

MINUTES

JOINT COMMITTEE ON ADMINISTRATIVE RULES AND REGULATIONS

January 3, 2012
Room 152-S—Statehouse

Members Present

Representative Carl Holmes, Chairperson
Senator Vicki Schmidt, Vice-chairperson
Senator Oletha Faust-Goudeau
Senator Ralph Ostmeyer
Senator Allen Schmidt
Representative Steve Huebert
Representative Joe Patton
Representative Jan Pauls
Representative Ed Trimmer
Representative Caryn Tyson
Representative Valdenia Winn

Staff Present

Raney Gilliland, Kansas Legislative Research Department
Jill Shelley, Kansas Legislative Research Department
Sharon Wenger, Kansas Legislative Research Department
Ken Wilke, Office of the Revisor of Statutes
Nobuko Folmsbee, Office of the Revisor of Statutes
Eunice Peters, Office of the Revisor of Statutes
Katherine McBride, Office of the Revisor of Statutes
Judy Glasgow, Committee Assistant

Conferees

Kelly Melton, Kansas Department of Health and Environment
Rosanne Rutkowski, Kansas Department of Health and Environment
Kris Kobach, Secretary of State
Jeff Barnes, Kansas Home Inspectors Registration Board
Carmen Allen, Kansas Board of Emergency Medical Services
Rick Scheufler, Kansas Department of Agriculture
Linden Appel, Kansas Department of Corrections

Other Attending

See attached list.

Morning Session

Chairperson Carl Holmes called the meeting to order on January 3, 2012 at 10:05 a.m..

The Chairperson asked for action on the Joint Committee on Administrative Rules and Regulations minutes for November 21, 2011. Senator Ostmeyer stated he had been in attendance at the meeting and his name should be included. *Senator Ostmeyer moved the minutes be approved as corrected; Representative Trimmer seconded the motion. The motion was approved.*

The Chairperson recognized Kelly Melton, Division of Health Care Finance, to address the proposed rule and regulation noticed for hearing by the Department of Health and Environment (KDHE) KAR 129-5-1, prior authorization.

Staff noted that in the first paragraph “Kansas” should be removed and “division of health care finance” should be moved in front of “department” to conform with the statutory language.

A Committee member had a question concerning how this would be handled if a person was on a drug that was not on the list and there was no other drug listed that could replace it. Ms. Melton stated there were three criteria the agency uses to find a replacement. It was asked if these were covered in the statutes. Ms. Melton stated she would find out and let the Committee know.

The Committee requested a summary of the process when a Medicaid recipient develops intolerance for a particular drug.

Rosanne Rutkowski, Bureau of Local and Rural Health, was recognized by the Chairperson, to speak to the proposed rules and regulations noticed for hearing by the Department of Health and Environment. KAR 28-54-1, definitions; KAR 28-54-2, standards for designation; KAR 28-54-3, application for designation; KAR 28-54-4, application for change of designation; and KAR 28-54-5, certificate of designation, renewal.

Ms. Rutkowski stated these rules and regulations define terms in the trauma center regulations and update the rules and regulations to include the definition of Level IV trauma center.

Staff noted, in KAR 28-54-1, (h), the definition of “regional trauma council” as one of the six councils as defined in KSA 75-5663” needs to be clarified. A question was raised in both KAR 28-54-3 and KAR 28-54-4 concerning Level IV trauma centers. Ms. Rutkowski stated she would look at the section more thoroughly.

There was a question on KAR 28-54-5, about issuing a certificate for three years when the American College of Surgeons (ACS) certification date could be less than three years. Staff stated a clarification should be made.

The Chairperson welcomed Kris Kobach, Secretary of State, to address the proposed rules and regulations noticed for hearing by the Office of the Secretary of State (Attachment 1). KAR 7-23-4, notice of places and dates of registration; KAR 7-23-14, assessing documents

submitted as evidence of United States citizenship; KAR 7-36-7, processing advance voting ballot applications; KAR 7-36-8, uniformed and overseas citizens absentee voting act, ballot distribution deadline in local mail ballot elections; KAR 7-46-1, post election submission of photographic identification by provisional voter; KAR 7-45-2, election board worker assessment of validity of photographic identification documents; KAR 7-46-3, declarations of religious objection; and KAR 7-46-4, submission of photographic identification by permanent advance voter.

