

Approved: 3/25/94
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on March 23, 1994 in Room 123-S of the Capitol.

Members present: Senators Burke, Downey, Feleciano, Gooch, Harris, Kerr, Ranson, Reynolds, Salisbury and Steffes

Committee staff present: Lynne Holt, Legislative Research Department
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: Vernon R. Silvers

Others attending: See attached list

Confirmation hearing

Vernon R. Silvers appeared before the Committee and discussed his interest in and qualifications for appointment as the manufacturing representative of the Kansas Technology Enterprise Corporation Board of Directors, see attachment 1.

Senator Kerr moved and Senator Reynolds seconded to recommend confirmation of the appointment of Vernon R. Silvers to the Kansas Technology Enterprise Corporation Board of Directors. The motion carried on a roll call vote.

Senator Burke requested that a memorandum he received from Charles E. Simmons, dated March 23, 1994, in response to the various issues raised in the Kansas Association of Public Employees' (KAPE) letter of March 21, 1994, be distributed to committee members, see attachment 2, and submitted for the record.

Consideration of SB 692-Employment security, benefit disqualification for misconduct

Senator Burke moved and Senator Reynolds seconded to amend SB 692 by reinserting the language on page 3, (1), lines 22 through 27, except on line 27, "or evil design", and on page 5, to reinsert (C) "the employer gave written notice to the individual that future absence may result in discharge;"

A substitute motion was made by Senator Kerr and seconded by Senator Ranson to leave the language struck on page 3, lines 22 through 27, including "or evil design", and to reinsert (C) "the employer gave written notice to the individual that future absence may result in discharge;" on page 5. The substitute motion carried on a voice vote.

Senator Kerr moved and Senator Reynolds seconded to recommend SB 692, as amended, favorably for passage. The motion carried on a roll call vote.

Consideration of SB 834-Civil service-discipline of certain employees

A letter from Susan Seltsam, Secretary, Department of Administration, was distributed to the Committee, see attachment 3. She explained in her letter that SB 834 codifies two policy statements previously issued by the Division of Personnel Services, Policy Statement #37 and Policy Statement #40. The

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on March 23, 1994.

bill embodies existing requirements of the Fair Labor Standards Act (FLSA) regarding exempt status to ensure that civil service statutes and regulations are interpreted in conjunction with the FLSA.

A fiscal note for SB 834, from the Division of the Budget, was distributed to the Committee, see attachment 4.

An article from the Topeka Capital Journal, Law officers want back pay, dated 3/22/94, was distributed to the Committee, see attachment 5.

Senator Kerr moved to recommend SB 834 favorably for passage. Senator Ranson seconded and the motion carried on a roll call vote.

Senator Gooch moved and Senator Steffes seconded to adopt the minutes of March 22, 1994. The motion carried on a voice vote.

The Chairman adjourned the meeting at 8:40 a.m.

GUEST LIST

COMMITTEE: SENATE COMMERCE COMMITTEE

DATE: 3/23/94

[illegible]



PHILIPS

Philips Lighting

TO: MEMBERS OF THE SENATE
FROM: VERN SILVERS
DATE: MARCH 23, 1994
SUBJECT: KTEC BOARD CONFIRMATION

I appreciate your time and consideration in this important board appointment.

I'm Vern Silvers from Salina Kansas. My families all have roots around the Pittsburg Kansas area.

I graduated from Pittsburg State University in 1963. I was hired by Mr. Bruce Peterman of Cessna Aircraft Company. Today Mr Peterman is a Vice President of Cessna and a board member of KTEC. From that time on I have worked in various areas of technology.

I later went to work for Westinghouse and was the first engineer to start production at the fluorescent lamp plant in Salina. Today it is owned by Philips Lighting and is the largest lamp plant in the world. We make (6) lamps per second and (1) out of (10) made in the world. On April 1 we will increase this 23%.

