

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 18, 2011, in Room 346-S of the Capitol.

All members were present except:

Representative Bruchman  
Representative Collins  
Representative Tietze

Committee staff present:

Jill Wolters, Office of the Revisor of Statutes  
Matt Sterling, Office of the Revisor of Statutes  
Tamera Lawrence, Office of the Revisor of Statutes  
Lauren Douglass, Kansas Legislative Research Department  
Robert Allison-Gallimore, Kansas Legislative Research Department  
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:

Ed Klumpp, Kansas Association of Chief of Police, Kansas Sheriffs Association, and Kansas Peace Officers Association  
John Mackey, presenting for Steve Bukaty, State Lodge Attorney, Fraternal Order of Police

Others attending:

See attached list.

The Hearing on **HB 2163 - Amendments to laws regarding racial profiling** was opened.

Jill Wolters, Staff Revisor, provided an overview of the bill for the committee. (Attachment 1)

Ed Klumpp, Kansas Association of Chief of Police, Kansas Sheriffs Association, and Kansas Peace Officers Association addressed the committee as a proponent of the bill. He provided some background information leading up to the request for this bill. He explained last year the House passed a floor amendment adding significant racial profiling amendments to a Senate bill and by doing so, those provisions were never heard in any committee in either chamber. Some of those provisions were contrary to decisions made by the Governor's Task Force on Racial Profiling and that this subject is an important issue and one which should be vetted through the committee process and simply added on the floor without meaningful dialogue and discussion. He proceeded to list several issues this bill addresses. (Attachment 2)

John Mackey, presented testimony on behalf of Steve Bukaty, State Lodge Attorney, Fraternal Order of Police, in support of the bill. He told the committee that in the last eight years, there have been a total of eighty-seven complaints regarding the racial profiling statute and only six had merit. He added no court in the State of Kansas has ever held that an officer violated the racial profiling law and the vast majority of the 560 departments in the State have never had a racial profiling complaint filed against them. He stated these facts demonstrate that the current Statute more than adequately protects the citizens of Kansas. He added if changes are made to the current Statute, he pointed out some areas they recommended the Committee focus on, such as 1) Data Collection, 2) amend K.S.A. 22-4610 (d)(5) to read "Provide that the law enforcement agency shall take appropriate corrective action with regard to officers who are found to have engaged in biased policing," 3) He stated all current police departments have internal affairs or professional standards units that are trained in the investigation against their officers and there is no reason to change that procedure. He also stated since the FOP only has a few concerns with this bill, they are still to be viewed as a proponent of the bill who is supporting the bill if these concerns can be addressed. (Attachment 3)

Sandy Jacquot, League of Kansas Municipalities provided written testimony in support of the bill. (Attachment 4)

Joseph Mastrosimone, Chief Legal Counsel, Kansas Human Rights Commission provided written testimony as a neutral on the bill. (Attachment 5)

CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on February 18, 2011 in Room 346-S.

There were no opponents.

The hearing on **HB 2163** was closed.

**HB 2031 - Allowing the attorney general or the county or district attorney to request of the district court the convening of a grand jury to investigate alleged violations of serious felonies.**

Representative Brookens made the motion to report **HB 2031** favorably for passage. Representative Smith seconded the motion.

Representative Brookens made a substitute motion to remove "judicial district" on Page 1, Line 10, and insert "county". Representative Colloton seconded the motion. Motion carried.

Representative Brookens made a substitute motion to remove "attorney general in any judicial district or the" on Page 1, Line 9. Representative Alford seconded the motion. Motion failed 7 to 8.

Representative Osterman made the motion to report **HB 2031** favorably for passage as amended. Representative Smith seconded the motion. Motion carried.

**HB 2042 - Requiring law enforcement to collect and report pornographic materials found at scene of or in possession of person who commits a sexually violent crime.**

Representative Brookens made the motion to report **HB 2042** favorably for passage. Representative Ryckman seconded the motion.

Representative Smith presented a balloon and made a substitute motion to amend the bill as follows:

*Line 18, delete "evidence collection form evidence" and insert "Kansas standard offense report the presence". Line 26, insert a new subsection (d) "The Kansas bureau of investigation shall: (1) Make the necessary change to the Kansas standard offense report and the Kansas incident based reporting system handbook; and (2) shall promulgate rules and regulations concerning the training for law enforcement agencies to implement the provisions of this section."*

Representative Brookens seconded the motion. Motion carried.

Representative Brookens made a substitute motion to amend the bill by adding subsection (e) and inserting "Nothing in this section shall be construed to expand the scope of the officers search."

Representative Colloton seconded the motion. Motion carried.

Representative Smith made the motion to report **HB 2042** favorably for passage as amended. Representative Osterman seconded the motion. Motion carried.

**HB 2068 - Amending the Kansas power of attorney act regarding durable power of attorney and duties of the attorney in fact.**

Jill Wolters, Staff Revisor, provided the committee an overview of the bill.

