

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 12:00 p.m., on March 22, 2011, in Room 548-S of the Capitol.

All members were present except:
Senator Emler – excused

Committee staff present:

Ms. Margaret Cianciarulo, Committee Assistant
Mr. Ken Wilke, Office of the Revisor of Statutes
Mr. Reed Holwegner, Kansas Legislative Research Department
Ms. Dorothy Noblitt, Kansas Legislative Research Department

Conferees appearing before the Committee:

Ms. Rebecca Proctor, Legal Counsel, Kansas Organization of State Employees
Mrs. Karin Brownlee, Secretary, Department of Labor
Mr. Ken Hansen, Chief Legal Counsel, Department of Labor

Others attending:

See attached list.

Continued hearing on the Department of Labor's amendment pertaining to classified employees to Substitute for HB2135, an act concerning certain employees; relating to misclassification of employees to avoid tax withholding contributions and reporting requirements.

Upon calling the meeting to order, Chairperson Wagle stated last week the Committee took action on this bill and added an amendment the Secretary of Labor had requested. The bill has now been pulled back into Committee and is a blessed bill. They do not have to act on it, but she wanted to have further discussion on the amendment and called on Ms. Rebecca Proctor, Legal Counsel for the Kansas Organization of State Employees, who explained:

1.) No Change is Required, as the Kansas Civil Service Act creates a Merit-Based System – Secretary Brownlee has been quoted as saying that federal law requires the agency dealing with unemployment insurance must be a performance-based employment system and quoting Section 303(a)(1) of the Social Security Act. However, the standards of a merit system of personnel administration are set in 5 CFR 900.603 and are identical to Sections 6 (a)(3)(A-F) of Secretary Brownlee's amendment. Her recitation of Federal law is correct except she replaced the term “merit system” used in the Federal law, with “performance-based employment system, which does not appear in Federal law. The amendment fails to point out that the Kansas Civil Service Act itself creates a merit-based employment system set for in K.S.A. 75-2925 and reads, “Personnel administration actions shall be based on merit principles and fitness to perform the work required and shall provide fair and equal opportunity for public service,” and defines “merit principles” in K.S.A. 75-2925(f) as “relative knowledge, skills, and ability.”

2.) Kansas Already Has a Comprehensive Employee Evaluation System – The proposed amendment recites the standards of a merit system, but does not provide any information or detail regarding how the Secretary will implement these standards. Referring to Section 6(c) and Section 6(a)(2), these two provisions create:

A.) A system where the Secretary of Labor can implement whatever procedure she sees fit and may discipline or discharge employees for any reason, or none at all.

B.) Circumstances where even departmental managers or supervisors will have no idea or guidance regarding what performance measures will be used until the Secretary creates those measures. She then gave a history of **HB2196**, passed in 2008 and the performance management process (PMP), where the state embarked on its first major overhaul evaluation and pay system in over 30 years and was implemented by the State in 2010. A trial/dry-run period in 2009 included training sessions for both managers and employees, and instructions and documentation for each step. Ms. Proctor stated, this amendment seeks to abandon the PMP for the DOL employees and allow them to create its own evaluation system under which the employees will serve at the pleasure of the Secretary of Labor.

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Lastly, she said the amendments makes no provision for the benefits the DOL classified employees have accrued under the Civil Service system, places no restrictions on the Agency regarding the personnel system it intends to develop and makes no provision for employees to vote and authorize removal. A copy of her testimony is ([Attachment 1](#)) attached hereto and incorporated into the Minutes as referenced.

The Chair then called on Mrs. Karin Brownlee, Secretary, Department of Labor, who first asked is she correct in saying the Committee report was not turned in? (The Chair said, that's correct.) So the bill is as it was previously and the amendment the DOL offered is not in the bill? (No, it is in the bill. The Committee took action and it has been blessed.) But the bill resides in Committee rather than having been read into the Senate? (Yes.)

Secretary Brownlee began her testimony by saying they came to the DOL on January 10, 2011, they have tried to sort what are the laws, rules and regs of government personnel, what is on the federal and state level, and frankly, they see different messages in all of this and they are trying to mesh it together and figure out how to make that work. We do have a large number of employees who are retirement eligible, 46%, within the next four years. So as we refill positions, we want to make sure we are doing it according to the laws and rules and regs that govern the DOL, believing the merit based system is the route to go. She said, if she uses the words "performance based" or "merit based," she would consider the terms to be synonymous of each other.

She said despite commentary to the contrary, the merit system outlined by the amendment provides for nondiscrimination protection for all employees, shielding them from the political whim as administrations change, the premise upon which now the unwieldy civil service based system originated, and an act itself that is now almost purely a tenure based system.