I would very much like to serve on the KTEC board. Please consider the following qualifications:

- * Working in advanced technology for (31) years.
- * I gave technology speeches for KTEC for (2) years.
- * I have made technology training presentations in (3) countries and in the off shore islands.
- * I have been a member of the advisory board for the Technology School and the Technology Transfer Center at Pittsburg State University for (4) years. I am currently chairman of that group.
- * I have served on the advisory councils for the Salina Area Vo-Tech School and the Kansas State University Salina School.

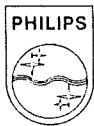
Philips Lighting Company

A Division of North American Philips Corporation

3861 South 9th Street
Salina, Kansas 67401

Commerce
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Attachment 1-1



PHILIPS

Philips Lighting

* I have been a member of the KTEC Centers Committee, for (2) years under the excellent leadership of Senator Kerr.

* I also have my own management consulting and speaking company.

I feel very strong about economic development, technology value and in general generating jobs in our state. I will make every effort possible to insure that monies are spent wisely for the maximum benefit for the people of Kansas.

Again thank you for your taking time in this important matter.

Vernon R. Silvers

Vernon R. Silvers CHMM

Philips Lighting Company

A Division of North American Philips Corporation

3861 South 9th Street
Salina, Kansas 67401

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M E M O R A N D U M

DATE: March 23, 1994

TO: Senator Burke
Room 359-E

FROM: Charles E. Simmons
Chief Legal Counsel

RE: KAPE letter of March 21, 1994

I wish to respond to the various issues raised in the referenced letter concerning my nomination to the Public Employees Relations Board.

First, let me say that I know absolutely nothing regarding the statement in the letter that duty assignments for some department employees were changed in order to preclude their attendance at the March 21st confirmation hearing. I took no action whatsoever to have any employee's duty assignment changed nor do I know of anyone who did so. I have no knowledge of any employee or employees who desired to attend the March 21st hearing.

The letter references various actions as actions I have personally taken. These actions were department actions, not actions taken by me as an individual. I represent the Department of Corrections and any actions taken by me were in that capacity.

FAIR LABOR STANDARDS ACT CASES: The Department of Corrections has been sued in four cases regarding whether employees were receiving thirty minute bona fide meal periods under the Fair Labor Standards Act. One of these cases involved twenty-one corrections officers at Lansing Correctional Facility. This case was tried to a jury in November, 1992, with a verdict in favor of the plaintiffs. The case has been appealed to the Tenth Circuit Court of Appeals. A second case involving sixty-four corrections officers at Hutchinson Correctional Facility is scheduled for jury trial in July, 1994. Eleven other plaintiffs in this case, all food service employees at Topeka Correctional Facility, were involved in a settlement of their claims (approximately \$29,000). A third case involved another food service employee at TCF (this case was settled for approximately \$2000). The fourth case involves approximately 250 corrections officers at Lansing Correctional Facility. This case is in the initial stages of discovery.

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Attachment 2-1

RETALIATION: As a result of the November, 1992, verdict and the filing of the case involving the Hutchinson officers and TCF food service employees, a decision was made to discontinue roll call, shift relief briefings, and meal breaks. The thirty minute uncompensated meal breaks had been used to offset the roll call and relief briefings, so that only an eight hour day was worked. Since the FLSA cases were alleging the noncompensated meal break should be compensable, and thus overtime, the decision was made to discontinue the meal periods in order to avoid the ongoing risk of liability for significant amounts of overtime.

This decision was made about a month after the November jury verdict and about the same time as KAPE was certified to represent officers at all correctional facilities other than Lansing. Discussions about what action to take in response to the jury verdict actually began immediately after the verdict was issued. Although KAPE has alleged that the decision was taken in retaliation for KAPE being certified to represent these officers, the reality is that the decision was made entirely in order to avoid an ongoing risk of liability for significant amounts of overtime. Four of the eight facilities included in KAPE's certification had already discontinued roll call, relief briefings, and meal breaks at various times prior to the jury verdict. The decision announced in December, 1992, put the four other facilities, plus Lansing Correctional Facility, on a straight eight hour shift as well.