In response to a question from the Committee, Mr. Kobach stated that names do not have to match, but have to be consistent to be accepted. A Committee member expressed concern about the middle name or initial being consistent with information provided. Staff noted, in KAR 7-23-14 (B), it should be clarified what is meant by a "second government-issued document." On page 3, (b) staff noted there are no instructions for the county election officer if they do not accept the second document for citizenship.

In response to a question from the Committee, Mr. Kobach stated the state election board consists of the Secretary of State, the Attorney General and the Lieutenant Governor. In KAR 7-36-7, a Committee member questioned the definition of "practicable." Mr. Kobach stated this denotes discretion of the county election officer. The Committee believed there should be a standard set of examples for the term "practicable" and the same criteria be used throughout the state. It was suggested that contact information for someone known to the applicant for an absentee ballot be included on the ballot application. A Committee member noted, in KAR 7-36-7, (b), the "means" by which the county election officer shall attempt to contact the applicant be listed. The Committee has some concerns about whether or not one or all items have to be met in (a), (b), and (c).

Committee members had concerns that the economic impact statement did not reflect the cost the county election offices would incur to carry out these rules and regulations. A Committee member expressed concern about the oversight for the county election officer.

In KAR 7-36-8, staff noted that in the history section there needs to be the addition of KSA 25-1225.

Committee members stated that in KAR 7-46-1, the number of days to get the photo identification back to the election board for the vote to be counted should be in the rules and regulations.

In KAR 7-46-2, (2), the Committee had some concern about the election board worker making the determination in (A) and (B) to give a regular ballot.

Committee members requested that the letter to the Secretary of State request a description of the voter education done to date by that Office. The Committee raised the concern that these changes could be considered substantial and may require the rules and regulations to be brought back before the Committee.

The Chairperson recognized Jeff Barnes on a conference call to speak to the rule and regulation noticed for hearing by Kansas Home Inspectors Registration Board. KAR 130-2-1, fees.

Mr. Barnes stated the fees were being adjusted downward and the agency expects to meet its fiscal demands with the reduced income. There were no questions from the Committee.

The Chairperson recessed the meeting until 1:30 p.m.

Afternoon Session

The Chairperson reconvened the meeting at 1:35 p.m.

Chairperson Holmes recognized Carmen Allen to speak to the rules and regulations noticed for hearing by the Board of Emergency Medical Services. KAR 109-5-1c, emergency medical technician-intermediate, emergency medical technician-defibrillator, emergency medical technician-intermediate who is also certified as an emergency medical technician-defibrillator, and advanced emergency medical technician; continuing education; KAR 109-5-3, continuing education approval for long-term providers; KAR 109-7-1, schedule of fees; KAR 109-8-2, scheduling examinations for certification; KAR 109-10-1c, approved advanced emergency medical technician education standards; KAR 109-10-2, long-term accreditation of training programs conducting initial courses of instruction; KAR 109-11-4a, advanced emergency medical technician (AEMT) course approval; and KAR 109-13-1, training officers.

In KAR 109-5-1c, staff indicated that in subsections (a), (b), and (c), it appears anyone qualifying for renewal under paragraph (2) also would be subject to the requirements of paragraph (1), due to the language “before December 31, 2014.” The Committee requested clarification. In (c)(1) and (c)(2) staff noted the word “both” should be inserted to read “... certification renewal who is certified as both an EMT-I and as an EMT-D.”

In KAR 109-5-3, page 2, (3) “advisor should be changed to “director.” The history section should be updated to KSA 65-6101 and to KSA 65-6148.

In KAR 109-7-1, page 2, staff noted paragraphs (d)(5), (6), and (7) appear to refer to a different certification than paragraphs (d)(1), (2), (3), and (4). Committee members suggested the agency clarify this by introducing a new paragraph specifying fees for those certified as EMT-I/D.

In KAR 109-11-4a, staff noted that in subsection (c), the word is “ensure” and in subsection (e) it is “insure” and these should be consistent. In KAR 109-13-1 (1) the word should be “physician assistant.” This should be changed throughout the rule and regulation.