She offered facts including:

- 1.) In the bill, the classified employees of the DOL are not being deprived of continued employment absent a merit-related cause. If fact, the bill provides that personnel decisions by the Secretary of Labor shall consider specific merit principles.
- 2.) The KDOL employees will still enjoy a personnel system that is based purely on merit and safeguards of discrimination.
- 3) The amendment does not contain mandatory terminations upon passage.
- 4.) The bill does not conflict with the Civil Service Statutes, see K.S.A. 75-2925(z), which provide for unclassified service positions held by state officers or employees who are specifically designated by law as being in the unclassified service. So if this amendment passes, it would be in sync with the existing provision.

Lastly, she offered information in her testimony the Committee might look through that have been cited. For example, 5 CFR 900603(d), retaining employees on the basis of the adequacy of their performance, correcting inadequate performances, and separating employees whose inadequate performance cannot be corrected. She also offered the Kansas Attorney General's opinion and some court cases. A copy of her testimony is ([Attachment 2](#)) attached and incorporated into the Minutes as referenced.

Secretary Brownlee asked her Chief Legal Counsel, DOL, Mr. Ken Hansen, for his comments regarding Ms. Proctor's testimony which included:

- 1.) Spending some time in the personnel's website, looking at an entire section on how, as a manager, we are suppose to execute this evaluation system and finding nothing in the documents he opened, that went down the path of these performance evaluations that are to be used in such a manner as to properly discipline employees. The sole focus of that website was how to run employees through the rate category so they can get accelerated pay raises.

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2.) Even though the Department of Personnel Services replaced 26 different performance management and review systems and replaced it with one large system (PMP) does not make it right.

4.) Regarding consistency, it says that the performance systems creates a consistent evaluation system, but they only work depending on the supervisors, as some do not like conflict so they write up a pretty evaluation, hit the satisfactory button, and move on.

5.) Another problem with the classified systems, to really get a bump in any kind of pay, you have to move them up a box. This does not lend itself appropriate to performance evaluations. No written testimony was offered.

The Chair thanked all of the conferees and asked for questions from the Committee, answered by Mr. Hansen and Secretary Brownlee which included:

1.) Senator Faust-Gaudeau who asked, regarding page of 5 of their testimony they mention "The Board." Who is that Board and what is the makeup of that Board? (Mr. Hansen – The Civil Service Board, is appointed by the Governor and believes it breaks down along congressional districts. He thinks the Board members are all confirmed by Senate confirmation.)

2.) Senator Holland asked if they have had any discussion outside the DOL, particularly on this amendment? (Secretary Brownlee – We have had some discussion with the Department of Administration but did not run this amendment by them.) So I would assume it would be fair to say, you did not get into specifics? (Actually, we have tried regarding their bringing rules and regs, which is another aspect of the whole Civil Service thing.) In looking on page 2, regarding Federal laws, for example, 5 CFR 900 603, how long has it been in existence, years? (Mr. Hansen – Believes so but would have to check.) Has the US DOL ever related to you that they have a problem with our current system? (Not that I am aware of, but if they would have gone in and looked for these problems, it probably never would have come up.) Is it your contention Kansas has somehow been out of compliance with the Federal regs, for what, years now? (He is not going into the direction of that, but what this is based on in our 60 days in office, we feel the intent of that Federal statute, while it may be acknowledged by the Civil Service, perhaps it is certainly not being fully implemented.) Currently, do you folks conduct periodic evaluations of classified employees? (Believes according to their HR Director, they are doing that.) What ratings do you use? (They follow the performance management forms using satisfactory, unsatisfactory, exceptional and room for comments.) How many employees have been rated unsatisfactory in the last six months? (Don't know that, they would know that.) Lastly he asked, have they ever run this by the US DOL? (No we have not.) He respectfully requests they do and would like to hear the US DOL's comments. His main concern is the phrase, "at the pleasure of the Secretary." (Secretary Brownlee feels he has raised a point that is worthy of consideration and removing this phrase would be a reasonable change.)

The Chair commended the DOL for the progress they have made in their short time in the DOL. She said the Secretary has come before the Committee responding to the needs of Kansas, as opposed to the last few years. This Secretary, in a matter of weeks, has made the DOL function in a better way and their goal here is to meet the needs that are required by the Agency and serve the needs of Kansas. So, the Chair would like to find some way to meet the needs of the Secretary, the people of Kansas, and respect the rights of those who are classified. She said the Committee will continue to look at this, have further communication and meet again.

Adjournment

As there was no further discussion, the meeting was adjourned. The time was 12:50 p.m.

The next meeting is scheduled for April 1, 2011.

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