

Approved: Feb. 4, 1994  
Date

## MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

The meeting was called to order by Chairman Lana Oleen at 11:05 a.m. on January 25, 1994 in Room 254-E of the Capitol.

All members were present

Committee staff present: Mary Galligan, Legislative Research Department  
Jeanne Eudaley, Committee Secretary

Conferees appearing before the committee:  
See attached list

Others attending: See attached list

Sen. Oleen referred to Committee Minutes for January 19 and 20 and asked members to review them for action later.

Sen. Oleen opened the hearing for SB 392 and introduced the following proponents who presented testimony to the committee:

Stan Teasley, (Attachment 1),  
Charles Yunker, (Attachment 2)

Sen. Oleen asked Mr. Yunker if he were present when the 1983 legislation was passed, removing the exemption for veterans. Mr. Yunker answered he was, that questions were raised at that time, and the Veterans organizations were assured the exemption would be covered by Rules and Regulations; therefore, the Veterans organizations did not testify against the 1983 Session bill. Sen. Oleen introduced Dr. Lorne Phillips, who presented additional testimony (Attachment 3) to the committee. Sen. Oleen referred to the fiscal note dated March, 1993 and asked Dr. Phillips what the impact would be to his department, since the committee has not received a revised fiscal note, which was requested several days ago. Dr. Phillips stated the fiscal note completed by his department shows there is no impact to the department since all moneys generated by Vital Statistics goes into the general fund. The department takes no position on the bill. Dr. Phillips also stated there is no way of estimating how many veterans would request copies of certificates under this exemption and that the exemption for veterans is the only exemption extended by Vital Statistics. Sen. Hensley asked if there were other groups who had requested free copies of certificates in the past, and Dr. Phillips answered various advocacy groups, welfare recipients and disabled. He pointed out the Legislature would have to determine if there were other exemptions, and to whom. Mr. Yunker stated the 5,000 figure used by Dr. Phillips in his testimony is probably not accurate, since some veterans would not require certificates. John Hill, Treasurer of Disabled Veterans, stated the veterans did not oppose removing the exemption in 1983 and were told the exemption would be easier to administer by Rules and Regulations. He estimated the volume of requests for certificates would not be great.

Sen. Oleen introduced Bill Craven, who presented a proposal (Attachment 4) to the committee for consideration as a committee bill. Mr. Craven stated his proposal is patterned after a Nebraska law and cautioned this would not be an attorney fees bill, but would require state agencies to pay attorneys fees in civil cases when damages are the result of action or inaction by a state regulatory agency. He stated there should be no fiscal note on this bill, if the state regulatory agencies are doing their job. Sen. Parkinson stated the Judiciary committee is studying a similar bill, but Sen. Oleen stated the Judiciary committee has a great number of bills it is considering; consequently, she would entertain a motion for it to be introduced by this committee. Sen. Hensley made a motion the committee introduce it as a bill, and it was seconded by Sen. Walker; the motion passed.

## CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS, Room 254-E  
Statehouse, at 11:05 a.m. on January 25, 1994. CONTINUATION SHEET

Sen. Oleen introduced Mark Burghart, who briefed the committee on taxing military retirement pay issue (Attachment 5). Mr. Burghart announced all legislators will receive a packet containing information on the procedure for requesting tax refunds for years 1990 and 1991, a summary of administrative process for requesting refunds and a form letter for filing a claim from the Secretary of the Department of Revenue. Sen. Oleen asked Mr. Burghart to inform him that the committee was briefed in the interim regarding the facts in the lawsuit. Mr. Burghart referred to Pages 1 and 2 of his briefing, and gave background information, recent court rulings and current status of the litigation; he emphasized the case is limited to retired military pay and the U. S. Supreme Court's Ruling that the state cannot tax one group and not another. On December 17, 1993, the Kansas District Court granted defendants' motion to dismiss plaintiffs' motion to refund taxes paid. The court ruled that plaintiffs had failed to pursue and exhaust their administrative remedies which may provide a full, adequate and complete remedy for tax refund relief. The court determined it lacked subject matter jurisdiction over the issue of refunds. He referred to Page 3 outlining "Administrative Proceedings" and stated 20% of the military retirees have filed for refunds for all years involved, and there have been 3,000 appeals filed. He cited the Harper v. Virginia case and the predeprivation remedy, which means the plaintiffs may challenge the tax without paying it. Kansas has a predeprivation remedy, and there has been no determination by the court whether refunds have to be paid.

