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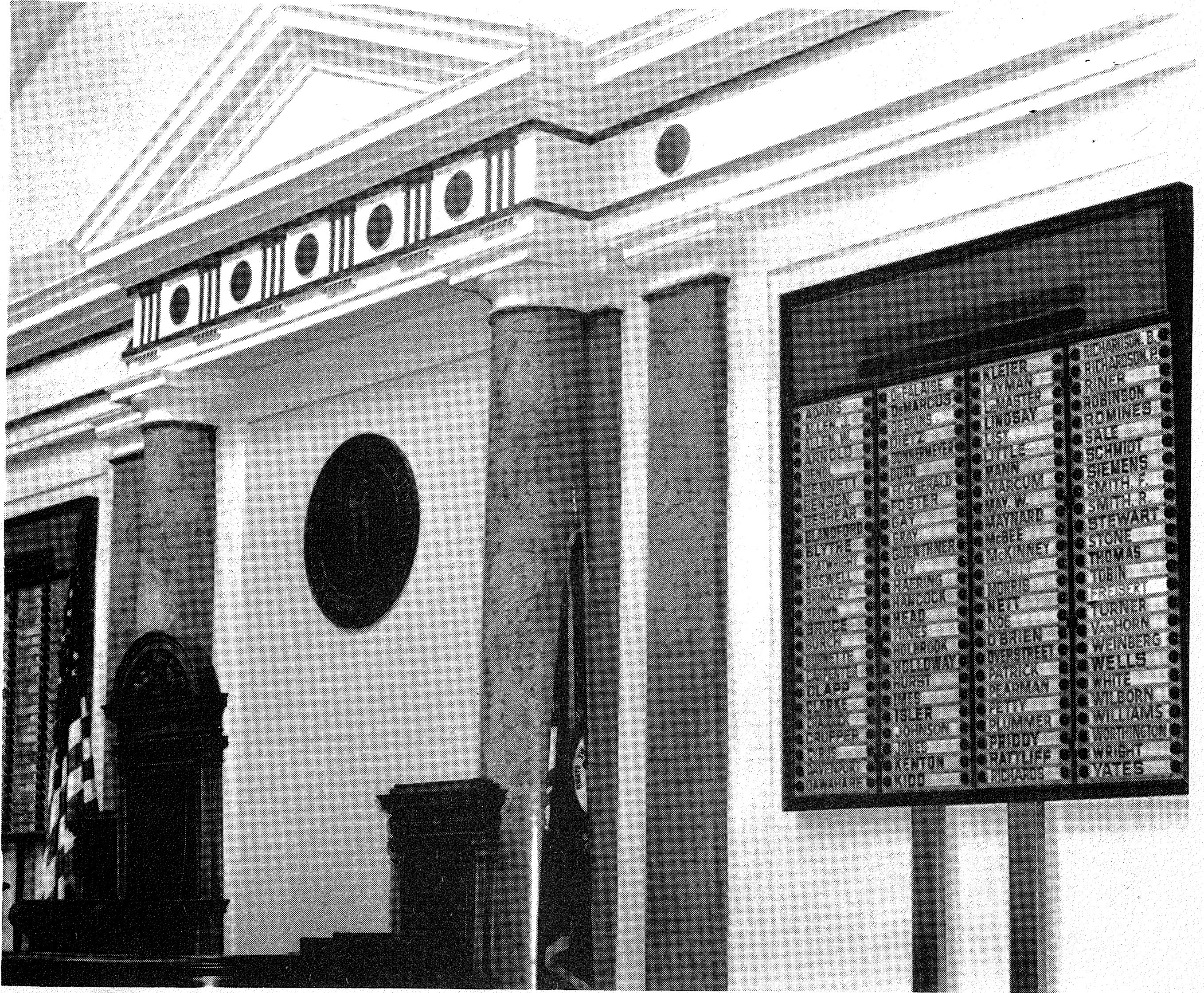
ISSUES CONFRONTING THE 1986 GENERAL ASSEMBLY



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Informational Bulletin No. 152

LEGISLATIVE RESEARCH COMMISSION

Frankfort, Kentucky

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ISSUES CONFRONTING THE 1986 GENERAL ASSEMBLY

Prepared by
Members of the
Legislative Research Commission Staff

Edited by
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Frankfort, Kentucky

September, 1985

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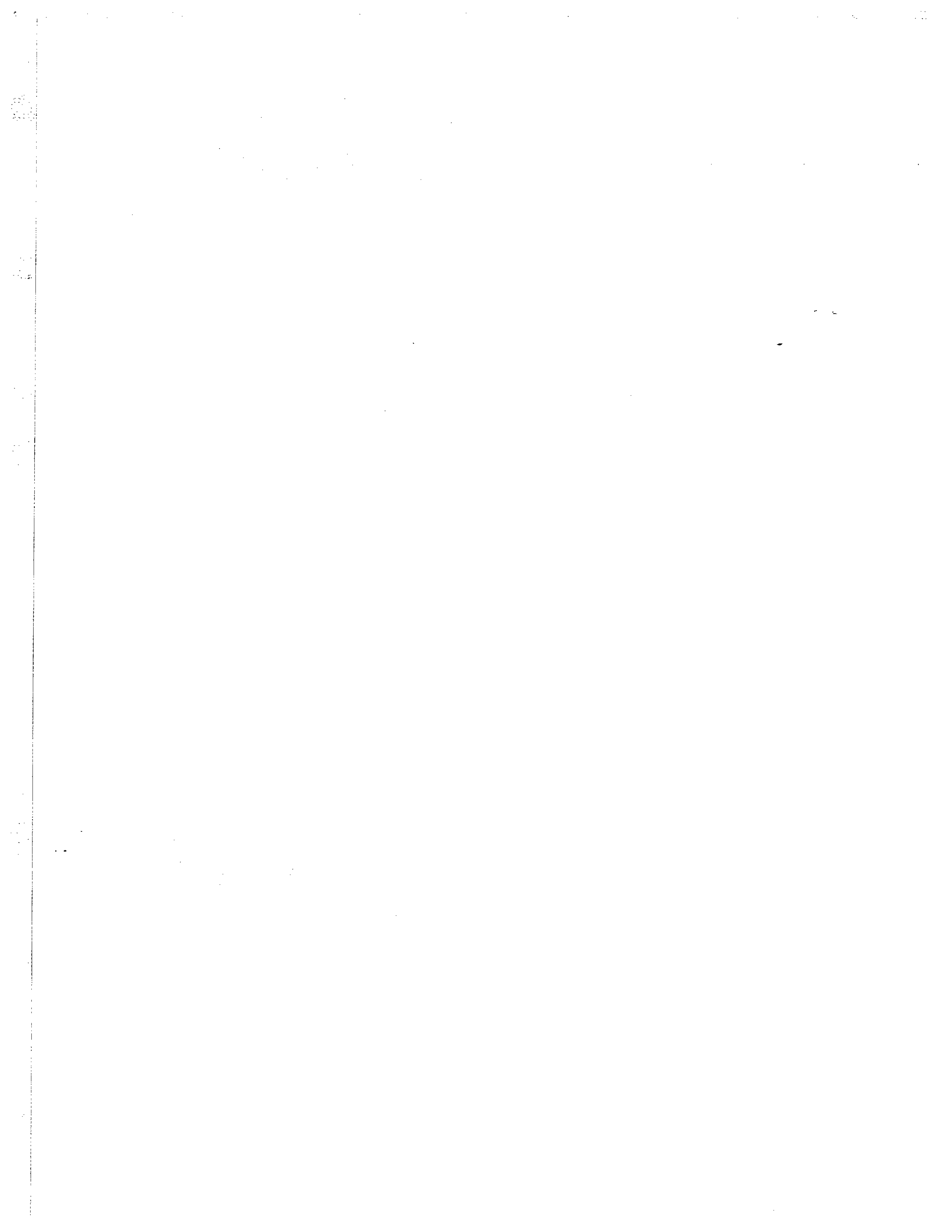