Representative Ward made the motion to table the bill. Representative Rubin seconded the motion. Motion carried.

**HB 2069 - Enacting the Kansas adverse medical outcome transparency act.**

Jill Wolters, Staff Revisor, provided the committee an overview of the bill.

Representative Patton made the motion to report **HB 2069** favorably for passage. Representative Rubin seconded the motion.

Representative Patton made the substitute motion to amend the bill per balloon as follows:

## CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on February 18, 2011 in Room 346-S.

Substitute Section 1. (b) with the following language:

"A health care administrator may convene a facilitated conference for the purpose of the health care provider and the health care administrator expressing benevolence, regret, mistake, error, sympathy, apology, commiseration, condolence, compassion or a general sense of benevolence to a patient or person on behalf of such patient allegedly experiencing an adverse outcome of medical care. In any claim or civil action concerning such alleged adverse outcome, any verbal statements made in such facilitated conference shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest"

Insert the following new language for subsection Section 1 (d) (2) "Health care administrator means the individual directly responsible for planning, organizing, directing and controlling the operation of a medical care facility" and adding subsection Section 1 (d) (3) with the language previously shown in Section 1 (d) (2).

Representative Brookens seconded the motion. Motion carried.

Representative Patton made the substitute motion to amend the balloon to add " or such administrator's designee", after the words " a health care administrator". Representative Ryckman seconded the motion. Motion carried.

Representative Patton made the substitute motion to amend the bill to include the word "sorry" in the list of expressions. Representative Brookens seconded the motion. Motion carried.

Representative Patton made the substitute motion to amend the bill to include language that "the fact such conference was called shall not be admissible." Representative Osterman seconded the motion. Motion carried.

Representative Patton made the substitute motion to amend the bill to define who can attend the conference by adding the language to page 2 of the balloon, "with a health care provider or providers and the patient." Representative Kelly seconded the bill. Motion carried.

Representative Patton made the substitute motion to amend the bill to ensure the only place a facilitated conference may be held is in a medical care hospital. Seconded by Representative Kelly. After further discussion, with permission of the second, the motion was withdrawn.

Representative Brookens made the substitute motion to amend in subsection (b), at the end of the first sentence, add "in a medical care facility." Representative Patton seconded the motion. Motion carried.

Representative Pauls made the substitute motion to amend the bill to include language that waiver of charges for medical care provided can be done and shall not constitute an admission of liability or an admission against interest. Representative Patton seconded the motion. Motion carried.

Representative Brookens made the substitute motion to include language that if the defendant waives such inadmissibility of statement, such waiver shall not be construed to be a failure to assist with the defendants insurance carrier in the defense of the claim. Representative Patton seconded the motion. Motion carried.

Representative Keuther asked if the vote on the bill could be delayed until the next meeting due to the heavily amended bill. Chairman Kinzer instructed the Revisor to make all the amendments or draft as a substitute bill if desirable and have available at the next meeting.

The next meeting is scheduled for February 21, 2011.

The meeting was adjourned at 5:40 p.m.

# JUDICIARY COMMITTEE GUEST LIST

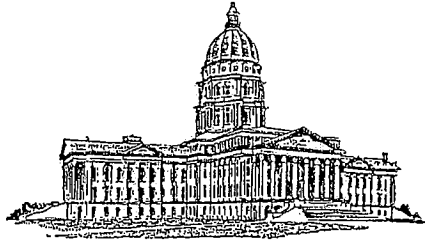
DATE: 2-18-2011

NAME	REPRESENTING
ROD BROWN	FOP
Phillip COSBY	NCPC & F
Ed Kump	KACP/KPOA/KSA
Steve A. J. Bukaty	FOP attorney
Whitney Gahn	KS Bar Assn.
RJ Wilson	KSAJ
CALLIE DENISON	KSAJ
Megan Pinegar	AG
Dereen How	HEW LAW FIRM
Abigail Jones	Intern. Rep. Victims
Dan Morin	KS Medical Society
Chad Austin	KS Hosp Assoc.
Cynthia Smith	SCU Health System

MARY ANN TORRENCE, ATTORNEY  
REVISOR OF STATUTES

JAMES A. WILSON III, ATTORNEY  
FIRST ASSISTANT REVISOR

GORDON L. SELF, ATTORNEY  
FIRST ASSISTANT REVISOR



OFFICE OF REVISOR OF STATUTES  
KANSAS LEGISLATURE

Legal Consultation—  
Legislative Committees and Legislators  
Legislative Bill Drafting  
Legislative Committee Staff  
Secretary—  
Legislative Coordinating Council  
Kansas Commission on  
Interstate Cooperation  
Kansas Statutes Annotated  
Editing and Publication  
Legislative Information System

To: House Committee on Judiciary  
From: Tamera Lawrence, Assistant Revisor of Statutes  
Date: February 15, 2011  
Subject: House Bill 2163

HB 2163 provides that the term “racial profiling” will be renamed “biased policing” and redefined as an unreasonable use of race, ethnicity, national origin, gender or religion by a law enforcement officer in deciding to initiate an enforcement action. It further provides new policies and procedures for law enforcement agencies to prevent and handle biased policing.