Sen. Parkinson asked who makes the decision when claims are appealed and who serves as the administrative hearing officer. Mr. Burghart replied an administrative law judge (from the Department of Revenue) serves as administrative hearing officer and is designated by the Secretary of the Department of Revenue. Sen. Parkinson asked if other groups (classes) have filed for refunds under the situation as the retired military personnel, and Mr. Burghart answered there has been one other - that of a retired CIA employee and indicated others could file, such as retired FBI personnel, Federal judges, etc.; the impact from other federal groups is small. He also stated the law was changed in 1992 - that all are exempt now, and that there is a three year statute of limitations which was passed by the 1989 Legislature. Sen. Parkinson stated that although 20% of the retirees have appealed, the remaining 80% did not; and asked if settlement discussions have continued. Mr. Burghart stated the predeprivation remedy was available and that the department's position is that only the discriminatory portion of the tax is refundable. He replied there has been no settlement discussions since the original one, but that the Secretary of the Department of Revenue is willing to discuss settlement with the plaintiffs. Referring to the 80% who have not filed appeals, Mr. Burghart stated the plaintiff's attorney plans to open the statute of limitations. Sen. Parkinson questioned if that could be done without legislation.

Sen. Ramirez stated the Department of Revenue must feel it is in the right position to refuse payment to the retirees and asked what the total would be. Mr. Burghart answered if everything were paid back plus interest at 12% per year, the maximum liability would be \$81 to \$85 million; \$55 million is taxes paid to the state. He added that the department called on an outside expert advice to arrive at that figure. Sen. Oleen stated the U.S. Supreme Court decision was unanimous to reverse the Kansas Supreme Court decision. Mr. Burghart stated that was true; that the Court ruled the Kansas law which gave the state authority to tax military retirees was ruled unconstitutional. Sen. Oleen referred to Page 2, No.2 of Mr. Burghart's statement and asked what "decertify" means. Mr. Burghart explained Judge Allen certified the group, which meant they could file suit as a class and could not be treated on an individual case basis. Since the Department of Revenue's position has been the individual taxpayer has administrative remedies to exhaust, they should not be certified; consequently, the departments' motion to decertify was filed but has not been ruled on. He pointed out that as long as the class is certified, the individual taxpayers cannot file separate law suits, nor can the Department of Revenue settle with one and not others. Mr. Burghart said the state must have assurance that the resolution must bind everyone; to decertify would mean the Department of Revenue could approach individuals to attempt settlement; however, it would not prevent additional lawsuits from being filed. He also stated the Legislature could set parameters within which the Department of Revenue could act.

Sen. Oleen asked Mr. Burghart to set out the procedure a retired military taxpayer would go through to request a refund. Mr. Burghart stated the taxpayer would request a refund in writing and the refund would be denied; the taxpayer could then request a hearing, and it would be put on the docket. If a hearing is desired the case may be put in writing in lieu of a hearing. A pre-hearing conference may be scheduled and the retiree can submit the facts in a brief. Sen. Oleen asked who would be present at that hearing. Mr. Burghart answered the persons present at a hearing would include: the administrative law judge (a Department of Revenue employee), the Department of Revenue's attorney, the taxpayer and his/her attorney, if the retiree chose to have legal representation. If judgment is against the retiree, he/she may appeal the judgment to the Board of Tax Appeals. Frank Reeb has been serving as the administrative law judge for the department. He also stated at the present time there are several appeals under advisement. In answer to a question from Sen. Oleen, Mr. Burghart stated there were no hearings between 1989 and 1993, as retirees were not anxious to pursue the case until the decision of the U.S. Supreme Court which struck down the Kansas law. Sen. Oleen asked how many refunds have been made by the Department of Revenue, and Mr. Burghart answered there have been none, as the substantive issue has not been determined. Sen. Oleen continued by stating retirees are receiving information regarding applying for refunds for tax years 1990-92 only and asked why. Mr.

## CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS, Room 254-E  
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Burghart answered the statute of limitations has expired on years previous to 1990; that retirees may file for previous years, but they are not considered timely until the statute of limitations is waived. Sen. Oleen asked if Mr. Burghart knew why the statute of limitations was changed and when. He answered it was changed in the late 80's to adopt a more uniform time for appealing all taxes. He further stated the Department of Revenue requested the change to the Assessment and Taxation Committee, and Sen. Oleen pointed this was after the case was filed. He stated there is confusion with some cases to know when the statute of limitations expired because of the transition time and the change in the law; that he believes the packet each legislator will receive will answer many of these questions. Sen. Oleen asked why some retirees have not received a response from the Department of Revenue, and Mr. Burghart responded he does not know why they have not received responses from the Department.