FOREWORD

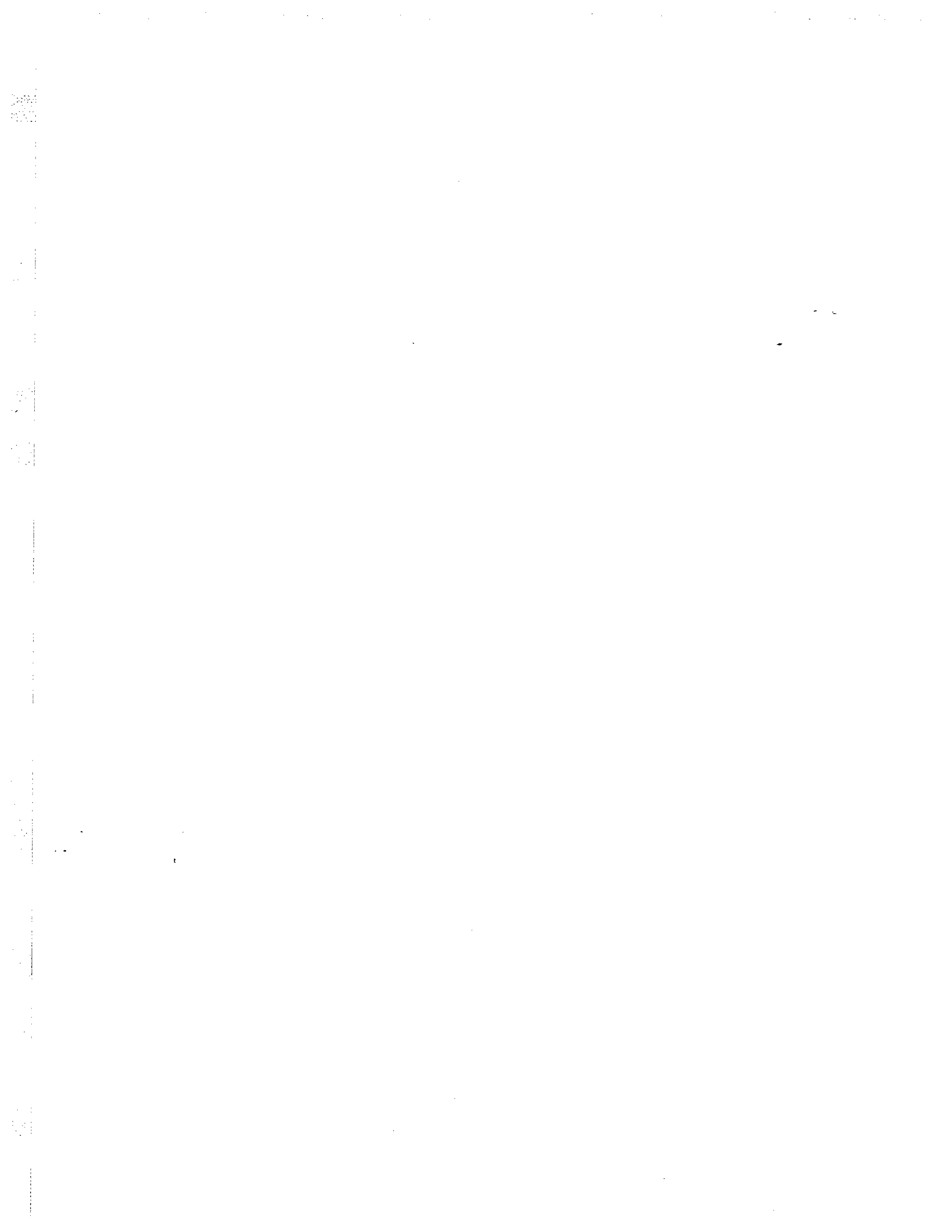
This collection of briefs, prepared by members of the Legislative Research Commission staff, attempts to bring into sharper focus some of the major issues which have received considerable legislative attention during the interim. The reports by no means exhaust the list of important issues facing the 1986 Legislature. At the same time the alternatives and comments suggested are neither exclusive nor exhaustive.

Effort has been made to present these issues objectively, unemotionally, and in as concise a form as the complexity of the subject matter allows. They are grouped for the convenience of the reader into the various committee jurisdictions and no particular meaning is placed upon the order in which they are presented.

Staff members who prepared the reports were selected on the basis of their knowledge of the subject matter and their work with the issues during the 1984-85 interim. Most of the staff has worked closely with the interim legislative committees which studied the issues and helped draft some of the proposed legislation.

Vic Hellard, Jr.
Director

Frankfort, Kentucky
September, 1985



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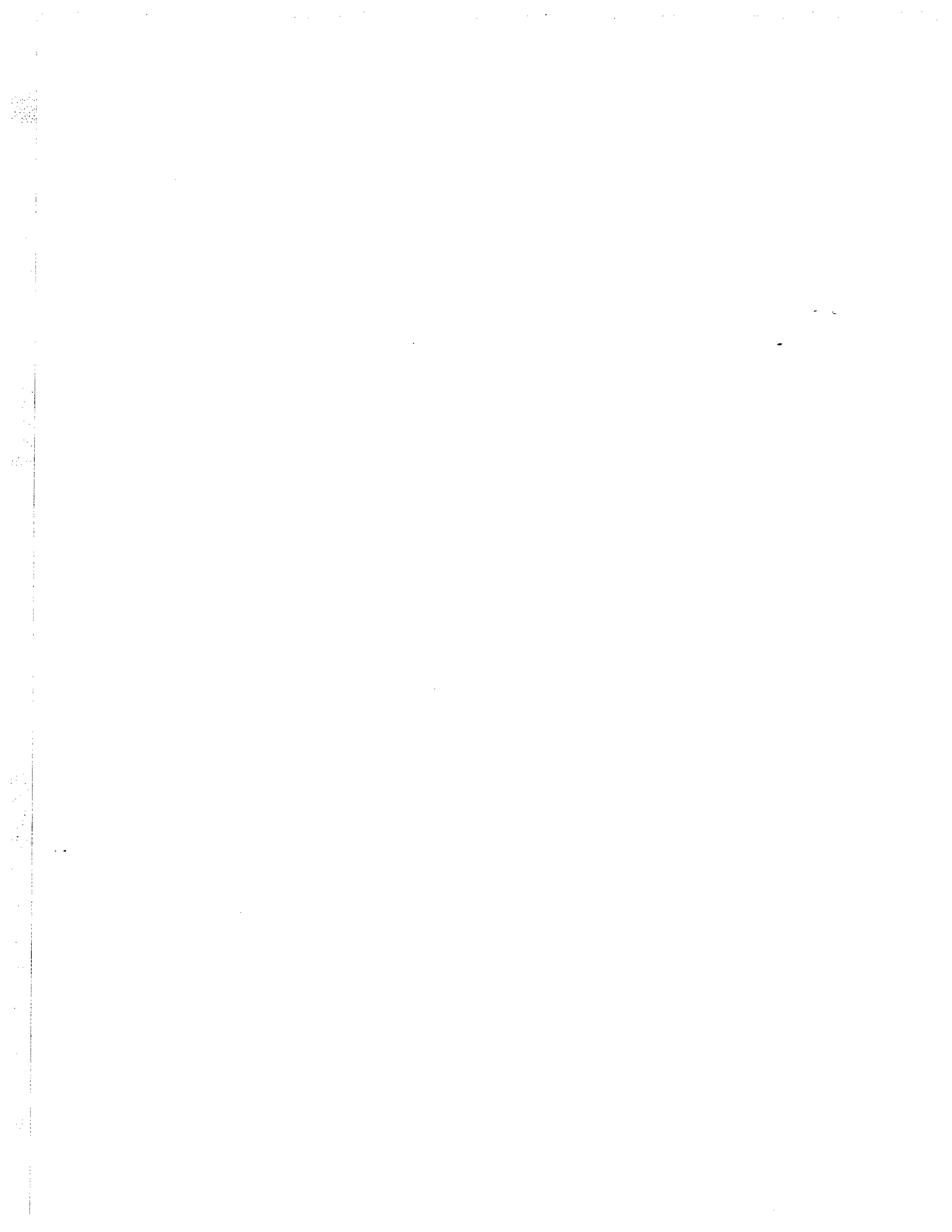


AGRICULTURE AND NATURAL RESOURCES

KENTUCKY RIVER LOCKS AND DAMS 5-14

Prepared by Brooks H. Talley

Issue

Should the state own and operate locks and dams 5-14 on the Kentucky River?