Current law requires law enforcement agencies to have written policies and procedures designed to prevent and handle racial profiling. This bill similarly requires law enforcement agencies to have written policies and procedures designed to prevent and handle biased policing.

If a law enforcement agency employs 10 or more full-time law enforcement officers, it shall be required to have a community advisory board and also be required to collect data on all traffic stops. The information to be collected will include, but is not limited to, the time, date and duration of the stop, the primary reason for the stop, the age, race, gender and ethnicity of the primary person stopped, whether that information was obtained from officer perception or investigation, the type of action taken by the officer, whether a search was conducted and the rationale for such a search.

Small law enforcement agencies who employ fewer than 10 full-time law enforcement officers shall work in conjunction with their community to develop a comprehensive plan to preempt biased policing.

All law enforcement agencies will also be required to compile an annual report regarding biased policing and submit such report to the attorney general for review. This report will be open public records and made available on the attorney general’s website.

The bill also provides procedures for a person to file a complaint of biased policing and how an agency shall review and handle such a complaint.

House Judiciary  
Date 2-18-11  
Attachment # 1



**Kansas Association of  
Chiefs of Police**

PO Box 780603  
Wichita, KS 67278  
(316)733-7301



**Kansas Sheriffs  
Association**

PO Box 1853  
Salina, KS 67402  
(785)827-2222



**Kansas Peace Officers  
Association**

PO Box 2592  
Wichita, KS 67201  
(316)722-8433

**Testimony to the House Judiciary Committee  
In Support of HB2163  
Amendments to Racial Profiling Statutes  
February 15, 2011**

Over the past several years, the Kansas Association of Chiefs of Police, the Kansas Sheriffs Association, and the Kansas Peace Officers Association have been active in attending the meetings of the Racial Profiling Task Force, attended Task Force community events, listening to the concerns of the people in Kansas regarding racial profiling, and participating in developing and carrying out training programs for law enforcement regarding racial profiling. In particular, during the last year and a half, we participated as much as possible in the dialog of the Task Force. We have attended National Seminars on the topic and engaged with national experts in the field. As a result of those efforts we asked for HB2163 to be drafted. It is designed to generally follow the recommendations of the Governor's Task Force on Racial Profiling with some of the gaps filled in where the Task Force was unable to reach a final recommendation.

Last year the House passed a floor amendment adding significant racial profiling amendments to a Senate bill. The provisions of that amendment were never heard in any committee in either chamber. Some of the provisions of the amendment was contrary to decisions made by the Governor's Task Force on Racial Profiling. This is an important issue. One which should and must be vetted through the committee process and not simply added on the floor without meaningful dialogue and discussion. We recognize that over the past four years or so, this debate has taken place in the Senate, but not in any House committee.

We support HB2163. Although we are not totally unhappy with existing statute, we recognize there are some gaps between current provisions and the continued concerns by some citizen groups. We recognize the importance of attempting to close those gaps. This bill proposal is a statement of our support, in general, for the work completed by the Task Force. It includes some Task Force recommendations we struggle with, but addresses them in a manner with a give and take approach.

Law enforcement absolutely agrees policing decisions based on personal biases are not only counterproductive to our communities, but destructive of the trust necessary between the community and law enforcement to effectively provide law enforcement services. It is not our desire to debate the existence of biased policing. Reality or perception, intentional or unintentional, a person contacted by law enforcement who believes a law enforcement decision was made due to a bias generates the same obstacles to trust. Our bill is designed to address those issues through training, awareness, and understanding. It provides for retraining, direction, and correction when an officer's actions are unreasonable. It allows the application of discipline as provided by the state certifying agency, the city or county personnel standards and, where applicable labor contracts.

During the past 5-and-a-half years, there have been 87 complaints of racial profiling filed with the Kansas Human Rights Commission. (Through November 2010.) Six of those complaints resulted in a

House Judiciary

Date 2-18-11

Attachment # 2

probable cause finding. So we are averaging about 1 probable cause finding a year. We are only aware of one of those probable cause findings ultimately ending up in court. In that case the court dismissed the allegation against the police. And none of those have been sustained by a court of law to this point. This leaves the officers in the other five probable cause findings with that cloud hanging over them with no way to contest the finding. They are not allowed to challenge the finding in court. Only the complainant can do that.

We have attempted to present a bill that is not particularly high on our wish list, but one we feel addresses the concerns in a comprehensive and thorough manner with balance between our desires and those of concerned citizens. In some cases our recommendations are broader than the Task Force recommendations and in some cases more clear in the direction to law enforcement.