Sen. Gooch asked Mr. Burghart the number of individuals who have filed and are seeking relief from the department at this time, and Mr. Burghart answered it would be hard to tell - maybe several thousand. Sen. Hensley referred to Page 3, Paragraph 1, K.S.A. 60-907(a), and asked if a military retiree could file a tax return with the department and withhold tax under the predeprivation remedy. Mr. Burghart answered that could be done and has been used for property taxes. However, it has not been challenged by military retirees. The Department of Revenue is awaiting a decision by the U.S. Supreme Court on their motion. Sen. Oleen asked the status of the case and who will make the decision, and Mr. Burghart answered the Kansas Supreme Court will make the decision. Sen. Gooch asked what would happen if a taxpayer filed but refused to pay taxes owed to the state, would the department take action? Mr. Burghart answered that there would be an assessment filed against the taxpayer under present law; the department has allowed no exemptions. Sen. Oleen asked the number of military retirees who refused to pay taxes from 1984 to 1992, and Mr. Burghart answered ten percent are in noncompliance. Sen. Oleen asked if any action has been taken against the ten percent, and Mr. Burghart answered no action has been taken. She also asked if the DOR had taken into consideration the fact that the Legislature passed a bill in 1991 to stop collection of taxes from military retirees, but that the Governor vetoed the bill. She emphasized the fact that the Legislature had spoken before the court decision; in fact, the Legislature has addressed the taxation of retired military since 1971. She asked Mr. Burghart to check on the ten percent in noncompliance and if they have received communication from the Department of Revenue. Mr. Burghart responded that the Department of Revenue has compared the ten percent in noncompliance with a list from the Department of Defense and confirmed the noncompliance percentage is ten percent. He added that it is possible some of those on the list did not have to file returns in Kansas. Sen. Oleen thanked Mr. Burghart for presenting this information to the committee.

Sen. Oleen referred to the Committee Minutes for January 19 and 20, and Sen. Ramirez called attention to an error on January 20 Minutes, bottom of Page 1, change "Sen. Elaine" to "Sen. Oleen". Sen. Gooch made a motion to approve the Minutes of January 19 and January 20 as corrected; it was seconded by Sen. Ramirez; the motion passed.

Meeting adjourned at 12:30.

## GUEST LIST

COMMITTEE: Senate Federal &amp; State Affairs

DATE: JAN. 25, 1994

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Bill Craven	701 Jackson #220 Topeka	Self
Matt Hill	4721 NE Indian Creek	Self
Randy Scott	Jayhawk Tower 701	KCUA
Jean Taylor	3813 SE 32nd	Advocate
MARK A. BURGHART	TOPEKA	REVENUE
Jess W. Taylor	3813 SE 32nd ST	Self
Kevin Fowler	400 SW 8th Suite 409	KMRTF
Chete Rottbaum	6501 S US 4503 E Main St. 67202	Military Reserve
Clay Capton	4020 Turner Dr Lawrence 66047	TROA
DON KOHL	830 BEAVER TRAIL DERBY	SELF
Hollis B. Logan	1601 SW SIEBEN TOPEKA, KS 66611	Self
JOE E. ZOLLINGER	14409 WILLOW BOND CIR WICHITA, KS 67230	Self
John C. Frieden	400 SW 8th Topeka, Kas.	Self
Gale Mc Gill	Topeka, Kas	Military Retiree
KEVIN M. WALKER	TOPEKA, KS	SENATE PRESIDENT
R. G. HENLEY	LAWRENCE, KS	LTC, USA, ret.
Stewie Case	Olathe	Sen. Parkinson
Ch. Stutzb	TOPEKA	KDHE
Theresa Jasso	Topeka	Journal's office
Roger Clay	Leavenworth	TROA
Lorne Lichtenwelter	Leavenworth	TROA
Lane A. Phibbs	LSOB	KDHE
Chuck Yunker	Am. Legion 1314 Topeka	Am Topeka KS 66612
John A. Reed	Topeka	Disabled American Vet.
Craig Grant	Topeka	KWEA

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DATE: JAN. 25, 1994

[illegible]



**KANSAS**  
**COMMISSION ON VETERANS' AFFAIRS**  
**KANSAS**

**TESTIMONY BY**  
**STAN TEASLEY, EXECUTIVE DIRECTOR**  
**KANSAS COMMISSION ON VETERANS AFFAIRS**  
**ON SENATE BILL 392**  
**BEFORE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS**  
**JANUARY 25, 1994**

Madam Chairman and Members of the Committee, I would like to express my appreciation for the opportunity to testify as a proponent of Senate Bill 392, which would provide for a free copy of needed vital statistical documents from the Kansas Department of Health and Environment for Veterans and their dependents who require said documents in applying for benefits from the United States Department of Veterans Affairs.

It is important to note that prior to 1983, K.S.A. 65-2418 provided for free documents for Veterans and their dependents under the aforementioned circumstances. The 1983 Legislature eliminated the language from this statute, not with the intent of discontinuing the service, but to allow for such exemptions by rule and regulation. The Commission and the Veteran Organizations did not oppose this change as we were assured by the Secretary of Health and Environment at the time, Ms. Barbara J. Sabol, of the Department's intent to provide for this free service by rule and regulation. During 1983, the Department of Health and Environment attempted to accomplish this objective by submitting a rule and regulation with the appropriate exemption language. However, the Attorney General's Office after reviewing the submitted rule and regulation issued an opinion stating that the, "statute which purports to authorize the promulgation of this rule and regulation is unconstitutional." Consequently, for this provision to be reinstated, as was the original intent of the Legislature at that time, it is necessary that an exemption clause be included in K.S.A. 65-2418 by legislation. A copy of a letter from Ms. Sabol written in January of 1986 has been provided

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*JAN. 25, 1994*      *Attachment #1*

to Members of the Committee for their review, which outlines some history on this matter.