Chairperson Holmes asked Ken Wilke to review the bill as requested by the Committee at the November 21, 2011, meeting on the batterer intervention program (Attachment 2).

A Committee member noted, page 1 (c), line 7, the “or” between aging and department should be removed and a comma inserted. A question was asked by a Committee member who would make up the members of this advisory board. A handout was presented by the Attorney General’s Office listing those on the board at the present time (Attachment 3). Senator Vicki Schmidt requested that a date certain be included for the completion of the rules and regulations. Mr. Wilke stated, if it was acceptable to the Committee, he would use July 1, 2013. The Committee agreed. *Senator Vicki Schmidt moved to introduce the bill in the Senate with the changes requested by the Committee. Representative Pauls seconded the motion. Motion carried.*

Linden Appel, Chief Legal Counsel, was recognized by the Chairperson to speak to the proposed rules and regulations noticed for hearing by the Department of Corrections. KAR 44-5-115, service fees; KAR 44-9-101, definitions; KAR 44-9-105, preliminary hearing for alleged

violators; KAR 44-9-107, house arrest program; KAR 44-9-501, general provisions; KAR 44-9-502, final revocation hearings; KAR 44-9-503, sanctions, computation of time; and KAR 44-9-504, waiver of final revocation hearing; (KAR 45-100-1; KAR 45-500-1; KAR 45-500-2; KAR 45-500-3; and KAR 45-500-4, REVOKED).

In KAR 44-9-101, staff noted the definition of (c) “correctional facility” needs to be clarified. Staff also noted in (2), the term “completely” may need clarification. Staff noted, when there is a reference to the prison review board, the agency may want to make a reference to Executive Reorganization Order 34, 2011 Section Laws, Chapter 130, Sections 2 and 3.

The Chairperson welcomed Rick Scheufler to speak to the proposed rules and regulations noticed for hearing by the Department of Agriculture. KAR 4-15-5, live plant dealer license fee; and KAR 4-15-6, plant pest emergency response fund fee.

Mr. Scheufler stated \$80.00 is the cap for this fee. There were no other comments.

The Chairperson stated the next meeting of the Committee would be February 27, 2012. The meeting was adjourned at 3:50 p.m.

Committee Comments on Proposed Rules and Regulations, January 2012

Kansas Department of Health and Environment. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning prior authorization. After discussion, the Committee had the following comments.

KAR 129-5-1. The Committee suggests removing “Kansas” before the name of the department, as the statute establishing the department (KSA 75-5601) does not include “Kansas” in the name. For clarity, the Committee suggests that the phrase read “placed by the division of health care finance at the department of health and environment” or “placed by the department of health and environment's division of health care finance.”

The Committee requests the Department provide a summary of the process when a Medicaid recipient develops an intolerance for a particular drug on the preferred drug list and note whether the process is outlined in any rule and regulation or in statute.

Kansas Department of Health and Environment. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning definitions; standards for designation; application for designation; application for change of designation; and certificate of designation, renewal (trauma centers). After discussion, the Committee had the following comments.

KAR 28-54-1. In subsection (h), the definition of “regional trauma council” is unclear. That term is not defined in KSA 75-5663; however, the statute defines the term “council” as one of the regional trauma councils. Please provide general information on the number, definition, and organization of the regional trauma councils.

KAR 28-54-3 and 28-54-4. In paragraph (a)(1)(A) of KAR 28-54-3 and paragraph (a)(1) of KAR 28-54-4, why is there no mention of a Level IV trauma center? There is a fee for a Level IV trauma center in the subsequent paragraph of each proposed regulation.

KAR 28-54-3. Subsections (a) and (b) contain references to periods of 30 days. Should those subsections specify "calendar days" as in subsections (c) and (d)? Please review this set of regulations for consistency.

KAR 28-54-5. Subsection (a) states that each certificate of designation is good for three years. What happens if the ACS verification certificate is valid only for a lesser period of time? The Committee requests the agency clarify subsection (a).