The following summarizes our bill and why we believe the provisions of HB2163 are the best alternatives to move forward in the legislative process.

Through the Task Force process, law enforcement was persistent about using the term "biased policing" instead of "racial profiling." Biased policing is broader and more inclusive than racial profiling. This is the level of professionalism and understanding Kansas law enforcement strives to produce in their officers through the selection processes and training.

HB2163 proposes adopting the definition as recommended by the task force with one exception. We did not include "socio-economic status." This term is very broad and we are not aware of it being voiced as a concern by the public. It is not a normally observed or identifiable characteristic leading to a law enforcement decision. And it is not easily categorized. It is a topic to be included in training curricula but it is not a clearly definable term. Therefore we chose not to include it. This is found on page 1, lines 23-29 of HB2163.

The definition has the term "unreasonable" on page 1, line 25 as part of the definition. This word is absolutely critical to the acceptance of this definition. The term is frequently found in statute and in court rulings. It is this word that provides the law enforcement officer to take reasonable action based on the information they have available at the moment a decision is made. It is what a reasonable person would do given the same knowledge and in the same circumstances. It does not take away from the target of this bill, which is the unreasonable action of a police officer based on biases. This is a key word to assure the balance between an officer investigating suspicious or illegal activity and assuring biases are not interjected into the law enforcement decision process. It is important to note the Task Force included this in their recommended definition.

Additionally, the recommended definition of biased policing included the term "enforcement action" which the Task Force did not define. As a result we recommend the changes to Section 1, subsection (e) on page 1, line 31 through page 2, line 3. We removed the definition of "routine investigatory activities" since that term is no longer used in the statutes.

In HB2163 we have recommended repeal of KSA 22-4608 stating racial profiling (now biased policing) is illegal. Our only reason for repealing it is because it is duplicative of the provisions we added on page 2, lines 6-16 in HB2163.

The Task Force recommendations included a balance reached in regards to data collection. HB2163 includes those provisions in Section 3 starting on page 3, line 22. It follows the Task Force recommendation of either 1) develop a comprehensive plan, or 2) collect traffic stop data. This is found on page 13 of the Task Force report.

Additionally, the Task Force recommended requiring agencies having 10 or more full-time certified officers to have a community advisory board. Our recommendation, found starting in HB2163 on page 3, line 22, incorporates that provision but adds it to the alternative of a comprehensive plan, just as the data collection was recommended by the Task Force. You will also see on page 4, line 10 the requirement for the question of whether the agency will utilize a community advisory board is to be one of the determinations of the community/law enforcement group developing the comprehensive

plan. This allows the local communities to decide this issue when a comprehensive plan is used. So either those agencies use a comprehensive plan including a community decision about a community advisory board, or they must use a community advisory board. We also maintained that all first class cities retain the requirement to have a community advisory board, even if they choose the comprehensive plan route.

We included a list of minimum data elements for data collection. This starts on page 4, line 11. The Task Force report does not include this.

You will find the recommended changes to the policy required by each agency in HB2163 on page 5, lines 9-39. We propose the use of attorney general recommendations for defining "acts constituting biased policing" as an option. We pondered not including this language at all but chose to include it since it was the Task Force desire to add it. However, we feel the definition in the amended KSA 22-4606 should be the definition used in policy. Further understanding of that definition is an issue best left to local determination, perhaps as part of the comprehensive plan or with recommendations from a community advisory board preferably to be included in training. On page 5, lines 14 and 15 of HB2163 is the requirement for the local policy to include this information and encourages consideration of any attorney general developed clarifications.

The Task Force recommended changes to the annual report. See their report starting on page 10, recommendations 10, 11 and 12. We incorporated those changes in HB2163 starting on page 5, line 40. We proposed two clarifications. First, we wanted to make it clearer that every agency, even if they received no biased policing complaints, will report. We did that on page 6, line 4 by requiring the listing of the number of complaints. So zero complaints still need a listing. Second, we proposed clearer language in reporting of training. This can be found in HB2163 on page 6 lines 13-16. We proposed the reporting of the number of officers who completed training required by the statutes or by the comprehensive plan. The provisions of KSA 74-5607a are added because they provide how KS-CPOST can excuse officers from required training for things like extended military leave, extended sick leave, or other issues where an officer is unable to complete training.

The Task Force recommended *annual* training. We propose allowing the agency to determine the frequency and amount of training. This will, in most cases, be part of the comprehensive plan or part of recommendations from a community advisory board where applicable. It is our experience any training repeated every year becomes counterproductive and that training based on community needs and addressing individual agency concerns produces the best results. In addition, there is a multitude of training necessary in keeping officers proficient, knowledgeable, and skilled. Nowhere else are we mandated by statute to complete training on a specific topic annually. We believe this is as it should be. If we start down this path the amount of required annual training will skyrocket as groups with specific interests will come to the legislature pushing for annual law enforcement training. The result will be an additional burden, especially on small agencies, to meet this demand. Law enforcement is already required to complete 40 hours of training every year. This training can be on any relevant topic. Law enforcement management must identify training needs and assure the appropriate training for their agency is met. Additionally, the Task Force recommends utilizing the remainder of the grant money to fund this training or development of the training. This is not in this bill but should be addressed in some manner by the legislature.