According to the National Association of State Director of Veterans Affairs, Kansas represents the only State in the United States, which does not provide free copies of needed documents for Veterans seeking USDVA benefits. Consequently, Kansas also represents the only State in the Nation that is unable to participate in a reciprocity agreement among states to provide free copies of needed documents to Veterans seeking USDVA benefits who reside in one state, but their records are maintained in Kansas. Our Kansas Veterans, who's records are located in another state, receives the benefits of this reciprocity agreement, but Kansas is unable to provide the same service. Many of our agency's clients are seeking pension benefits, which in essence represents a income maintenance program. To be eligible for such pensions, an individual must have quite modest financial means and possess a permanent and total disability. Although the \$10 current charge for documents from Health and Environment may not represent a great deal of resources to the vast majority of the their clientele, to many of our clients \$10 does constitute a sizeable percentage of their available resources, due to their circumstances. Requiring these individuals to pay the \$10 charge, in many cases, delays the process as they must make the arrangements to obtain the necessary funds to purchase these needed documents. A delay in benefits from the U.S. Department of Veterans Affairs results in a hardship for many of our clients, and is depriving the State of Kansas from the economic and social benefits of Kansas citizens receiving their deserved benefits in a timely fashion.

Lastly, I wish to take issue with the fiscal note prepared for this bill on the 22nd of March, 1993. This fiscal note estimates that a reduction in State General Fund receipts would occur based upon a projected 5,000 free copies being provided each fiscal year at a loss of revenue of \$7.00 per copy. Since the completion of this fiscal note, the charge for the first certified copy of a document has been increased to \$10.00 per copy, which would increase

their estimated fiscal note to \$50,000. The prepared fiscal note states in the last sentence of the last paragraph that, "the Department's estimate of requests is based on the actual number of death certificate copies requested in FY 1992 to obtain benefits from the Veterans Administration." This simply is not an accurate statement. An official from Vital Statistics indicated to me that the 5,000 estimate was based upon the number of death certificates taken in during FY 1992 that were identified as Veterans. To state that the number of Veterans who happen to die during a given fiscal year would also represent an accurate estimate of the number of requests for birth, death, marriage, and divorce documents to obtain USDVA benefits does not appear to be based upon very sound reasoning or logic. In fairness to the Kansas Department of Health and Environment it is very difficult to estimate how many free documents would be given during a given fiscal year, and it would appear that some misinterpretation has occurred of information provided to the Division of Budget by Vital Statistics. However, based upon discussions with staff and others, I personally have concluded that the number of requests for free documents should be below 1,000 per year, which would place the fiscal note on this bill at less than \$10,000. Senate Bill 392 requires that a person who is requesting a free document must exhibit correspondence from the United States Veterans Administration or the Kansas Commission on Veterans Affairs which indicates that the documents are necessary to apply for benefits. Therefore, this Committee can be assured that our agency will do our part in ensuring that requests for free documents will be based upon legitimate need to keep the loss of revenue to a minimum.

Considering that the State of Kansas provided this service to our Kansas Veterans in the past, the expressed legislative intent of the change in 1983 was to continue this service through rule and regulation and not to eliminate the free service, that this service would have a positive benefit to the claims process by the avoidance of unnecessary delays, that this service would assist Kansas citizens whom are seeking benefit that have limited financial resources, and the fact that Kansas is the only State to not provide free documents, I would

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January 25, 1994  
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encourage the passage of this legislation. This is a small service that Kansas can provide to its' Veterans who served this country with dedication and have in many cases paid a tremendous sacrifice.

Thank you for this opportunity, and I would be happy to answer any questions.

FEB 3 1994

## DEPARTMENT OF HEALTH AND ENVIRONMENT

State of Kansas . . . John Carlin, Governor

Barbara J. Sabol, Secretary

Forbes Field  
Topeka, Kansas 66620  
913-862-9360

January 29, 1986



Mr. Stan Teasley  
Executive Director  
Kansas Veterans Commission  
512 West 6th  
Topeka, Kansas 66603

Dear Mr. Teasley:

As you know, at one time the Department of Health and Environment provided a free birth certificate to the United States Veterans Administration or the Kansas Veterans Commission in order to assist veterans in obtaining benefits; therefore, it would pose no administrative difficulties for us to return to this procedure.

Should such legislation be developed, you should consider modeling it after the repealed 1980 K.S.A. 65-2418 which provided that only one free copy may be issued upon presentation of correspondence from the United States Veterans Administration or the Kansas Veterans Commission indicating that such person is applying for benefits from the United States Veterans Administration and that such person needs the requested information to obtain such benefits. For a second or subsequent certified copy of a certificate the usual fee would be charged.

In 1983 the Department attempted to provide the United States Veterans Administration or the Kansas Veterans Commission with a free copy by regulation, however, in the Attorney General's opinion the "statute which purports to authorize the promulgation of this rule and regulation is unconstitutional."

