, there would be no discussion and action Friday, February 18th, on the confirmation of George E. McCullough to the Public Employee Relations Board.

The Chairman adjourned the meeting at 9:00 a.m.

The next meeting is scheduled for February 18, 1994.

GUEST LIST

COMMITTEE: SENATE COMMERCE COMMITTEE DATE: 2/17/94

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Terry Leatherman	Topeka	KCCI
Jeff Chanay	Topeka	Entz & Chanay
TOM HANNA	"	KEY PERSONNEL
Linda Tierce	Topeka	DHR
Bill Layes	Topeka	KSHR
PAUL BICKNELL	TOPEKA	KDHR
Sam Orozco	Topeka	KDHR
Greg McFarland	Overland Park	OP Chamber of Commerce
Jim McHoff	Topeka	KS AFL-CIO
Wayne Maichel	Top	" " "
JOE DICK	TOPEKA	DHR
Bernie Koch	Wichita	Wichita Area Chamber of Commerce
Bill Jarrell	Wichita	Boeing
Mark Barcellina	Topeka	KDOC&H
Page Thaute	"	Ks Gov Consulting
Ralph Skoog	Topeka	Ks C.A.T.V. Assn
Michelle Clum	Topeka	atty. Jon Small
Mark Rau	Topeka	Manpower Inc.
Bob Stacks	Topeka	KDHR

Senate Commerce Committee
February 17, 1994

TESTIMONY ON SENATE BILL 738

Madam Chairperson, members of the Committee, my name is Bob Stacks, Director of the Unemployment Insurance Division with the Kansas Department of Human Resources. I appear before you today, representing the Agency and in support of the amendments contained within Senate Bill 738. There are four amendments to the Employment Security Law contained within Senate Bill 738 and I would like to address them in sequential order as they appear in the Bill.

The first amendment can be found on Page 2, Line 21, where we have inserted the words "*returned to work*". This language was inserted to insure in accordance with federal UI law that a claimant returns to insured work after completing one benefit year before they can qualify for benefits in the next benefit year. This issue was discussed at the Employment Security Advisory Council meeting in early September and received the Council's approval to forward this measure to the 1994 Legislature with a positive recommendation.

The second amendment can be found on Page 2, Lines 24-27. This amendment establishes a new subsection (f) under 44-705 as part of a federal conformity issue. On November 24, 1993, the President signed into law the Unemployment Compensation Amendments of 1993, Public Law 103-152. Public Law 103-152 extended the Emergency Unemployment Compensation or (EUC) Program, and amended the Social Security Act to require states, as a condition of receiving administrative grants, to establish and utilize a system of profiling all new claimants for regular unemployment compensation. Profiling is designed to identify claimants who are likely to exhaust unemployment compensation and who might need job service assistance to make a successful transition to new employment. The Social Security Act was further amended to require states to

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Attachment 1-1

disqualify any individual identified by this profiling system, when and if the individual fails to participate in reemployment services. Since we are required to have this in effect by November 24, 1994, and since this Legislative session would have been the only means to codify this language, we submitted this amendment and contacted our Regional Federal Office to inform them of our efforts to meet compliance.

The third amendment can be found on Page 2, Lines 32-37. This amendment falls under the disqualification section of K.S.A. 44-706, and represents language that was supported and recommended by the Council to be an Agency amendment to subsection a of 44-706. The amendment primarily addresses the area of temporary employment and what shall constitute a voluntary quit.

The last proposed amendment can be found on Page 23, Lines 1-3. Early this year, Mr. Layes, Chief of Labor Market Information Services, brought to our attention the necessity to add additional language to the current subsection in order to meet our own State computation guidelines to accurately reflect the actual year end trust fund balances. Each year when contribution rates are computed for eligible employers, we use contributions paid on or before July 31st following the 12 month period which ends on June 30th. This allows us to consider the amount of taxes that are due and paid on those wages paid and reported for the 12 month period. We therefore submitted the amendment which basically provides that the certification is to cover a 12 month period ending on June 30th to insure an accurate reflection of trust fund balances.