The Task Force recommends a training oversight group be formed to review each agencies training program. We did not include this because it is too high a burden on the law enforcement agency to have two boards to work on this issue. This is especially true of small agencies who may not have the mandated specialized resources. If this were done at the state level it will need to be funded. This would be quite a task to approve each agencies training plan. We recommend using the grant money to have KLETC develop distance learning tools on the subject. But even this training will need updating and future funding from the state.



Finally, this brings us to the issue of complaint investigations. This is found in section 4 of HB2163 starting on page 6, line 24. This is an area where the Task Force did not agree to a recommendation. See the Task Force Report pages 12-14. One of the concerns we have had with the KHRC investigations is the lack of due process for the accused officers. A probable cause finding against an officer will have a negative impact on their careers and their ability to change agencies. But the officer nor the agency has any legal recourse under current law once a probable cause finding is levied against them. We proposed this process be transferred to the Kansas Commission on Police Officer Standards and Training. This is the professional commission certifying law enforcement officers in Kansas. This places us with the same process every other profession in Kansas is provided when state processes are mandated. It also provides us with due process for the officers. In addition, it puts the case on the table of the certifying agency for any appropriate action within their authority. In our proposal we have included additional provisions not included in the Task Force recommendations or current statute. HB2163 sets standards for the handling of complaints by the agency (page 6, lines 35-43) and by KS-CPOST (page 7, lines 1-19. HB2163 also retains the provisions for a civil cause of action.

We respectfully request a positive consideration for our proposals as provided in HB2163.

Ed Klumpp

Kansas Association of Chiefs of Police, Legislative Committee Chair

Kansas Sheriffs Association, Legislative Liaison

Kansas Peace Officers Association, Legislative Liaison

E-mail: eklumpp@cox.net

Phone: (785) 235-5619

Cell: (785) 640-1102

# Steve A.J. Bukaty, Chartered

STEVE A.J. BUKATY  
DENISE M. HOWARD  
Admitted in Kansas and Missouri

8826 SANTA FE DRIVE, SUITE 218  
OVERLAND PARK, KANSAS 66212  
(913) 341-1040  
FAX: (913) 385-5535

laborlawyers@sbcglobal.net  
sbukaty@bukatylaw.com  
dhoward@bukatylaw.com



February 14, 2011

## REMARKS OF STEVE A. J. BUKATY, STATE LODGE ATTORNEY, KANSAS STATE LODGE, FRATERNAL ORDER OF POLICE

Re: House Bill No. 2163

TO: House Committee on Judiciary

Chairman Kinzer and Members of the Committee:

My name is Steve A. J. Bukaty. I have served as the State Lodge Attorney for the Kansas State Lodge of the Fraternal Order of Police (FOP) since 1987. The majority of my law practice is devoted to the representation of police officers in matters such as labor relations, internal affairs investigations, and disciplinary hearings. I serve as the legal counsel to most of the FOP local lodges in the State of Kansas.

I am here today to address the proposed changes to the Racial Profiling Statute, as contained in House Bill No. 2163, which is identical to Senate Bill 82.

The FOP and its members are unequivocally opposed to any form of racial profiling or biased policing. Race, as the sole factor in determining whether to stop or investigate a pedestrian or vehicle, is abhorrent to every officer's sense of justice and will never be condoned by the FOP. It is the overwhelming consensus of our members that the current Racial Profiling Statute, K.S.A. 22-4606 *et seq.*, more than adequately addresses any concerns that have been or could be raised concerning racial profiling. It is the FOP's position that the current Racial Profiling Statute does not need to be amended. The evidence bears this out.

The Kansas Commission of Police Officer Standards and Training (CPOST) has indicated that there are approximately 560 law enforcement agencies in the State of Kansas that will be affected if the Amendments to the Racial Profiling Statute, as set out in House Bill 2163, are adopted. The Racial Profiling Statute has been on the books for approximate eight years. During those eight years, there have been a total of 87 complaints. The KHRC, which conducts no hearings into complaints of racial profiling, has only found probable cause to believe that six of these 87 complaints had merit. The courts have the ultimate authority to issue a binding legal decision as to whether there has been a violation of the Statute. No court in the State of Kansas

House Judiciary  
Date 2-18-11  
Attachment # 3

has ever held that an officer violated the racial profiling law. Indeed, the vast majority of the 560 departments in the State have never had a racial profiling complaint filed against them.

These facts demonstrate that the current Statute more than adequately protects the citizens of Kansas. Accordingly, it must be said that maintaining the status quo does not constitute a vote in favor of racial profiling. Accordingly, the FOP urges the members of the Committee to recommend that the current Racial Profiling Statute remain intact, with no amendments.