Apparently if this benefit is to be reinstated it must be through legislation. If necessary, KDHE staff are available to meet with you and/or your staff.

Sincerely,

Barbara J. Sabol  
Secretary

BJS:mrh

cc: Dr. Lorne A. Phillips

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SENATE FEDERAL AND STATE AFFAIRS COMMITTEE  
TESTIMONY BY CHARLES M. YUNKER  
IN SUPPORT OF SB 392  
JANUARY 25, 1993

On behalf of the more than 90,000 members of the Kansas American Legion, American Legion Auxiliary and Sons of The American Legion, I wish to express my sincere appreciation for the opportunity to address your committee today in favor of Senate Bill 392. My name is Chuck Yunker and I am the State Adjutant of The Kansas American Legion.

Prior to 1983 Kansas, like all other states, provided veterans and their surviving dependents who were filing for earned VA benefits certified copies of birth, marriage and death certificates at no charge. As I understand it, this service pre-dated the formation of the Kansas Veterans Commission in 1950 (now known as the Kansas Commission on Veterans Affairs). The KVC was established in lieu of a World War II veterans' bonus to provide veterans and their families a state agency to assist them in obtaining earned VA benefits.

During the establishment of the KVC, 'no cost' documentation was discussed by the Legislature as an integral part of the overall veterans "package". In 1983 The American Legion did not object to the removal of this provision from the Kansas Statutes because we were led to believe this service would be reinstated by rule and regulation.

Mr. Dale Renaud, a Past National Commander of The American Legion, a former President of the National Association of State Directors of Veterans Affairs, and currently a Special Assistant to Secretary Jesse Brown of the Department of Veterans Affairs, told me this past October that Kansas is the only state which does not

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Attachment 2

provide this service to veterans. Further that Kansas is the only state that does not reciprocate such services with other states.

Lines 22 through 32 of SB 392 are very specific in that only one copy will be furnished per person, and only after that person provides proof they are applying for VA benefits. It must be understood and emphasized that not every veteran applies for VA benefits. Only those seeking compensation for active duty service connected injuries and those applying for a VA pension because they are among Kansas' most needy citizens will use this service.

Whether an individual receives funds from the VA or a State funded agency makes no difference; those funds are tax dollars. If the State of Kansas can assist its eligible citizens to obtain federal benefits at what we consider a minimal investment, then Kansas is better off because our federal tax dollars are flowing back into Kansas while at the same time lessening the drain on State tax dollars.

The American Legion urges your support of SB 392. Again I thank you for the opportunity to address you today.

State of Kansas  
Joan Finney, Governor



Department of Health and Environment  
Robert C. Harder, Secretary

Testimony presented to  
Senate Federal and State Affairs  
by

The Kansas Department of Health and Environment

Prior to 1983 K.S.A. 65-2418 authorized the family of a veteran one free copy of a death certificate. In 1983, the legislature voted to strike the provision.

S.B. 392 would require the Office of Vital Statistics to provide a free copy anytime evidence was produced that indicated the person was applying for veteran's benefits. We estimate the number of requests for such copies would be approximately 5,000; therefore, the negative impact of this bill on the general fund would be approximately \$50,000. This estimate was made based on deaths occurring in 1993 in which the death certificate indicated the deceased was a veteran--the actual figure was 5,092.

It should be noted that passage of S.B. 392 could set a precedent for issuing free copies. H.B. 2155 introduced during the 1993 legislative session would have required free copies be provided to judges for use in court cases; however, this bill was killed.

We might note, however, that in an informal telephone survey conducted recently by Office of Vital Statistics staff we found that all 20 states contacted provided a free copy for VA benefits.

Since this bill has no direct impact on the Department of Health and Environment, the Department takes no position on the bill.

Testimony presented by: Dr. Lorne A. Phillips  
Director and State Registrar  
Center for Health and Environmental Statistics  
January 25, 1994

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BILL CRAVEN  
Attac 14

Businesses and citizens frequently complain about actions of administrative agencies being too harsh or too lenient. But there is nothing in state law to reimburse those who are forced to litigate claims involving administrative agency action or inaction. In several years of legislative-watching, I have frequently heard legislators say that they wished there was a "hammer" to force administrative agencies to adhere to the laws as passed by the legislature.

The solution I propose is to amend K.S.A. 77-622, a part of the "Act for Judicial Review and Civil Enforcement of Agency Actions."

The language I propose is modeled after similar legislation in Nebraska (Nebraska Revised Statutes 25-1803 et seq.). Here is that proposed language:

(1) Unless otherwise provided by law, the court having jurisdiction over a civil action or an action for judicial review brought against the state pursuant to this act shall award attorneys fees and other expenses to the prevailing party unless the prevailing party is the state, except that the court shall not award fees and expenses if it finds that the position of the state was substantially justified.