Background

The Corps of Engineers has determined that its statutory mandates will not allow it to continue to operate locks and dams 5-14 on the Kentucky River. The Corps made this decision on the basis that there is no longer commercial traffic through locks 5-14, and federal funds are scarce. The Corps operates locks and dams 1-4, since there is commercial traffic through these locks.

The Corps did not request funds for the operation and maintenance of locks and dams 5-14 (Upper Kentucky River) for the 1981 federal fiscal year. The Corps had decided, absent Congressional mandate or funding, to close locks 5-14 at the end of the 1980 summer recreation season. But Congress did appropriate $1,200,000 for the operation and maintenance of locks 5-14 for the 1981 fiscal year. The Corps closed the locks in October 1981 with the expectation that they would not be reopened for the 1982 summer recreation season.

The Corps did not request funds for the operation and maintenance of locks 5-14 in its 1982 fiscal year budget either. But in February 1982, the Assistant Secretary of the Army directed the Corps to reopen and operate locks 5, 6, 8, 9 and 10 for a 15-week period over the weekends in the 1982 recreation season. These locks were returned to a caretaker status (locks 7 and 11-14 were already in caretaker status) in September 1982. In a caretaker status, the locks are welded closed, usable equipment removed, and buildings and residences boarded up.

In December 1982, the Louisville District Office of the Corps and the Cincinnati Division Office of the Corps recommended that the federal government dispose of locks and dams 5-14. The Chief of the Corps of Engineers later concurred in this recommendation.

Discussion

Because of these actions by the Corps, the Kentucky River Task Force was created by the 1982 General Assembly. The Kentucky River Task Force initially was organized into three subcommittees: Subcommittee on Economic Development, Subcommittee on Navigation, and the Subcommittee on Water Supply, Water Quality, and Flood Control.

The subcommittees of the task force met with concerned groups and individuals to collect information in completing their work. For example, they met with boat dock operators, representatives of public utilities, recreation boaters, representatives of the Corps of Engineers, and representatives of state agencies. Municipal water plants and businesses along the river also were surveyed. The full task force membership toured the river from lock 7 to lock 4.

After considering the issue, "Should the state own and operate locks and dams 5-14 on the Kentucky River?" for four years, the basic position of the task force is that it is the responsibility of the federal government to operate and maintain the locks and dams on the Kentucky River (locks and dams 1-14). But because the Louisville and Cincinnati offices of the Corps recommended that locks and dams 5-14 be disposed of, and because these locks have been closed since September 1982, and because the Corps' budgets for fiscal years 1983 and 1984 did not contain funds for their operation and maintenance, the task force recommended to the 1984 General Assembly that locks 5-14 be operated and routinely maintained by the state during a 15-week period over the weekends in the summer recreation seasons of 1984 and 1985 at an estimated cost of $300,000. This would give the state some experience in operating and routinely maintaining the locks while the Natural Resources and Environmental Protection Cabinet negotiated with the Corps over the entire Kentucky River lock and dam system. The estimated cost of this negotiation was $25,000. The legislative members of the task force prefiled legislation for the 1984 session to accomplish this negotiation and limited state operation of locks 5-14. The Interim Joint Committee on Agriculture and Natural Resources recommended passage of this legislation.

The members of the task force believe the Corps' reducing the availability of locking facilities on the river from almost a 24-hour-a-day operation to about an eight-hour-a-day operation reduced the efficiency of barge operation to such an extent that it contributed to the demise of commercial navigation on the river. The task force believes that there is potential for commercial navigation on the Kentucky River in its existing configuration.

Similarly, the task force believes that the Corps' reduction in the hours of daily operation of the locks resulted in the stifling of recreation and tourism development.

The task force realizes the importance of the Kentucky River in supplying water to about 400,000 persons. This importance was emphasized by the drought of 1983. The cities of Lexington, Richmond, Frankfort, Winchester, Harrodsburg, Versailles, Beattyville, Nicholasville, Irvine, Lancaster, Lawrenceburg, and Wilmore draw their water supply from the Kentucky River. Accordingly, the task force recommended that the locks and dams be properly maintained to prevent a loss of pool and to allow repair craft passage for making repairs to the locks and dams to assure a supply of drinking water.

The position of the task force is that: "First and foremost ... it is the responsibility of the U. S. Army Corps of Engineers to operate and maintain locks and dams 1-14 on the Kentucky River." In the event this does not happen, the task force recommended that the state negotiate with the Corps for

a combined state-federal operation of the locks and dams. But the task force recommended that the Corps be required, in addition to the terms of the negotiated agreement, to: (1) retain full responsibility for the operation and maintenance of locks 1-4, which presently have commercial traffic; (2) retain responsibility for the major repair or rehabilitation of locks and dams 1-14 to ensure against the failure or leakage of a structure which might result in the subsequent loss of a pool; (3) repair lock and dam 7; and (4) provide the state with an engineering report on the necessary repairs and costs which should be made to each lock and dam 5-14.

The Legislative Research Commission reconstituted the Kentucky River Task Force on August 1, 1984. The purpose for doing this was to ensure that the legislation enacted in 1984 was being implemented. The original Kentucky River Task Force prefiled legislation in the 1984 Regular Session of the General Assembly to reopen locks 5-14 on the Kentucky River. This prefiled legislation was enacted as House Bill 987 of the 1984 session.

House Bill 987 directed the Natural Resources and Environmental Protection Cabinet to negotiate with the Corps of Engineers for the continued operation of locks 5-14 on the Kentucky River. The legislation appropriated $25,000 for this purpose. House Bill 987 also directed the cabinet to operate these locks in compliance with the negotiated state and federal agreement. The bill appropriated $300,000 over the biennium for this purpose.

The Kentucky River Task Force requested the Natural Resources and Environmental Protection Cabinet to report to them the progress being made in implementing House Bill 987. The cabinet believed that the amount of money appropriated by the 1984 General Assembly was sufficient for limited operation and general maintenance of the locks, but it was not sufficient to cover the cost of structural repairs to the locks. The cabinet reported this to the Corps, but the Corps maintained that it had only enough money for the caretaker operation of locks 5-14.

Because of the stalemate in reopening locks 5-14 on the Kentucky River, the Kentucky River Task force created the Special Subcommittee on Congressional Action on October 18, 1984. The purpose of this special subcommittee was to present Kentucky's case for reopening the locks on the Kentucky River before Kentucky's Congressional delegation and the appropriate Congressional committees.

Governor Collins formally requested the Chief of the Corps of Engineers to"... reinstate the operation and maintenance of locks 5-14" on the Kentucky River and to "...negotiate improvements in those facilities so that potential commercial use can be realized."

The Special Subcommittee on Congressional Action met with Congressman Larry J. Hopkins on November 6, 1984. On November 15, 1984, Governor Collins met with Robert K. Dawson, Assistant Secretary of the Army for Civil Works and subsequently announced a tentative agreement with the Corps to reopen ten locks on the Kentucky River.