This concludes my testimony on Senate Bill 738. I thank you for your time and would be more than willing to answer any questions you might have regarding the amendments contained within Senate Bill 738.

Testimony of Tom Hanna appearing for Patti Bossert, Key Temporary Personnel, 400 SW Croix, Topeka (267-9999)

Re: S.B.738

Sec. 2. K.S.A. 44-706 is hereby amended to read as follows: 44-706. An individual shall be disqualified for benefits:

(a) If the individual left work voluntarily without good cause attributable to the work or the employer, subject to the other provisions of this subsection (a). After a temporary job assignment, failure of an individual to affirmatively request an additional assignment on the next succeeding work day, if required by the employment agreement, after completion of a given work assignment ~~and when comparable work is available~~, shall constitute leaving work voluntarily.

We are in favor of these changes since all temporary job assignees do not contact us, as requested in advance of their assignment, when their temporary assignments are completed. In many cases they go directly to sign up for unemployment compensation when in fact, we continually have over 300 openings that we could send them to the following day.

We cannot on short notice know when all 300 "temps" have completed their assignments. Many temporary employees do not maintain a telephone and we are out of contact until the "temp" contacts us as they did originally.

We are always anxious to place employees in assignments since that is the way we make profits to exist. No placement--no profit!

We would like the words "when comparable work is available" deleted because we always have 300 to 500 openings that are awaiting qualified applicants.

Any questions?

Thank you

Tom Hanna

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Attachment 2

MEMORANDUM

TO: Senate Commerce Committee

FROM: Jeffrey A. Chanay, Entz & Chanay

RE: Kansas Employment Security Law/Senate Bill 738

DATE: February 17, 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 submitted that Senate Bill 738's amendment to K.S.A. 44-706(a) is contrary to public policy and contravenes the recent case of Topeka Services, Inc. v. Employment Security Board of Review, Case No. 92 CV 1326 (Shawnee County District Court, August 13, 1993).

Topeka Services, Inc. and Wichita Services, Inc. could support the new language found in K.S.A. 44-706(a) if the words "and when comparable work is

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available" (page 2, line 36) is struck from the proposed amendment. With this language struck from the proposal, the amendment merely reflects current law. However with the "and when comparable work is available" language left in, the amendment represents a departure from current law.

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 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 the 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, Judge 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 "and when comparable work is available" language as found on page 2, line 36 of SB 738 would legislatively overrule Judge Buchele's decision and require the employer to affirmatively prove the availability of comparable work even though the employee was not available for that work.

As a practical matter, the proposed language is unfair for temporary employers and is unworkable. In practice, an unemployment appeal reaches the Referee's level usually three to five months after the separation from employment occurred. Under the proposed amendment to K.S.A. 44-706(a), an employer would be asked to prove that comparable work would have been available to the claimant if the claimant had actually returned to work when required. It is suggested that the phrase "comparable work" is too subjective to be left to the whims of Department Referees and that the test enunciated by Judge Buchele is the fairest and most objective means of measuring eligibility for unemployment benefits.

In sum, Topeka Services, Inc. and Wichita Services, Inc. asks that the Committee strike the phrase "and when comparable work is available" from page 2, line 36 of Senate Bill 738. If this language is struck, my clients would support the amendment to K.S.A. 44-706(a).

Thank you for your consideration of this matter, and my clients would appreciate the Committee's willingness to strike the offending phrase from the amendment.

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

MANPOWER®
TEMPORARY SERVICES

STATEMENT OF TESTIMONY
Senate Commerce Committee

DATE: **February 17, 1994**

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

FROM: **Mark S. Rau, Manpower Temporary Services (913/267-4060)**

I am the Area Manager for Manpower Temporary Services franchise offices in Eastern Kansas. We have fourteen 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. Some of these people would otherwise be drawing unemployment benefits if we didn't provide them with work.

In general, I am here to testify in favor of a modified Senate Bill 738. I would like for you to modify an amendment regarding temporary employment contractors.

A 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.

> 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.."

We ask that the "and when comparable work is available" on page 2, line 36 of SB738 be struck from the proposed amendment. If this language is struck, we would support the amendment to K.S.A. 44-706(a).

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Commerce

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Attachment 4