Kansas Secretary of State. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning notice of places and dates of registration; assessing documents submitted as evidence of United States citizenship; processing advance voting ballot applications; uniformed and overseas citizens absentee voting act, ballot distribution deadline in local mail ballot elections; postelection submission of photographic identification by provisional voter; election board worker assessment of validity of photographic identification documents; declarations of religious objection; and submission of photographic identification by permanent advance voter. After discussion, the Committee had the following comments.

KAR 7-23-14. In subsection (a) and paragraph (a)(1), election officers are to consider an individual's middle name in determining U.S. citizenship. Committee members request the procedure that must be followed by a potential voter who may have changed a middle name upon marriage or whose document reflect use of different names in various documents based upon when the documents were issued.

KAR 7-23-14. In paragraphs (a)(2)(A), (B) and (C) on page 1 and in the corresponding paragraphs (a)(5)(A), (B) and (C) on page 2, the phrase "second, government-issued document" needs to be defined. Does the term "second" mean another or different? Does the term "government-issued" refer to a document submitted as evidence of United States citizenship or a document issued by a county or local unit of government, another state or even another country?

KAR 7-23-14. In subsection (b) there appears to be an unintended consequence. Paragraph (b)(1) directs the county election officer to accept and assess the citizenship document. Paragraph (2) directs the county election officer to add the applicant's name to the voter registration list regardless of the result of the second assessment. The Committee suggests the agency specify the result if the citizenship document is not acceptable.

KAR 7-23-14. Paragraphs (a)(2)(C) and (a)(3) mention the processes of KSA 25-2309(m). Since KSA 25-2309(m) requires the applicant seeking assessment of the evidence submitted to prove citizenship on appeal to the State election board and the Board must give notice at least five days before the hearing date, does the process outlined in this draft regulation guarantee a decision prior to the applicant's vote being canvassed by the local canvassing board? In other words, will the appeal process allow the vote to count?

KAR 7-23-14. In paragraphs (a)(2)(B) and (a)(5)(B), the election officer is directed to allow the applicant to sign an affidavit. Where is the election officer directed to accept registration if the applicant provides such an affidavit?

KAR 7-36-7. In subsection (a), the phrase “if practicable” provides wide discretion to local officials in timing and means and should be clarified to provide more direction to local officials. The Committee notes that the phrase “if practicable” is rarely used in statute when defining required actions. In subsections (b) and (e), the phrase “by any means” similarly should be clarified to provide direction to local officials. It appears that nothing in this regulation would prevent a local official from attempting to contact an applicant *via* email only or phone only, regardless of whether such connections are available to the applicant. Committee members suggest local officials be directed to require that contact be attempted *via* U.S. Mail, telephone, and local individuals who may be able to indicate the whereabouts of a voter requesting an advanced ballot. (Contact information for someone known to the applicant could be included on the ballot application.)

KAR 7-36-7. Are sections (a) through (g) all required for an advanced voter's ballot to be considered?

KAR 7-36-8. In the history section, consider adding KSA 25-1225 to the list of authorizing statutes. KSA 25-440's authorizing section does not cover KSA 25-1215 as amended.

KAR 7-46-1. The Committee suggests local election officials should be directed to inform voters of the deadline for submitting a valid photographic identification document. In subsection (a), what other electronic means might be approved by the Secretary of State without amending this rule and regulation? The Committee notes that the opinion in *Bruns v. Kansas State Bd. of Technical Professions* (255 Kan. 728, 877 P.2d 391 (1994)) states that a policy that is not filed and published has no force and effect of law.

KAR 7-46-2. The Committee notes that subsection (c) provides review by a supervising judge if a voter and an election board worker have a dispute as to whether proper identification has been provided, but subsection (e) provides that only the election board worker may decide whether to issue a regular ballot or a provisional ballot “if the election board worker determines that a voter is attempting to circumvent the photographic identification requirement.” The Committee recommends that a supervising judge, not the election board worker, should make the determination described in subsection (e).

General Issues:

The Committee expresses its overall discomfort with the level of discretion given to local election officials in determining the acceptability of documents and in determining the identity of individual voters at polling places. The Committee notes that determinations of the State Election Board are exempted from the Judicial Review Act (KSA 2011 Supp. 77-603(c)(4)) and requests the agency respond to this concern. Where would an aggrieved potential voter learn of procedures for appealing to federal officials?