If changes are made to the current Statute, the FOP requests that the Committee focus on the following points:

1. Amendments to K.S.A. 22-4610

The Bill proposes several changes to this section of the Statute. There are two points of principal concern to the FOP regarding the amendments to this section.

A. Data Collection

Under the Bill, any law enforcement agency which employs ten (10) or more full time law enforcement officers, and does not utilize a comprehensive plan to pre-empt biased based policing, developed in conjunction where their community, will be required to maintain and submit substantial amounts of data on every vehicle stop. The FOP is opposed to this proposal for the following reasons:

1. The decision of whether to adopt a comprehensive plan should be left to the discretion of local officials to determine whether such a plan is necessary, and whether biased based policing or racial profiling are an issue in their community. Because the vast majority of Kansas law enforcement agencies have never received a complaint of racial profiling against any of their officers, blanketly requiring these agencies, as a matter of law, to develop such plans, where no problem exists, is unnecessary and constitutes an unfunded mandate.

2. The data collection requirements in the amendments to K.S.A. 4610 are onerous. They will have a tremendous financial impact on any department which has to collect and report such data. Yet, under the amendments as proposed, if a City determines that it does need a comprehensive plan, it will be required as a matter of State law to collect and report this data, at great expense. In the current economic climate, such a fiscal impact is totally unjustified, especially in view of the fact that there has never been a racial profiling complaint which has been sustained by the courts in the State of Kansas.

3. There is also real concern on behalf of our members that requiring such onerous data collection and reporting will have a deleterious effect on law enforcement activities. If officers are compelled to complete extensive contact forms on every citizen they encounter, such additional burdens will lead to increased response times for serious incidents, and will increase black-out times for police departments, i.e., periods of time during which no officers are

available to respond to calls. History has shown that an increase in response times and black-out times, leads to an increase in criminal activity.

B. The Bill also requires that K.S.A. 22-4610 be further amended to require "each law enforcement agency in this State" to adopt a detailed written policy that, among other things, must provide "for the discipline of law enforcement officers who engaged in biased policing." It is the FOP's position that "requiring" discipline in all such cases is inappropriate. A further subsection of the Bill simply requires law enforcement agencies to "take appropriate action" if they find that an officer has acted in direct violation of the agency's written policies regarding biased policing.

Although the FOP believes that the proposed amendments to K.S.A. 22-4610 are unnecessary, if the Committee intends to adopt any of them, the FOP specifically requests that K.S.A. 22-4610 (d)(5) be amended to read as follows:

"Provide that the law enforcement agency shall take appropriate corrective action with regard to officers who are found to have engaged in biased policing."

While the FOP is opposed to racial profiling and biased policing, it is inappropriate to require that, if an officer is found to have violated Department policy, he or she must be automatically disciplined. Given the complexities of police work, there are many situations where remedial training or counseling may be more appropriate, than discipline. Further, in some cases, the written policy may need to be clarified. There is no reason to tie a law enforcement agency's hands by requiring discipline in every case. Accordingly, the FOP requests that all references to "discipline" in the Bill be deleted.

## 2. K.S.A. 22-4611 – Complaints

Currently the Statute gives the Kansas Human Rights Commission authority to investigate complaints of racial profiling. Any individual, who has exhausted that process, may file a civil action against the agency and officer involved. House Bill 2163 proposes to change this procedure to give jurisdiction for administrative investigations of such complaints to the local agency and to (CPOST).

The FOP believes it is appropriate for local law enforcement agencies to investigate any complaints against their officers; including complaints of racial profiling or biased policing. The FOP believes it is unnecessary for the CPOST to be involved in all such proceedings. Like many state agencies, CPOST is currently undermanned, overworked and under funded. Transferring jurisdiction for all racial profiling and/or biased policing complaints to CPOST will enhance its workload, and will require the expenditure of additional funds by the State, which, as everyone knows, are quite scarce. Yet, there will be no real benefit to this.

All current police departments have internal affairs or professional standards units which are trained in the investigation of complaints against their officers. There is no reason to change that procedure.