(2) The court, in its discretion, may reduce the amount to be awarded pursuant to this section, or deny an award, to the extent that the prevailing party, during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy or when an overriding public interest exists which would make an award unjust.

(3) A party seeking an award for fees and other expenses pursuant to this section shall, not later than thirty days after final judgment is made in the action, submit to the court an application which provides evidence of eligibility for and the amount of an award pursuant to this section. If the amount sought includes an attorney's fee or the fee for an expert witness, the application shall include an itemized statement for each such fee indicating the actual time expended in service to the applicant and the rate at which the fees were computed.

It is important to realize that this proposal is limited to administrative agencies. It is not an attorney fees bill that applies to every civil case in the state. You should also know that Nebraska also has provisions limiting those eligible to receive attorneys fees to those whose gross receipts are less than \$2 million annually, or those businesses who employ less than 50 people. (N.R.S. 25-1804 (2)). I question whether Kansas needs those restrictions, but I leave that to you.

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Bill Craven

## EXPENSES AND ATTORNEY'S FEES

§ 25-1803

Attorney's fees were not recoverable in action to enforce judgment. *Ehlers v. Campbell*, 159 Neb. 328, 66 N.W.2d 585.

Under prior act, where claim exceeds three hundred dollars, it does not fall within this section. *Young v. Chicago, B. & Q. R. R. Co.*, 110 Neb. 452, 194 N.W. 450.

### 3. Procedure

In order to receive an attorney fee under this section, it is necessary to plead and prove all the conditions precedent enumerated in the statute. *Guaranteed Foods v. Rison*, 207 Neb. 400, 299 N.W.2d 507.

Where request for attorney's fees failed to show compliance with this section or Rule 8 b 3 of Rules of the Supreme Court, 1974, it was disallowed. *Edward Frank Rozman Co. v. Keillor*, 195 Neb. 587, 239 N.W.2d 779.

Prejudgment interest and an attorney's fee cannot be recovered hereunder unless it is

proved the claim was presented ninety days before suit commenced. *Andrews Electric Co. v. Farm Automation, Inc.*, 188 Neb. 669, 198 N.W.2d 463.

To collect attorney's fee hereunder, plaintiff must plead and prove conditions precedent. *Nichol v. Clema*, 188 Neb. 74, 195 N.W.2d 233.

To recover an attorney's fee, there must be pleading and proof of conditions precedent. *Andrews v. Wilke*, 181 Neb. 398, 148 N.W.2d 924.

### 4. Miscellaneous

Cited and held not in point on facts in action involving fidelity policy or bond. *Beshaler v. Helberg*, 187 Neb. 584, 193 N.W.2d 261.

Allowance of attorney's fee within the limitations provided are within the sound discretion of the trial court. *Anoka-Butte Lumber Co. v. Malerbi*, 180 Neb. 256, 142 N.W.2d 314.

**25-1802. Award of fees and expenses against state; terms, defined.** As used in sections 25-1802 to 25-1807, unless the context otherwise requires:

(1) Fees and other expenses shall mean reasonable attorney fees and the reasonable expense of expert witnesses plus court costs, but shall not include any portion of an attorney's fee or salary paid by a unit of local, state, or federal government in the case.

(2) State shall mean the State of Nebraska, a state agency as defined in section 60-1009, or any official of the state acting in his or her official capacity.

Source: Laws 1982, LB 192, § 1.

**25-1803. Award of fees and expenses against state; when authorized.** (1) Unless otherwise provided by law, the court having jurisdiction over a civil action brought by the state or an action for judicial review brought against the state pursuant to the Administrative Procedure Act shall award fees and other expenses to the prevailing party unless the prevailing party is the state, except that the court shall not award fees and expenses if it finds that the position of the state was substantially justified.

(2) The court, in its discretion, may reduce the amount to be awarded pursuant to this section, or deny an award, to the extent that the prevailing party, during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy or when an overriding public interest exists which would make an award unjust.

Source: Laws 1982, LB 192, § 2.

#### Cross Reference

Administrative Procedure Act, see section 84-920.

The establishment of "substantial justification" for a position under the provisions of this section is dependent upon the circumstances of each case. For the purposes of this section, a position has substantial justification if it has a reasonable basis both in law and in fact. The unsuccessful pursuit of a position by the State does not, in and of itself, establish that the position was not "substantially justified" so as to

entitle the prevailing party to the award of fees and other expenses under the provisions of this section. *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988).

Attorney fees may be awarded under this section only in legal and administrative proceedings initiated after July 17, 1982. *Drinkwine v. Flebbe*, 219 Neb. 291, 363 N.W.2d 152 (1985).

**25-1804. Award of fees and expenses against state; conditions; application.** (1) A party seeking an award for fees and other expenses pursuant to sections 25-1802 to 25-1807 shall, not later than thirty days after final judgment is made in the action, submit to the court an application which provides evidence of eligibility for an award pursuant to sections 25-1802 to 25-1807 and which specifies the amount sought. If the amount sought includes an attorney's fee or the fee for an expert witness, the application shall include an itemized statement for each such fee indicating the actual time expended in service to the applicant and the rate at which the fees were computed.