Committee members request information on the public education efforts undertaken by the Secretary of State's office regarding the SAFE Act. Committee members expressed concern regarding the public's ability to deal with the law and regulations if education efforts have not been widely undertaken.

The Committee reminds Secretary Kobach that if the above issues warrant substantial changes in the proposed regulations, those regulations must be brought before the Committee again.

The Committee notes that the Economic Impact Statement is incomplete because it does not estimate the costs of the regulations to local election boards and officials and requests inclusion of those costs in an amended Economic Impact Statement.

Kansas Department of Corrections. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning service fees; definitions; preliminary hearing for alleged violators; house arrest program; general provisions; final revocation hearings; sanctions, computation of time; waiver of final revocation hearing; and revocations. After discussion, the Committee had the following comments.

KAR 44-9-101. The Committee suggests the term "correctional facility" in subsection (c) be changed to "correctional institution," the term defined in KSA 75-5202. In paragraph (e)(2), the definition of "pardon" appears to be broad. Does a pardon issued after serving, for example, five years of a 20-year sentence forgive the time served?

General Issue:

The Committee requests that the agency review history sections and consistently, as appropriate, add a reference to "as amended by L.2011, ch.130, sec. 2 and 3" (ERO No. 34, establishing the Prisoner Review Board and abolishing the Kansas Parole Board).

Kansas Home Inspectors Registration Board. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning fees. After discussion, the Committee had no comments.

Kansas Board of Emergency Medical Services. The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning emergency medical technician-intermediate, emergency medical technician-defibrillator, emergency medical technician-intermediate who is also certified as an emergency medical technician-defibrillator, and advanced emergency medical technician, continuing education; continuing education approval for long-term providers; schedule of fees; scheduling examinations for certification; approved advanced emergency medical technician education standards; long-term accreditation of training programs conducting initial courses of instruction; advanced emergency medical technician (AEMT) course approval; and training officers. After discussion, the Committee had the following comments.

KAR 109-5-1c. In subsections (a), (b), and (c), it appears that anyone qualifying for renewal under paragraph (2) also would be subject to the requirements of paragraph (1), due to the language "before December 31, 2014." The Committee

requests clarification. Also, the Committee suggests that paragraphs (c)(1) and (c)(2) be clarified by adding “both” after “certified” and before “EMT-I.”

KAR 109-5-3. In the history section, the reference to KSA 65-6111 should include “2010 Supp.”

In KAR 109-5-3 paragraphs (b)(1)(C) and (D) and in KAR 109-10-2 paragraphs (b)(1)(D) and (E), the Committee believes the reference to “Kansas statutes and Kansas regulations” should be more specific, limited to the provisions of KSA 65-6101 through KSA 65-6148, and amendments thereto, and the rules and regulations promulgated thereunder.

KAR 109-5-3, in paragraph (b)(3) and in others of these regulations, the Committee believes the term “medical advisor” should be changed to “medical director” to be consistent with KSA 2011 Supp. 65-6112(q) (L.2011, Ch.114, Sec. 82 as further amended by Sec. 59).

KAR 109-7-1. Paragraphs (d)(5), (6), and (7) appear to refer to a different certification than paragraphs (d)(1), (2), (3), and (4). The Committee suggests the agency clarify this by introducing a new paragraph specifying fees for those certified as EMT-I/D.

KAR 109-11-4a. For clarity, the Committee suggests “insure” in subsection (e) be changed to “ensure,” as in subsection (c).

KAR 109-13-1. In paragraphs (b)(1) and (d)(2), the Committee suggests “physician's assistant” be changed to “physician assistant,” the term used in 2011 amendments to the Nurse Practice Act, in 2011 Supp. 65-6112(z) (L.2011, Ch. 114, Sec. 59).

Kansas Department of Agriculture The Joint Committee on Administrative Rules and Regulations reviewed for comment rules and regulations concerning live plant dealer license fees and the plant pest emergency response fund fee. After discussion, the Committee had no comments.

Prepared by Judy Glasgow
Edited by Raney Gilliland

Approved by the Committee on:

February 10, 2012
(Date)