The Commonwealth and the Louisville District Office of the Corps developed a tentative memorandum of understanding in which the Commonwealth would assume complete ownership of locks and dams 5-14 and their appurtenant property over

a three-year period ending October 15, 1988. Under the terms of the tentative agreement, the state would operate and maintain locks and dams 5-14 commencing in 1985 and also provide their routine maintenance. The Corps would have major maintenance responsibility for locks and dams 5-14 until October 15, 1986, at which time the state would assume major maintenance responsibility for locks 9-14. The Corps would retain major maintenance responsibility for locks 5-8 until October 15, 1988, at which time the state would assume that responsibility. Either party could withdraw from the agreement within the three-year period by providing a 30-day notice.

A special subcommittee of the task force, the Negotiation Review Subcommittee, was appointed to advise the cabinet in the development of the final terms of the memorandum of understanding. The subcommittee made its report on the memorandum of understanding and the lease to the task force, and the task force adopted the report.

The task force reluctantly endorsed the Commonwealth's entry into the memorandum of understanding and the lease. The primary reason for the task force's hesitancy about entering into these two agreements was the Corps' refusal to put locks 5-14 in good condition. The Corps said they would spend no more than $500,000 on repairing the locks and dams. The task force believes this will not be nearly enough money to place locks and dams 5-14 in good condition. The Natural Resources and Environmental Protection Cabinet is contracting for an independent assessment of the condition of the locks and dams.

But the task force realizes that, at this time, the Commonwealth has no alternative but to enter into these agreements, in order to ensure a source of drinking water for about 400,000 Kentuckians and to reopen the locks for commercial and recreational traffic. The memorandum of understanding was signed by the Commonwealth and the Corps February 22, 1985, and the lease was signed May 21, 1985. On May 24, 1985, locks 5-14 were reopened for limited weekend operation for the summer.

The task force believes the Commonwealth should continue to seek specific Congressional funding for the Corps to fulfill its legal and moral responsibilities of properly maintaining the Kentucky River locks and dams until the Commonwealth takes ownership and responsibility for locks and dams 5-14.

The real cost to the Commonwealth of maintaining and operating locks and dams 5-14 will not be known until the cabinet's independent contractual assessment is completed. The 1986 and 1988 sessions of the General Assembly will ultimately decide the issue of state ownership and operation of Kentucky River locks and dams 5-14.

TOBACCO PRICE SUPPORT

Prepared by Brooks H. Talley

Issue

Should the federal tobacco price support program be continued?

Background

The tobacco price support program was established by Congress by the enactment of the Agricultural Adjustment Act of 1938, amended in 1941. The Burley Tobacco Growers Cooperative Association (incorporated in 1922) began operating the federal program in Kentucky in 1941. The price support program provides stability in the marketing of tobacco by providing a base price to the tobacco producer and controlling supply through production quotas.

The federal tobacco price support program works in the following manner. Each year prior to the planting season, the Agricultural Stabilization and Conservation Service (ASCS) of the U.S. Department of Agriculture sets the marketing quota that each tobacco producer is allowed to sell and for which he will receive at least the minimum price set by the price support program. If the tobacco does not sell for more than the price support, the tobacco is purchased by the appropriate producer cooperative, the Burley Tobacco Growers Cooperative Association in the case of burley tobacco, and the tobacco producer is paid by the cooperative with money borrowed from the federal Commodity Credit Corporation (CCC). The cooperative receives and stores the tobacco (in the "pool") and later sells it and repays the loan, plus interest, to the CCC.

In 1982, Congress enacted the No Net Cost Tobacco Program Act. This law prevents the federal government from losing money that is loaned from the CCC to the tobacco cooperatives to pay producers when tobacco does not sell for a price higher than the support price. To prevent the federal government from losing money on these loans, a tobacco producer is charged an assessment for each pound of tobacco sold. This assessment varies according to the type of tobacco, but for burley the assessment was one cent per pound in 1982, five cents per pound in 1983, nine cents per pound in 1984; it will be thirty cents per pound in 1985 unless Congress amends the law.

The federal tobacco price support program has been under increasing criticism since 1964 when the U.S. Surgeon General reported that cigarette smoking is harmful to human health. Opponents of smoking believe that the federal government should not be involved in a program which it considers to be harmful to human health. In 1981, the U.S. Senate was one vote short of repealing the price support program.

Other problems have plagued the price support program. For example, foreign imports of tobacco have increased to the point where they account for 25 percent of all burley used in American tobacco products. Cigarette consumption is down in the United States. The amount of tobacco in the price support "pool" is increasing, thereby increasing the farmers' assessment. Finally, the Reagan Administration proposed the phase-out of the program.

Discussion

The question then becomes: Should the federal tobacco price support program be continued?

The Legislative Research Commission created the legislative Tobacco Task Force to address this question. The Tobacco Task Force firmly believes that the federal tobacco price support program should be continued. This conviction is expressed in the Task Force's activities. For example, the Task Force, testifying before the International Trade Commission, urged it to recommend to President Reagan that he place import restrictions on foreign-grown tobacco because the imports are "materially interfering" with the price support program.

The Task Force also has conducted six public hearings in tobacco-producing areas of the state to receive the ideas of persons living in those areas about the importance of tobacco to their communities.

The Tobacco Task Force has met with U.S. Secretary of Agriculture, John R. Block, and Kentucky's Congressional delegation in an effort to preserve the price support program. The Task Force sponsored the first Tobacco Conference of the States, designed to unify the state legislatures of tobacco producing states in their efforts to save the price support program.

The Task Force has conducted its own research into the importance of tobacco to the economy of Kentucky and to the state's budget. The task force has found the following:

- Tobacco represents an annual cash sale of $1 billion to Kentucky's tobacco farmers.
- Seventy-two percent of Kentucky's tobacco farmers depend on tobacco for 50 percent of their gross farm sales.
- The gross state product (similar to the nation's gross national product, GNP) of Kentucky's tobacco production is $2.4 billion.
- Tobacco accounts for 50 percent of the state's total crop receipts.
- Tobacco quotas in Kentucky are small, averaging only a little more than one acre per farm for burley.
- The full-time equivalent employment (direct and indirect) of Kentucky's tobacco production is 54,521 persons.
- The value of tobacco to Kentucky's agricultural real estate is $1.5 billion.
- Local school boards and county governments receive about $5.5 million in real property taxes from tobacco land.

- Tobacco production brought in about $143 million in state revenue in 1984 (excise, sales, income, real property, and other general taxes).

These statistics relate only to the impact of the production of tobacco in Kentucky and clearly show its economic importance. In addition to the economic impact of the actual production of tobacco, there is also the economic impact of the tobacco manufacturing industry in Kentucky, which is substantial.

The Tobacco Task Force continues to strive to save the price support program. The Task Force is very closely monitoring the progress of legislation in Congress to save the program, and it is in constant contact with Kentucky's Congressional delegation about the legislation, making suggestions for its improvement.

TWO-ACRE PERMIT PROGRAM

Prepared by Andrew Cammack

Issue

Should Kentucky's two-acre surface mining program be changed?

Background

In 1977 the U.S. Congress passed Public Law 95-87, the Surface Mining Control and Reclamation Act, which placed stringent requirements on the mining and reclamation of coal lands. The Act did not apply, however, to the extraction of coal where the surface mining operations affect two acres or less. The exemption was meant to allow small "mom and pop," "pick and shovel," or one-man mines to stay in business after the permanent program went into effect.

Anticipating problems that could arise from not regulating two-acre mines, the 1978 General Assembly passed SB 273, requiring the Natural Resources and Environmental Protection Cabinet to issue reasonable minimal regulations for the extraction of coal on two acres or less. The regulations utilized some of the requirements from the interim program (the less stringent transition program to the permanent program). Highwalls were not required to be eliminated. Silt structures in most cases were not required. Bond could be no more than $1,000 per acre. Applications were to be processed within 30 days and the Cabinet was barred from issuing cessation orders for failure to abate a violation.