(2) Notwithstanding any other provision of sections 25-1802 to 25-1807, fees and other expenses shall be awarded as provided in sections 25-1802 to 25-1807 only to those prevailing parties who are:

- (a) Natural persons; or
- (b) A sole proprietorship, partnership, corporation, association, or public or private organization:

(i) That had an average daily employment of fifty persons or less for the twelve months preceding the filing of such action; and

(ii) Whose gross receipts for the twelve-month period preceding the filing of the action was two million dollars or less or whose average gross receipts for the three twelve-month periods preceding the filing of such appeal pursuant to the Administrative Procedure Act was two million dollars or less, whichever amount is greater.

Source: Laws 1982, LB 192, § 3.

**Cross Reference**

Administrative Procedure Act, see section 84-920.

Attorney fees may be awarded under this section only in legal and administrative proceedings initiated after July 17, 1982. *Drinkwine v. Flebbe*, 219 Neb. 291, 363 N.W.2d 152 (1985).

**25-1805. Award of fees and expenses against state; additional to compensation.** Fees and expenses awarded pursuant to sections 25-1802 to 25-1807 may be ordered in addition to any compensation awarded in a judgment.

Source: Laws 1982, LB 192, § 4.

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## EXPENSES AND ATTORNEY'S FEES

§ 25-1807

25-1806. Award of fees and expenses against state; how paid. Fees and expenses awarded by a federal court or pursuant to sections 25-1802 to 25-1805 shall be paid in the manner provided in the State Miscellaneous Claims Act. Claims for such fees and expenses shall be filed with the State Claims Board in the manner provided in such act.

Source: Laws 1982, LB 192, § 5; Laws 1988, LB 864, § 6.

### Cross Reference

State Miscellaneous Claims Act, see section 81-8,294.

25-1807. Award of fees and expenses against state; proceedings to which applicable. Sections 25-1802 to 25-1807 shall apply only to legal and administrative proceedings initiated after July 17, 1982.

Source: Laws 1982, LB 192, § 6.

## ARTICLE 19

### REVERSAL OR MODIFICATION OF JUDGMENTS AND ORDERS BY APPELLATE COURTS

#### (a) REVIEW ON PETITION IN ERROR

Section.	
25-1901.	District court; appellate jurisdiction; scope.
25-1902.	Final order, defined.
25-1903.	Petition in error; filing; summons; contents; service, when returnable; cause, when triable.
25-1904.	Summons in error; praecipe; service; return; fees.
25-1905.	Proceedings in error; transcript; abstracts of record not required in Supreme Court.
25-1906.	Proceedings in error; transcript; how obtained.
25-1907.	Proceedings in error; effect; supersedeas bond.
25-1908.	Proceedings in error; stay of execution; supersedeas bond; approval; endorsement.
25-1909 and 25-1910.	Repealed. Laws 1974, LB 733, § 5.

#### (b) REVIEW ON APPEAL

25-1911.	Supreme Court; appellate jurisdiction; scope.
25-1912.	Appeal to Supreme Court; civil and criminal actions; procedure; notice of appeal; docketing fee; filing of transcript.
25-1912.01.	Appellate review; motion for new trial; when required.
25-1913.	Supreme Court; appealed causes; parties; how designated.
25-1914.	Appeal to Supreme Court; cost bond; cash deposit; appellate proceedings; dismissal.
25-1915.	Appeal to Supreme Court; unpaid costs itemized in mandate; payment.
25-1916.	Appeal to Supreme Court; supersedeas; cash or bond; effect; undertakings; amount, terms, and conditions; effect of having corporate surety.
25-1917.	Appeal to Supreme Court; substitute for undertaking.
25-1918.	Appeal to Supreme Court; bond; approval; by whom made.
25-1919.	Appeal to Supreme Court; briefs; general rule; appellant's brief; unspecified errors considered.
25-1920.	Appeal to Supreme Court; injunctions; cause advanced, when.

Burghart  
(DO)  
Attach. 5

## BARKER v. KANSAS

### Background

In 1989 the United States Supreme Court ruled in *Davis v. Michigan Dept. of Treasury* that states may not tax federal civil service retirement benefits while exempting state and local government retirement benefits. Shortly after *Davis* was decided, a lawsuit was filed challenging the taxation of military retirement pay under the Kansas Income Tax Act. For many years Kansas had taxed nondisability military retired pay but exempted state and local government retirement benefits. The lawsuit was certified as a class action with the Plaintiff Class consisting of over 14,000 military retirees residing in Kansas who have paid state income tax on their retirement pay.