It is concerning the prohibited practice complaint which KAPE filed over this action that I was testifying in the transcript attached to the March 21st letter. The transcript reflects that I initiated contact with KAPE regarding this action, to inform them of the action and to solicit from them alternatives to the action. No alternatives were presented other than to continue the existing practice. This alternative was determined not to be acceptable due to the potential liability for overtime costs. An offer was made by the department to meet and confer on this issue, as a single issue, on an immediate basis. KAPE declined this offer. This left the department facing the dilemma of court actions in which it was alleged that meal breaks were compensable time, as overtime, and KAPE contending that these conditions could not change. The entire transcript should be read, not just the highlighted sections.

The department took the position that since it was argued the meal periods were compensable time and that employees were entitled to overtime for working this time, that management had the prerogative to control overtime usage. The decision was made solely for fiscal reasons.

On the issue of retaliation, KAPE acknowledged in its brief filed with PERB that there was "no direct evidence that the respondent acted in retaliation." In addition, the decision was a Department of Corrections decision, not a Charles Simmons decision.

RECENT PERB ORDER: I recently represented the Department in a case

before the Public Employee Relations Board which resulted in a decision against the Department. This case concerned a complaint filed by AFSCME, the organization representing corrections officers at Lansing Correctional Facility. AFSCME alleged four issues of bad faith bargaining on the part of the management meet and confer team. (I was not part of this meet and confer team but did represent management at the hearing before the Public Employee Relations Board.) The four issues on which bad faith were alleged were: (1) wages; (2) health insurance; (3) binding arbitration; and (4) representation during investigations. PERB found a prohibited practice on two of the four issues: (1) wages (2) health insurance.

On the issue of wages, the management team took the same approach on this issue as has been taken by other state agencies. That position has been to tie employee wages to the state pay plan. In this particular case, AFSCME submitted a wage proposal calling for a six percent per year pay increase. The management team did not counter with a specific percentage wage increase but instead proposed that a wage study be conducted and to endeavor to assure fair and equitable compensation. The Board order was that the failure to submit a specific percentage increase proposal was bad faith participation in the meet and confer process.

On the issue of health insurance, the management team proposed that employees participate in the state's health insurance plan. AFSCME proposed that all premium increases for health insurance for the next three years be picked up by the State. PERB found that the failure to submit a counter-proposal for a specific percentage of health insurance increases was a prohibited practice.

PERB found that the management position on the issues of binding arbitration and representation during investigations was not a prohibited practice.

The management team approach to the issues of wages and health insurance was the state's approach in other meet and confer situations. The basis for this approach is primarily that the agencies have little control over either issue. Both issues are controlled by Legislative appropriations approved by the Governor.

DISDAIN FOR PUBLIC EMPLOYEES RELATIONS LAW: I do not believe it to be a fair or reasonable characterization to contend that because one represents a position different than that of an employee organization that the individual is showing "disdain" for the Public Employees Relations Act or other labor laws. First, as an attorney, I am representing an agency's position when I appear before a board or a court. Second, there can be room for legitimate disagreements regarding legal and factual issues. When the parties cannot agree, the boards and the courts are there to settle those issues. Third, I have been nominated as a representative of public employers. Management personnel may see issues in a different perspective. That does not mean that the individual's views are biased, or that the individual will be

unreasonable or unfair. While not everyone will agree with all decisions made and actions taken I believe my relationships with employees and employee organizations have been professional and ethical.