When the permanent program, with its more stringent standards, went into effect, the number of two-acre permits skyrocketed - from less than 100 in 1982 to 1500 in 1985. There were many abuses of the two-acre exemption and the Cabinet's lack of satisfactory enforcement became a major concern.

Discussion

In its annual report in April 1984 and the following semi-annual report in December 1984, the Office of Surface Mining (OSM) outlined its criticism of the Cabinet's regulation of two-acre permits. OSM said there were many violations involving mining beyond permit boundaries. Often haulroads were improperly considered as county roads, thus exempting the area of the haulroad from calculation as part of the two-acre permit. Many two-acre mines were found to be "related." A string of two-acre permit mines, which were not really separate operations, would be put together by miners or landowners.

Thus a larger mine had to meet only minimal two-acre reclamation standards. Cessation of mining and preparation of a comprehensive permit were not consistently being required by the Cabinet when an operation exceeded two acres. Enforcement was inconsistent or inadequate. The Department for Surface Mining's staff was insufficient to properly regulate the resource-intensive two-acre permit. According to the Department, the two-acre permit, while contributing very little to overall coal production, was comprising 35-40% of the Department's workload - requiring nearly 18,000 inspections annually.

In a December 21, 1984, letter, the Office of Surface Mining informed the Cabinet that funding for regulatory activities on two-acre sites - which was not required by law - would stop if certain actions were not taken by the state to improve regulation of two-acre sites. OSM said the state must come up with an improved review procedure and permit application for the two-acre permit. Review of two-acre permits was to be centralized in Frankfort. Kentucky would be required to conduct at least one on-site inspection of all existing two-acre permits. Further, the state would have to thoroughly document these inspections and determine whether the permits had properly considered "relatedness" criteria, if the haulroads had been appropriately classified and considered within the total affected areas of disturbance, and whether the permittee had or had not exceeded the two-acre threshold. OSM would then conduct a special study to statistically verify the adequacy and completeness of the state's review and inspection and enforcement efforts.

The Department acknowledged that abuse of the two-acre exemption was becoming widespread in 1983 and worse in 1984, but at that time it was so busy completing its transition to primacy - by eliminating a vast backlog of permit applications - that inadequate manpower and attention were given to the matter.

The Department set up a Two-Acre Task Force in September, 1984, to learn what kind of abuses were occurring. Its mandate later included dealing with OSM's concerns. After three months of intensive field work, the Department reported, on May 10, 1985, that during the inspections required by OSM, it found that nearly 40% of the operators had violated the two-acre exemption; considering the short time frame, and the adverse weather during January - March, the Department believed the actual number of violators could be substantially more. Overacreage was involved in 84 percent of the violations; however, 89% of those operations that exceeded their boundaries did so by less than one acre. Twenty-four operations were over five acres. After spot checks on the mines that the state said were in compliance, federal officials estimated that half of those mines were also in violation of the law.

The Department concluded that far too many two-acre operators exceeded their authorized boundaries and claimed exemptions they were not entitled to have. The two-acre exemption, which was designed for the small operator, has become big business - companies and individuals have pieced together, and otherwise abused two-acre permits. By exploiting the minimum environmental standards associated with two-acre permits, large profits may be taken. Such operations cause unfair competition with legitimate coal mining operations. A number of sources, including some coal interests, have recommended abolishing the two-acre exemption. Even some two-acre permit holders recognize that changes should be made in the program.

The Cabinet has said the experience gained from the study for the OSM, combined with changes recommended by the Two-Acre Task Force should bring the problem under control. For instance, permits now are reviewed in Frankfort for more thorough and consistent handling, and a new permit application and new review procedures are being put together. New regulations are being written to address such areas of concern as relatedness, boundary problems, water quality, sediment control, enforcement and legal issues, and public roads. The Cabinet has addressed and hopefully will resolve many of the problems associated with the two-acre permit. Additional effort and oversight will be required for final resolution of some of the issues. However, the problem will never be entirely eliminated, because there will always be some who try to take unfair advantage of the federal exemption. Some problems, such as the "relatedness" issue are extremely difficult to solve. Individuals and companies may change names or use multiple names to escape detection, or continue to mine after bond forfeiture.

The legislature has expressed its strong concern regarding the two-acre program. It has discussed the two-acre issue a number of times and undertaken two tours of two-acre sites. Formation of a legislative subcommittee to consider two-acre permits is presently being considered. In addition to its oversight, the General Assembly may wish to make various statutory modifications to the program. The Department has stated that an increase in the bond for a two-acre permit is necessary to adequately reclaim abandoned two-acre sites. Presently if a miner is outside his two-acre permit boundary, it is cheaper to forfeit his bond rather than reclaim the land to permanent program standards. The $1,000 per acre bond provides little deterrent. Reclamation of an illegal site almost always costs several times that amount.

Though the state's two-acre permitting program has had many problems and has been abused, it can be a legitimate program which serves to assure the economic well being of many small coal operations in the state. It allows operators with little capital to enter or remain in business. With the completion of the transition to primacy by the Cabinet, with the hiring of additional inspectors and the new focus on the two-acre permit, the Cabinet's enforcement should improve. Many agree the program needs to be kept, but its credibility must be maintained if it is to be continued.

WATER QUALITY STANDARDS

Prepared by Daniel J. Risch

Issue

Should the state's water quality standards be amended?

Background

The Commonwealth has more miles of surface streams than any other state in the lower forty-eight states. The water flowing in these streams carries responsibility and opportunity for Kentucky. The responsibility arises because these waters are a finite resource and an essential resource. The opportunity arises because these waters entice decision makers to locate their businesses in Kentucky. Many perceive the responsibility to protect the resource as in conflict with the opportunities presented by the resource. The reality is that in order for the responsibility and opportunity to be meshed to achieve a positive policy on water use, difficult decisions must be made.

In 1974 the Kentucky General Assembly passed a law stating:

> No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained or run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth...

The budget enacted by the 1984 Kentucky General Assembly allocated $4,494,500 from the general fund and agency receipts to be used by the Division of Water of the Natural Resources and Environmental Protection Cabinet to help carry out this state policy.

The federal Clean Water Act, passed initially in 1977 and presently before Congress for reauthorization, declares as a policy and goal of the Nation that

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...

To carry out this goal the U.S. Senate has passed a bill budgeting $31,000,000 to aid Kentucky in carrying out water-related programs.

The Division of Water administers the state's water-related programs. At the heart of those programs are water quality standards. Water quality standards establish goals for attaining or maintaining the purity of surface waters, depending on the use of the stream. These standards, wherever possible, seek to protect aquatic life and to provide for recreation in and on the water.

The standards, embodied in regulations, follow guidance provided by the U.S. Environmental Protection Agency but also incorporate criteria tailored to the uniqueness of Kentucky streams. Because of the involvement of the EPA and the infusion of federal money into the state's programs, the Division of Water must periodically review the water quality standards and report to the EPA.

In August of 1983 the Division began the current review procedure. Initial announcements were given to approximately 1500 individuals and groups who were requested to provide the Division with information and comments. On January 15, 1985, the proposed amendments to the standards were filed with the Legislative Research Commission, thus commencing the formal hearing process on amending the regulations. It was at the April 8, 1985, meeting of the Administrative Regulations Review Subcommittee that it was emphatically argued that efforts to manage the state's waters responsibly were at cross-purposes with the business opportunities provided by those waters. Presently the enforcement of the standards is being prevented by a restraining order issued by the Johnson County Circuit Court.

Discussion

Within the narrow focus of the issues raised by the litigants, the Johnson County Circuit Court will decide whether the Cabinet followed proper procedures to amend the water quality standards. However, at the heart of the lawsuit lies a question of public policy. It will be up to the General Assembly to more clearly delineate how the Cabinet can responsibly manage the state's waters while preserving business opportunities.

The suggestion has been made that the controversy surrounding the water quality standards for Kentucky has arisen because all the easy approaches for environmental protection have been taken. What remains to be done cannot be undertaken without careful consideration of all resulting non-environmental, economic impacts.