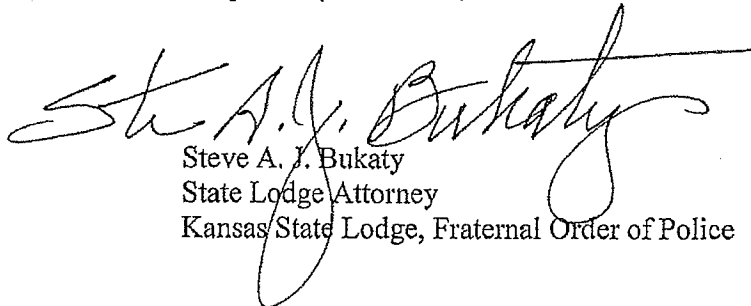
The FOP is not opposed to having CPOST perform investigations as it deems necessary. However, the FOP is concerned that allowing CPOST to conduct such investigations, and conduct a hearing into the matter, may conflict with the due process rights of many of its members. Many of the members of the FOP in Kansas are protected by collective bargaining agreements and/or local ordinances, which provide them with evidentiary hearings, at which any allegations of wrongdoing and concomitant discipline are subject to the rigors of due process. The Kansas Supreme Court has held that such hearings are constitutionally protected due process hearings which must be afforded to all "for cause" employees. *Gorham v. City of Kansas City, KS*, 590 P.2d 1051 (Kan. 1979). If CPOST is given jurisdiction over racial profiling or biased policing complaints, the FOP urges the Committee to recommend a provision which requires CPOST to defer to such local due process hearings, before it may conduct its investigation and any subsequent hearing.

Since the foregoing represents the only concerns that the FOP has with House Bill 2163, the FOP may be viewed as a proponent who is supporting the Bill with reservations. While the FOP continues to believe that the current Racial Profiling Statute is adequate, it can support the Bill if the above-described concerns are addressed.

I will be happy to answer any questions or provide any additional information to the Committee, as it deems necessary.

Thank you for your time and attention.

Respectfully submitted,



Steve A. J. Bukaty  
State Lodge Attorney  
Kansas State Lodge, Fraternal Order of Police

SAJB:dah



Hearing actually  
heard on 2-18-11  
Originally scheduled  
for 2-15-11

TO: House Judiciary Committee  
FROM: Sandy Jacquot, Director of Law/General Counsel  
DATE: February 14, 2011  
RE: Written Testimony only on HB 2163

Thank you for allowing the League of Kansas Municipalities to submit written testimony in support of HB 2163. While the League believes the current law has worked well, other parties interested in this issue, including the Racial Profiling Task Force, have advocated for more changes. LKM continues to encourage the Legislature to adopt an approach that strikes a balance between onerous requirements on law enforcement and, on the other side, takes a proactive approach to eliminating racial profiling. After reviewing HB 2163, LKM agrees with the law enforcement community that this bill is the most effective means of achieving any needed improvement in the law.

LKM has been involved in the discussions of racial profiling for several years now and has opposed mandatory data collection. The approach in HB 2163 is a reasonable one, requiring a city to either have a comprehensive plan or to collect data on traffic stops. The same alternative approach is taken with the advisory committee, except that it would continue to be required for cities of the first class. While LKM believes the better approach is to allocate our limited resources in the area of training and education which has been shown to be the most effective way to address racial profiling, the compromise in requiring a comprehensive plan is one cities can endorse. LKM will facilitate training for cities that need assistance in drafting a comprehensive plan. In addition, the change of reference from "racial profiling" to "biased based policing" more accurately describes the activity this bill seeks to eliminate.

Without belaboring the smaller details of each bill, LKM supports the testimony of the Kansas Association of Chiefs of Police, the Kansas Peace Officers Association and the Kansas Sheriffs Association. Therefore, LKM supports this committee reporting HB 2163 favorably for passage.

House Judiciary  
Date 2-18-11  
Attachment # 4

LOU ANN THOMS, Chair  
TOPEKA  
TERRY CROWDER  
TOPEKA  
DAVID HANSON  
TOPEKA  
CLYDE HOWARD, Vice Chair  
MANHATTAN  
ANTHONY VILLEGAS, SR.  
KANSAS CITY  
JEROME WILLIAMS  
WICHITA



# K A N S A S

KANSAS HUMAN RIGHTS COMMISSION

LANDON STATE OFFICE BLDG. – 5<sup>TH</sup>  
FLOOR

900 S.W. JACKSON – SUITE 568 S.  
TOPEKA, KANSAS 66612-1258  
(785) 296-3206

TTY (785) 296-0245  
FAX (785) 296-0589  
800# 1-888-793-6874

SAM BROWNBACK, GOVERNOR

WILLIAM V. MINNER  
EXECUTIVE DIRECTOR  
RUTH GLOVER  
ASSISTANT DIRECTOR  
JOSEPH P. MASTROSIMONE  
CHIEF LEGAL COUNSEL  
BILL WRIGHT  
TOPEKA INVESTIGATIVE  
ADMINISTRATOR  
ORIE KIRKSEY  
TOPEKA INVESTIGATIVE  
ADMINISTRATOR  
JANE L. NEAVE  
WICHITA INVESTIGATIVE  
ADMINISTRATOR  
RICK FISCHLI  
RACIAL AND OTHER PROFILING  
ADMINISTRATOR  
BETH MONTGOMERY  
OFFICE MANAGER

## TESTIMONY ON BEHALF OF THE KANSAS HUMAN RIGHTS COMMISSION REGARDING H.B. 2163

PROVIDED BY CHIEF LEGAL COUNSEL JOSEPH P. MASTROSIMONE, EXECUTIVE  
DIRECTOR WILLIAM V. MINNER, ASSISTANT DIRECTOR RUTH GLOVER AND  
RACIAL/OTHER PROFILING ADMINISTRATOR RICK FISCHLI