CES/nd

STATE OF KANSAS



DEPARTMENT OF ADMINISTRATION

State Capitol
Room 263-E
Topeka 66612-1572
(913) 296-3011

SUSAN SELTSAM, *Secretary*

JOAN FINNEY, *Governor*

March 23, 1994

Senator Alicia Salisbury, Chairperson
Senate Commerce Committee
Room 120-S
State Capitol Building
Topeka, Kansas 66612

RE: SB 834; Concerning State Employees

Dear Senator Salisbury:

As requested, I am writing to provide additional information to you and the members of the Senate Commerce Committee regarding SB 834. SB 834 codifies two policy statements previously issued by the Division of Personnel Services (Policy Statement #37 and Policy Statement #40). As did the policy statements, this bill embodies existing requirements of the Fair Labor Standards Act (FLSA) regarding exempt status to ensure that civil service statutes and regulations are interpreted in conjunction with the FLSA.

Background

Employees in exempt positions are not subject to the FLSA's overtime pay provisions if they meet a series of tests established under Department of Labor regulations, including payment of a salary. The Department of Labor regulation setting out the "salary basis" test (29 C.F.R. 541.118) is attached.

Under the regulation, deductions from the employee's pay that are not permitted include deductions for absences of less than a day for personal reasons, sickness or accident, deductions for absences caused by jury duty, attendance as a witness or temporary military leave, or deductions for disciplinary suspensions imposed for reasons other than violations of major safety rules. However, there is a general provision that no pay is required where the employee does not perform any work in a given workweek. Therefore, deductions for one or more full workweeks would not jeopardize an employee's exempt status.

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Attachment 3-1

Senator Alicia Salisbury
March 23, 1994
Page 2

Codification of Policy Statements

Because the provisions of the FLSA and associated federal regulations are controlling, it is important that Kansas statutes provide clear guidance by reflecting these same provisions regarding the salary basis test. The Department of Administration previously issued this guidance in the form of Policy Statements #37 and #40. (See attached.) While these statements are an explicit statement of the State's intent with respect to these matters, their codification in the form of SB 834 precludes any future attempt to raise a legal argument that Kansas regulations or statutes permit or require deductions of pay from exempt employees that would be inconsistent with 29 C.F.R. 541.118.

For example, K.S.A. 75-2949(a) provides that "An appointing authority for disciplinary purposes may suspend without pay a permanent classified employee for a period not to exceed 30 calendar days..." Under the Department of Labor's salary basis regulation, suspension of an exempt employee for a period of less than a full workweek for a reason other than the violation of a major safety rule could cause the loss of an employee's exempt status. SB 834 protects against an argument that K.S.A. 75-2949 permits a deduction that is inconsistent with the salary basis test. As salary basis issues have been raised previously in litigation, SB 834 is a means to ensure that the State's position is explicitly stated both in the form of a statement of policy and a statute that has the force and effect of law.

Please let me know if I can provide any further information or assistance as you consider this bill.

Sincerely,



Susan Seltsam
Secretary of Administration

41.118 Salary basis.

) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salary status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salary status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the

other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of \$155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of \$200 in each week in which any work is performed, and an additional \$50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

STATE OF KANSAS



DIVISION OF THE BUDGET

Room 152-E
State Capitol Building
Topeka, Kansas 66612-1504
(913) 296-2436
FAX (913) 296-0231

Joan Finney
Governor

Gloria M. Timmer
Director

March 21, 1994

The Honorable Alicia Salisbury, Chairperson
Senate Committee on Commerce
Statehouse, Room 120-S
Topeka, Kansas 66612

Dear Senator Salisbury:

SUBJECT: Fiscal Note for SB 834 by Senate Committee on Ways
and Means

In accordance with KSA 75-3715a, the following fiscal note
concerning SB 834 is respectfully submitted to your committee.

SB 834 amends current law regarding state employees considered
exempt from the provisions of the federal Fair Labor Standards Act
(FLSA). The bill prohibits exempt employees from being placed on
unpaid disciplinary suspensions for less than the employee's
standard workweek, except in cases of major safety violations. The
bill also requires that exempt employees be paid on a salary basis
and be considered in pay status for absences of less than a full
day for illness or personal reasons and for absences of less than
a workweek for jury duty, attendance as a witness or serving
military leave.