The water quality standards protect the many uses of Kentucky streams. An example can be found in 401 KAR 5:031, the regulation establishing the surface water standards. The regulation sets the maximum allowable concentrations for many specific substances. Two of these substances, chloride, set at a maximum allowable concentration of 250 milligrams per liter, and fecal coliform, set at 2000 organisms per 100 milliliters, are intended to protect domestic water supply usage. These standards to protect water for consumption have been easy to establish, as there is little to argue about when discussing an essential resource.

In the same regulation, though, another stream function which is protected is the water's capacity to sustain all stream life no matter how minute. To do this a different set of maximum allowable concentrations of certain substances has been set. A standard for the discharge of chloride into surface waters, for instance, has been set at 600 milligrams per liter. It is this standard in particular which has created a battleground upon which the future of public policy for water management in the state will be determined.

Estimates of the number of oil and gas wells within the state discharging chlorides into surface streams range as high as 10,000 to 12,000. The chlorides, sometimes referred to as produced waters, saltwater, or brine are a by-product of the extraction of oil and gas. Often the produced water from a well is eight to ten times the volume of the natural resource. Also, the water typically has a salt concentration higher than sea water. This salt concentration, when extremely high, is a substantial risk to aquatic life.

The Natural Resources and Environmental Protection Cabinet has, at the behest of representatives of the oil and gas industry, attempted to quantify that risk. In August of 1983 the Cabinet entered into a contract with the University of Kentucky to develop and field test a standard for chlorides. The proposed 600 milligrams per liter is based on the $100,000 University of Kentucky study.

The Cabinet has viewed the 600 milligram per liter standard as a reasonable compromise based on sound data. Some environmental representatives wanted a standard closer to that set for drinking water, while industry spokesmen argued that 1100 milligrams per liter would offer adequate protection for stream life. The background levels of chloride in unaffected freshwater is approximately 50 milligrams per liter.

Why is this standard the eye of a major public policy storm? Adherence to the standard could cause a sharp increase in the cost of developing and operating oil and gas wells within the state. There are also two textile dyeing operations in the state which would be affected by the standards.

There are approximately 24,000 producing oil and gas wells in Kentucky. The operators of these wells are mandated by regulation 401 KAR 5:090 to return produced waters back into the wells from which they were extracted. However, this is not always feasible, either economically or geologically. The Cabinet therefore provides an exemption. The exemption from reinjection allows discharging to surface waters. Now, with the proposed amendments to the surface water standards, operators seeking the exemption are being prohibited from discharging produced water to streams if the chloride concentrations exceed 600 milligrams per liter.

This "catch-22" could force 328 to 463 oil well operators out of business. These are, generally speaking, financially small operators who would not be able to absorb the approximately $48,000 to $108,000 needed to capitalize other brine disposal techniques. The potential for lost jobs is estimated at 600 to 1000. Complicating these adverse economic effects is the fact that there is a small group of eastern and south-central Kentucky

counties which produce a large share of the state's oil and gas and would therefore bear a disproportionate share of the economic dislocation created by application of this standard.

It is also an unfortunate circumstance that these same counties demonstrate for the entire state the devastating consequences of an absence of water quality standards.

Heavy oil and gas producing counties such as Lee, Daviess, Johnson, and Magoffin, rely heavily on streams and water wells for domestic water supplies. Many of these counties are also endowed with an abundance of wild, unspoiled natural beauty. Lee County, for example, encompasses a portion of Daniel Boone National Forest. These counties thus illustrate both the danger to drinking water supplies from irreponsibly handling produced water and the growing challenge to a responsible stewardship of the state's natural ecosystems.

In a state dependent upon its natural beauty to promote tourism and with more than 30 percent of its citizens dependent on water wells for water supplies, the danger and the challenge can't be ignored. Individual examples of the problems resulting from excessive brine being drained into the state's waters are numerous and increasing. The U.S. Army Corps of Engineers is rethinking whether to impound the waters creating Yatesville Lake in Lawrence County because of their belief that they would be creating a saltwater lake, due to the high concentrations of chlorides found in the Lawrence County streams. In 1984 the Kentucky Fair Tax Coalition, in conjunction with Vanderbilt University, tested water flowing in five different watersheds. The chloride concentrations in these streams ranged from 740 parts per million to 8,000 parts per million. A resident of Magoffin County discovered, with the assistance of the University of Kentucky, that brine discharges from an oil well were killing his trees. Another Magoffin County family spent $4,000 to drill a new water well when they no longer could use their old well because of a foul taste and discoloration of clothes and dishes resulting from chlorides.

And there are other components of produced water which can have detrimental health and environmental effects. Magnesium, manganese, calcium, and lead are also sometimes found to be discharged along with the chlorides. Another public health concern is the formation of trihalomethanes, suspected carcinogens, which can be created by the interaction of chlorides with organics found in public water supplies.

This has been a sampling of the concerns faced by the Cabinet in revising the water quality standards for the state. However, the depth of the issues necessitates the General Assembly's reassessment of basic policy: to what extent can the dislocation of business be allowed in order to preserve the environment, and to what extreme will the environment be sacrificed in order to protect jobs and tax revenues.

APPROPRIATIONS AND REVENUE

TAX AMNESTY

Prepared by Susan Pippen

Issue

Should a tax amnesty program be offered in Kentucky?

Background

One of the hot topics in the field of tax collection today is the uses and abuses of state tax amnesty programs. Tax amnesty is a tax collection tool which, in some forms, has the capability of producing significant amounts of revenue. For this reason, certain state programs such as those in Massachusettes, Illinois and California have received much publicity, and have more than piqued the interest of legislators and revenue officials across the country in their efforts to balance ever-shrinking state budgets.

In its most basic form, a tax amnesty program involves the designation of a period of time, usually one to three months, during which previous non-filers of state tax returns may file delinquent returns, pay their outstanding tax liabilities with interest, and be granted immunity from civil penalties and criminal prosecution. Twelve states have implemented tax amnesty programs, each designed to fit the individual state's needs and objectives, and all have met with varied degrees of success.

Although news reports tend to focus on the revenue raising aspects of tax amnesties, the success of a program is not necessarily measured by the number of tax dollars generated. Amnesty is a tax collection tool, used by states which are concerned about the size or scope of unpaid taxes being lost to the state at the expense of honest taxpayers. The experiences of the pioneer states have shown that amnesties are in fact, most effective when developed as one element of a broad program of stricter enforcement of a state's tax laws. In other words, the guiding principles in developing a tax amnesty program include both equity <u>and</u> revenue enhancement.

Discussion

In order to determine whether Kentucky would benefit from a tax amnesty program, several questions regarding goals and objectives must be answered. It is the <u>intent</u> of this type of undertaking which determines its scope, and it is the definition of its scope which allows for the measurement of success. An amnesty program offered for the sole purpose of generating a lot of money in a relatively short period of time will be designed somewhat differently from a program developed as part of a large-scale crackdown on tax evasion. Following is a list of elements important to the mechanics of a tax amnesty program, and a description of how and why these might be treated differently in different states.

1. Who would be responsible for tax amnesty? A state's revenue or tax agency charged with the responsibility of collecting taxes and enforcing tax compliance would be responsible for administering a tax amnesty program. Certain aspects of the program may require enabling legislation, depending on the scope of the department's authority to take such actions as waiving the penalties for tax offenses. (In Kentucky, most civil and criminal penalties for tax offenses are discretionary on the part of the Revenue Cabinet.) In some cases, the enabling legislation simply authorizes the tax department to implement an amnesty program, but greater legislative control would be achieved with an enactment specifying the elements of the program desired.

2. Which taxes would be included? Obviously, the greater number of state taxes included in the amnesty offer, the greater the potential revenues. States typically include (and receive the greatest revenues from) income and sales taxes. Some states have had enormous success with corporate taxes, especially Texas, which aimed its amnesty program at businesses not in compliance with state corporate tax laws.