BEFORE THE HOUSE JUDICIARY COMMITTEE

FEBRUARY 15, 2011

H.B. 2163 proposes to amend the Kansas racial and other profiling law, Kan. Stat. Ann. § 22-4606 *et seq.* (the "Act"). The Act currently makes it unlawful for law enforcement to engage in "racial profiling." H.B. 2163 would replace "racial profiling" with the broader term "biased policing." "Biased policing" is defined as "the unreasonable use of race, ethnicity, national origin, gender, or religion by a law enforcement officer in deciding to initiate an enforcement action." However, the use of such factors in combination with other identifying factors as part of a specific individual description is not biased policing. H.B. 2163 would also require law enforcement to collect and make public certain data regarding its public contacts unless it "works in conjunction" with the local community to "develop a comprehensive plan to preempt biased policing" by addressing various subjects.

H.B. 2163 defines an "enforcement action" as any law enforcement activity described in K.S.A. 22-4609 (determination of probable cause for an arrest or determination of a reasonable and articulable suspicion to justify detention of a person or the investigatory stop of a vehicle) that occurs during a nonconsensual contact with an individual or individuals. H.B. 2163 would make it unlawful to use biased policing in three limited circumstances: (1) determining the existence of probable cause to justify the arrest or taking into custody of a person, (2) determining the existence of a reasonable and articulable suspicion to justify the detention of a person or the investigatory stop of a vehicle, and (3) determining the existence of probable cause to search a person or conveyance. Under current law, racial profiling is limited to the selection

House Judiciary  
Date 2-18-11  
Attachment # 5

of individuals to subject to "routine investigatory activities" and deciding on "the scope and substance" of law enforcement activity following the initial routine investigatory activity. Current law limits the scope of protection to situations involving "traffic stops."

H.B. 2163 would both expand and contract the scope of the Act's protections. First, H.B. 2163 would remove the reference to "traffic stops" in defining what constitutes "biased policing." The removal of this limitation would apply the Act's protections to initiation of any "enforcement action" – whether or not it arises from a traffic stop. Second, H.B. 2163 would limit the Act's protections to only the decision to "initiate" the enumerated "enforcement actions" and appears to remove coverage regarding decisions made regarding the "scope and substance" of the law enforcement activity subsequent to the initial "enforcement action." Accordingly, a fair reading of H.B. 2163 would result in the Act applying to an officer's decision to stop a citizen on the street or a vehicle on the road but would not extend to the officer's subsequent decision to employ the use of a police dog or other investigatory methods, other than a specific decision to search the individual or conveyance.

H.B. 2163 would also alter the ability of individuals to bring civil actions for violations of the Act. Under current law, an individual is entitled to damages if a court determines that law enforcement engaged in racial profiling. H.B. 2163 would add a new requirement that a civil complainant also prove that he or she "suffered a loss directly caused by the officer or agency engaged in biased policing." H.B. 2163 fails to indicate whether that "loss" must be pecuniary.

H.B. 2163 would also remove the Kansas Human Rights Commission's (the Commission) jurisdiction over racial profiling (or biased policing) complaints. Presently, the Commission is responsible, along with local law enforcement agencies, for investigating allegations of unlawful racial profiling. H.B. 2163 would instead have biased policing complaints investigated by either the local law enforcement agency or the Kansas Commission on Police Officer Standards and Training ("KC-POST"). Additionally, H.B. 2163 would require that findings of biased policing be supported by "clear and convincing evidence" – a burden of proof higher than applied in most civil matters (preponderance of the evidence) and higher than currently applied by the Commission.

While the Commission believes that it can continue to enforce the Act, as the current unbiased investigatory agency, the Commission takes a neutral stance on the passage of H.B. 2163. That neutral stance reflects the need for the Commission's determinations regarding racial profiling (or biased policing) complaints to be accepted and credible. Accordingly, the Commission's neutrality regarding this bill is necessary to avoid the appearance that it may favor one side or the other if H.B. 2163 is adopted.

However, the Commission notes that H.B. 2163 proposes to place significant investigatory duties on KC-POST. The Commission stands in firm opposition to any suggestion that any of its dwindling resources should be transferred to KC-POST in order for it to fulfill its new duties. While the Commission employs two individuals who specialize in the investigation of racial profiling complaints, those individuals spend upwards of 80% of their time investigating and conciliating non-racial profiling matters such as allegations of discrimination in employment, housing, and public accommodations. Accordingly, any transfer of positions and



funds from the Commission to KC-POST would further hamstring the Commission's ability to fulfill its statutory duty to investigate and remedy allegations of discrimination in employment, housing, and public accommodations.

We will be glad to answer any questions that the Committee may have.