According to the Department of Administration, SB 834 has no
fiscal impact on state revenues or expenditures.

Sincerely,

A handwritten signature in cursive script that reads "Gloria M. Timmer".

Gloria M. Timmer
Director of the Budget

cc: Nancy Echols, Administration
Pat Higgins, Administration

Commerce
3/23/94

Attachment #

Date: _____

Sues

3-22-94

[] Topeka Capital Journal
 [] Wichita Eagle
 [] Kansas City Star
 [] Emporia Gazette
 [] Garden City Telegram
 [] Hays Daily News

[] Hutchinson News
 [] Johnson County Sun
 [] Kansas City Kansan
 [] Lawrence Journal World
 [] Manhattan Mercury

[] Olathe Daily News
 [] Parsons Sun
 [] Pittsburg Morning Sun
 [] Salina Journal
 [] Winfield Daily Courier

Law officers want back pay

Millions at stake in lawsuit against state

By SHERRY PIGG
The Capital-Journal

Testimony began Monday in U.S. District Court in a lawsuit that could possibly cost the state millions in back pay for law enforcement officers working for three state agencies.

The crux of the case to be decided by U.S. District Judge Dale Saffels is whether the law officers are entitled to additional wages because their positions require they work 171 hours during each 28-day pay period. A classified state employee who is not in a law enforcement position works 160 hours per pay period. The state pay plan is based on employees working 160 hours per pay period.

The suit was filed in 1991 by Marshall E. Schmitt, an agent with the Kansas Bureau of Investigation, and Jeff L. Collier, a trooper with the Kansas Highway Patrol. The lawsuit was filed on behalf of 341 KHP troopers, sergeants, pilots and governor's security staff, 18 conserva-

tion officers with the Kansas Department of Wildlife and Parks and 42 KBI agents.

The plaintiffs are represented by Topeka attorneys Patricia Riley and Wes Weathers. Representing the state are C. Steven Rarrick and Linda Fund, both of Topeka.

Weathers said the trial, expected to last at least two weeks, will determine only the state's liability for the back wages the officers allege they are owed. If Saffels determines the state is liable for those wages, there will be separate proceedings to determine the amount of damages each officer is owed. Damages could be awarded for hours worked dating back to November 1988.

The plaintiffs' attorneys estimate if Saffels approves all their claims the total award to the plaintiffs could be around \$6 million.

Gov. Joan Finney and her chief of staff, Mary Holladay, were in court Monday seated at the defense coun-

sels' table. It isn't known whether Finney will be called to testify.

In her opening statement, Riley said her clients represent "some of the finest law officers in the state."

She said the plaintiffs' evidence would show that various state laws and regulations establish a 40-hour work week for classified state employees and allow for some state agencies to deviate from that established work week if necessary. However, she said, there are no state regulations or laws that allow the state to avoid paying for additional hours worked in agencies that deviate from the normal work week.

Defense attorney Rarrick said in his opening remarks that it was the state's contention that the plaintiffs' salaries are to "compensate them for all the hours they were intended to work under the deviated work schedules."

He said that the plaintiffs are considered salaried employees and that the salaries they receive are based on the duties and responsibilities of their jobs, not on an hourly wage.

YOUTH BRIEFS

STATE AMPHIBIAN

■ **Topeka Collegiate students** Jaren Nance and Sarah Twemlow, with science teacher Larry Miller, testified earlier this month before the Senate Federal and State Affairs Committee in support of making the barred tiger salamander the state amphibian.

Topeka Collegiate students are writing letters to their state senators and representatives supporting the salamander's designation. They also have designed a T-shirt in support of the barred tiger salamander. The shirts sell for \$12. For more information, call Shelley Waugh at 862-2200.

Commence
3/23/94

Attachment 5