3. Who would be eligible for tax amnesty? No other aspect of tax amnesty is more affected by the goal of the program than the decision as to which taxpayers will be eligible. States concerned with the rate of tax compliance, such as Arizona and North Dakota, offer tax amnesty to unknown non-filers only, in the hopes that many will be persuaded to come forward voluntarily to pay outstanding tax liabilities. The success of these types of programs is practically impossible to predict, and, because of their limited scope, the immediate revenue picture is not significantly enhanced. State officials argue however, that the objective is to get as many filers "on the books" as possible, resulting in a small but reliable increase in the tax base over the long range, and that fairness considerations prevent them from allowing known delinquent taxpayers, or accounts receivable, the privileges of tax amnesty. Those states which are also motivated by the revenue raising aspects of tax amnesty, such as Massachussetts and California, make all non-filers, known and unknown, eligible for amnesty, and argue that this method of eliciting tax payments is more efficient than the long and sometimes costly process of audit, protest resolution and litigation. Almost all states, however, have excluded from amnesty eligibility those known tax evaders who are involved with the state in criminal investigation or prosecution proceedings.

Kentucky's Revenue Cabinet reports that as of April 30, 1985, 80,864 tax bills worth $558,423,878 were in the "active" files. The active files include such tax bills as those under first and second notice, protest resolution, Division of Collections, and other levels of tax collection. At that same point in time, 84,449 tax bills worth $22,491,605 had been labeled "inactive" by the Cabinet, meaning that they were no longer being actively pursued by state auditors.

4. How much would it cost? A successful tax amnesty program requires a degree of commitment and effort on the part of legislators and revenue department officials, but many states have learned that an appropriation of state funds can be a pivotal advantage. States with large-scale programs involving large numbers of taxpayers have hired extra agency personnel to answer phones, review applications and returns, and implement new enforcement procedures. Even states with smaller programs have found that an adequate publicity budget, used effectively, can have an enormous influence on the success of tax amnesty/increased enforcement programs.

Two points made above deserve re-emphasis. The first is that a state must offer tax amnesty only within the framework of a broad effort aimed at increasing overall tax compliance. Other states' programs, such as Arizona's Tax Hunt, Kansas' Fair Shair, Massachusetts' Revenue Enforcement and Protection Program (REAP), and Texas' Wipe the Slate Clean, include many other elements used both to discover previous non-filers of state taxes and to make the consequences of cheating on state taxes much more punitive. Some of these programs include expansion of audit staff and capabilities, increased use of criminal investigations, and most importantly, the establishment of much stiffer penalties for tax evasion. A strategy that has proven to be effective is the implementation of new enforcement procedures and harsher penalties in advance of the tax amnesty time period and the billing of tax amnesty as a one time only, last chance for non-filers to pay outstanding liabilities with immunity before the crackdown begins.

A second very important consideration in the development of a tax amnesty/compliance program is fairness. One criticism of tax amnesty is that amnesty is unfair to honest taxpayers, since it "forgives" the penalties for years of lawbreaking by tax evaders and delinquents. These grievances should be resolved by ensuring that everyone participating in amnesty undergoes some form of audit review in order to aid tax department officials in future efforts to enforce compliance, and that the tax interest rate charged on liabilities paid by amnesty participants is high enough to erase the advantage gained by breaking the law. (Kentucky's tax interest rate varies directly with the adjusted prime rate charged by banks. See KRS 131.183.)

In addition to the twelve states that have already conducted tax amnesty/compliance programs, several more are considering such action. Moreover, U.S. Congressional leaders have been quoted as saying that a tax amnesty program might be a good project for the Internal Revenue Service. The literature published on tax amnesty is extensive, and includes descriptions of each state's programs, results, publicity schemes and press releases, and even "how-to" booklets, detailing the prizes and pitfalls of tax amnesty programs.

PROPERTY TAX REVENUES

Prepared by C. Gilmore Dutton

Issue

Should House Bill 44 be repealed or amended to allow local governments more flexibility in raising property tax revenues?

Background

When the Kentucky General Assembly met in Special Session on August 23, 1965, it was in reaction to a June 8, 1965, Kentucky Court of Appeals decision ordering the Department of Revenue (now the Revenue Cabinet) to assess all property at its fair cash value. The court's landmark decision, Russman v. Luckett, gave Jefferson County parents the relief they had sought by reaffirming that Section 172 of Kentucky's Constitution did, in fact, require the assessment of property at its fair cash value.

At the time of the court's decision, property tax values averaged, state-wide, 30% of fair market value. Many school systems were levying the maximum statutory tax rate (and many local governments were at their constitutional rate limits), and because the majority of local property valuation administrators were not reassessing the property in their jurisdictions, little additional money was being made available for the operations of local schools (or cities or counties). This problem led to the legal challenge to the prevailing system of property assessment.

The result of the general assembly's action in that First Extraordinary Session of 1965 was House Bill 1. That act, which became popularly known as the "roll-back law," directed each taxing district to roll-back its tax rate for tax year 1966 to the point where the same amount of revenue would be produced under a 100% of value assessment system as was produced the year before under a partial value assessment system. House Bill 1 also gave each local taxing district the option of raising its rate by 10% in 1966 and the following year, but from that point on, House Bill 1 froze, on the upside, local property tax rates. In other words, the rate levied by school districts and other local taxing districts in 1967 was the maximum tax rate that could be levied from that point on.

During the ten-year period between 1965 and 1975, Kentucky's property tax system lived a rather quiet life. Property tax revenues increased annually at an average rate of about 5%, property tax assessments increased annually at a rate of about 5%, and property tax revenues to the local taxing districts increased annually at about 5%. While schools and local governments were not getting rich, they were, at least keeping pace with inflation, which was running at an annual rate of about 5%.

But in 1975, property values began to escalate at a very rapid rate. By 1978, property values were increasing at an annual rate of 10 to 12%. When local assessors increased their assessments by that same amount, the tax bills also went up by that amount, because the policy makers of the local taxing districts continued to levy the same tax rate, thus taking full advantage of the increase in assessments.

Taxpayers who had remained quiet with 5% increases in their tax bills now became irate at 10% increases. The legislative bodies of the local taxing districts countered by saying, "We didn't raise taxes, we just levied the same rate as we levied last year," and pointed their finger at the local assessor.

Consequently, property tax assessments began to fall behind, and by 1978 they had reached a level of 65% of fair market value, the lowest since 1966. The Department of Revenue took notice and ordered a number of county assessors to make substantial increases in their assessments for 1978. As a result of the department's action, the total, state-wide assessed value of property jumped by 11.4% in 1978. In some counties, 1978 assessments increased as much as 40 and 50%, a number increased by 20 to 30%, and still others by 10 to 20%.

By the fall of 1978, the taxpayers in a number of Kentucky counties were up in arms. In the face of substantial increases in the assessed value of property, the legislative bodies of the local taxing districts had levied the same rates that they had generally levied since 1977, without even the courtesy of a public explanation of their need for the additional funds. The public saw the major tax increases as unnecessary windfalls.

When the Kentucky General Assembly met in special session on the 8th of January in 1979, the property tax pot was approaching the boiling point. About one-half of Kentucky's 120 counties had received substantial increases in assessments in 1978; the other one-half were scheduled for substantial increases in 1979. As an example, the Department of Revenue had ordered for 1979 a 50% increase in farm land assessments and a 9% increase in residential property assessments for Jefferson County, a 19% increase in residential property assessments in Fayette County, a 14% increase in residential property assessments in Boyd County, a 22% increase in residential property assessments in Harlan County, and a 13% increase in residential property assessments in Madison County. With cries of anguish still ringing in their ears from the taxpayers whose 1978 assessments had jumped so dramatically, the general assembly was looking at a long list of increases for 1979. The product of that special session, House Bill 44, combined full disclosure and public participation provisions with tax revenue benchmarks, to produce an effective mechanism for local property tax restraint.