Although the taxation of military retired pay was upheld by both the trial court and the Kansas Supreme Court, the Supreme Court of the United States in 1992 invalidated the tax and remanded the case to the Kansas Supreme Court. The Kansas Supreme Court subsequently remanded the case to Shawnee County District Court where it originated. Shortly after the issuance of the United States Supreme Court decision, the Kansas Legislature corrected the constitutional violation by enacting Senate Bill No. 215 (1992) which exempts all types of federal retirement benefits, including nondisability military retired pay, from Kansas income tax.

### Recent Court Rulings

Several issues were raised by the parties on remand. Plaintiffs sought refunds of all income taxes paid by members of the Plaintiff Class during years 1984-1991 and an award of attorney's fees pursuant to 42 U.S.C. § 1988. Defendants sought to have the Plaintiff Class decertified and to have plaintiffs' refund claims dismissed for lack of subject matter jurisdiction.

On December 17, 1993, the Shawnee County District Court granted defendants' motion to dismiss plaintiffs' refund claims. The court ruled that plaintiffs had failed to pursue and exhaust their administrative remedies which provide a full, adequate and complete remedy for tax refund relief. Accordingly, the court determined it lacked subject matter jurisdiction over the issue of refunds.

Senate Fed. & State  
JAN. 25, 1994  
Attachment # 5

## Current Status of Litigation

Plaintiffs have filed an appeal from the district court's ruling with the Kansas Court of Appeals. There are also several issues that remain pending before the district court.

1. Plaintiffs have sought a permanent injunction to prevent the Kansas Department of Revenue from initiating any assessment, collection or enforcement proceedings to collect tax on military retired pay for tax years 1984-1991. The court is presently considering this matter.

2. The court has not yet ruled on defendants' motion to decertify the Plaintiff Class.

3. The court has stated it will defer ruling on plaintiffs' motion for an award of attorney's fees.

4. Plaintiffs have indicated they may file a motion to reopen the statute of limitations to permit military retirees to file refund claims with the Director of Taxation for tax years 1984-1989 if such refund claims have not already been filed. To date, no such motion has been filed.

## The Issue of Income Tax Refunds

Since the district court dismissed plaintiffs' refund claims on jurisdictional grounds, there has been no ruling on the substantive question of whether plaintiffs are entitled to receive refunds. The ultimate determination of this issue will depend, in large part, upon application of the principles announced by the United States Supreme Court on June 18, 1993 in *Harper v. Virginia Dept. of Taxation*.

In *Harper*, the Virginia Supreme Court had previously ruled that the *Davis v. Michigan* decision did not apply retroactively and Virginia was therefore not required to refund taxes collected from federal civil service and military retirees in years prior to 1989. The Supreme Court reversed this ruling and stated that *Davis* applies retroactively. The Court emphasized, however, that Virginia was not necessarily required to pay refunds. Whether refunds are due, the Court said, is a question of state law which the Virginia courts must address. The case was remanded to the Virginia Supreme Court for this purpose.

*Harper* states that the first question to be asked in determining the appropriate remedy is whether a state provides an adequate "predeprivation process," such as a statute authorizing taxpayers to bring suit to enjoin the imposition of a tax prior to its payment or allowing taxpayers to withhold payment and raise their objections to the tax at a hearing or enforcement proceeding. Kansas does have a statute permitting taxpayers to "enjoin the illegal levy of any tax, . . . the collection thereof, or any proceeding to enforce the same." [See K.S.A. 60-907(a)]. This statute and other predeprivation remedies available under Kansas law may constitute adequate relief under *Harper* so that the state would not be required to pay refunds.

If a state has no predeprivation remedy or if its predeprivation remedy is determined to be inadequate, a state is then obligated to provide what the Supreme Court has characterized as "meaningful backward-looking relief" to rectify the unconstitutional deprivation. Such relief consists of either full refunds to those burdened by the unlawful tax or some other means of creating in hindsight a nondiscriminatory tax scheme. One example of the latter option would be a retroactive assessment of tax on state and local government retirement benefits for all prior years at issue.

In the event it is determined that refunds must be paid, the state is prepared to offer evidence in support of the position that only the discriminatory portion of the tax, not the full amount of tax paid by military retirees, should be refunded. Since a portion of the pension benefits received by KPERS retirees includes previously taxed employee contributions, KPERS benefits are not entirely tax-exempt. To the extent that KPERS benefits include previously taxed income, the tax on the corresponding portion of military retired pay is not discriminatory and should not be refunded.

### **Administrative Proceedings**

Many military retirees have filed amended returns or refund claims with the Kansas Department of Revenue for one or more of the tax years at issue. The Department has denied these claims. Some retirees have appealed the denial of their claims to the Director of Taxation. An Administrative Hearing Officer designated by the Director will decide these appeals and determine whether refunds are due. The Hearing Officer's order can be appealed to the Kansas Board of Tax Appeals and a final order of the Board can be appealed to the Kansas Court of Appeals.

Kansas law provides for a three year statute of limitations on income tax refund claims. Claims filed for the 1990 tax year would be timely if filed on or before April 15, 1994. Claims for tax year 1991 would be timely if filed on or before April 17, 1995.