To meet the requirements of House Bill 44, local taxing districts (counties, cities, school districts and special taxing districts) must annually perform several functions. The first of these is the computation of a "compensating tax rate." The compensating rate, zero growth rate, or fully rolled-back rate, as it is variously known, is the rate which, when applied to the current year's value of "old year" real property, will produce just the same amount of revenue as was produced from the same property the year before.

Next, if the local taxing district proposes to levy a rate which will exceed the compensating tax rate, i.e., a rate which will produce more revenue from the real property which was on the tax roll last year than was produced from that property last year, it must advertise and hold a public hearing on the proposed rate. The advertisement must include specified data about the amount of additional revenue the district would earn, in addition to time and place information about the hearing.

Finally, if the local taxing district levies a rate which produces more than a 4% growth in revenue from old year real property, it must again communicate with the local taxpayers through an advertisement, notifying them of its action and advising them of their rights under the law. Those rights involve the filing of a petition which places the question of the tax-rate on the ballot at the general election held in November of each year. If the rate is approved by the voters, it stands as levied; if it is defeated, it is automatically rolled-back to an amount which will produce just a 4% increase in revenue from old year real property.

(The magic of the 4% level, set into law by the 1979 Special Session, was that a 4% growth in revenue from old year real property, plus a 3% growth in revenue from new real property and a 7% net growth in revenue from old and new personal property [the state-side averages in each of the three years prior to 1979], would give each taxing district an approximate annual 7% increase in revenues. Immediately prior to the General Assembly coming into special session in 1979, then President Carter had asked all elements of business, both private and governmental, to hold wages and prices at or below 7%. Thus, the 7% increase for local governments complied with the President's request.)

Looming over the 4% benchmark tax rate, however, is the ultimate local property tax restraint, the maximum tax rate provision of 1965 House Bill 1. Retained in 1979 House Bill 44, this provision has had an even greater impact when coupled with the constraints added by House Bill 44.

While House Bill 1 established the tax rate levied in 1977 by schools and other local taxing districts as the maximum tax rate that could be levied in the future, when added to the provisions of House Bill 44, that feature took on a new dimension. If a local taxing district chose to roll-back its property tax rate to stay within the House Bill 44 4% revenue increase benchmark, that rate then became the new maximum tax rate that could be levied by that taxing district in future years. And, while that same process was true under House Bill 1, House Bill 1 lacked the impetus to roll-back rates that was present in House Bill 44.

That House Bill 44 has effectively restrained local tax rates cannot be denied by even the most casual observer of Kentucky's local taxing process. In the initial years subsequent to the enactment of House Bill 44, the impact of that act was dramatic. The vast majority of schools and local taxing districts chose to levy rates that produced revenues within the 4% benchmark, and a number even adopted the compensating rate as their tax levy, thus experiencing no revenue growth. During this same period, unfortunately, the cost-of-living grew to double-digits, reaching 11.5% in 1979 and 13.8% in 1980, and while most local governments were able to realize a full 7% annual

increase in revenue, the disparity between income and expense was disastrous for schools and local governments.

In recent years, the pendulum has swung to the opposite side. Inflation has been held in check at levels of 3 and 4%, but a new problem has arisen.

With a low rate of inflation, the increases in property values have also been extremely modest, frequently trailing the cost-of-living index. In fact, during 1983 and 1984, property values experienced little or no increases, and in many locales fell below their 1982 levels. And schools and local governments are trapped by the maximum tax rate provision of House Bill 44.

Given a situation where local taxing districts are unable to increase tax rates, and where property values are stagnant, no new revenues are forthcoming. And while annual cost-of-living increases are modest, the cumulative effect of no new revenues and annual 3 to 4% rates of inflation is beginning to take its toll.

Discussion

There are several options available to persons interested in allowing local governments more flexibility in raising property tax revenues. Since the immediate problem is the result of the maximum tax rate provision, it is only logical that any alternative include repeal of this provision.

One option would be to simply repeal the maximum tax rate provision, while maintaining the 4% benchmark, full disclosure and public participation provisions of House Bill 44. Another alternative would be to repeal the maximum tax rate provision and the 4% benchmark, substitute a floating benchmark pegged to an increase to the Consumer Price Index (CPI), a fraction of the CPI, or an economic index designed specifically for this purpose. A third alternative would include repeal of the maximum tax rate provision and removal of the 4% benchmark and the petition and referendum provisions, while retaining the public notice and public hearing provisions. The proponents of this position argue that it gives local officials full flexibility to increase revenues, but also allows the taxpayers to make an informed decision at the ballot box at the next local officials' election. The fear of reprisal on election day would, presumably, keep tax rates within reasonable bounds.

A fourth alternative would involve the removal of the 4% benchmark and maximum tax rate provisions, thus allowing local officials to set whatever tax rate they choose, but giving the local taxpayers the right to petition for a referendum on <u>any</u> tax rate levied above the compensating tax rate. Under this proposal, of course, the public notice and hearing provisions of House Bill 44 would be retained.

The proponents of this last option claim that in the long run it would allow schools and local governments to realize more revenue than under any of the other alternatives. Removal of the 4% benchmark, which is seen as a psychological barrier, would make taxpayers more responsive to arguments by local officials for increased revenues. Local officials, knowing that

taxpayers could voice their displeasure by voting down the rate rather than the officials, would be more likely to seek revenue increases. An increase in the percentage of signatures of qualified voters necessary for a valid petition could be a partial trade-off for giving the public the opportunity to challenge any tax rate.

BANKING AND INSURANCE

EXPANDED POWERS OF BANKS

Prepared by Greg Freedman

Issue

Should banks' powers be expanded to permit them to engage in nonbanking activities?

Background

Banks today find themselves competing with large nonbank financial corporations. These nonbank institutions compete with banks in business lending, deposit-taking, and consumer credit. This increased competition, combined with growing operating costs and the removal of interest rate ceilings on bank deposits, have forced banks to seek new sources of revenue.

Banks claim that the deregulation that has occurred in their industry over the past several years has been primarily liability-side deregulation and there must be more asset-side deregulation. They also assert that they are at a competitive disadvantage because their nonbank competitors are not subject to the same regulations that govern banks. Opponents to further bank deregulation claim that the increasing number of bank failures is the result of a recent trend in deregulation and the trend should be slowed. Proponents of deregulation contend the failures cannot be blamed on deregulation, but are the results of poor bank management in times of volatile economic fluctuations.

A number of states have passed legislation to provide banks with new investment opportunities. State laws may not grant additional powers to national banks. Their authority is granted by federal law. Insured state banks and their affiliates that are not associated with a holding company are governed by state law where there are no restrictive FDIC regulations. Bank holding companies (BHC's) expand their activities through subsidiaries. Nonbank subsidiaries of BHC's are subject to Federal Reserve restrictions. This means that the most likely way of taking advantage of more liberal state laws is through state bank subsidiaries of BHC's. For example, when South Dakota enacted legislation allowing state banks to engage in insurance activities, several BHC's from out-of-state sought approval to acquire state banks.

The increased powers for banks authorized by states include insurance underwriting and brokerage, real estate development and brokerage, securities underwriting and brokerage, management consulting, and travel agency service. Several of the states that border Kentucky have expanded the powers of their banks. Indiana has provided for insurance brokerage and travel agencies. Ohio has authorized real estate investment, securities underwriting, management consulting and travel service. Virginia permits management consulting. The powers most often mentioned in Kentucky are real estate, insurance, and securities. According to the Conference for State Bank Supervisors, as of

November, 1984, five states permit insurance underwriting, eleven allow insurance brokerage, sixteen authorize real estate equity investment, nine permit real estate brokerage, eight allow securities underwriting, and three permit full service securities brokerage.

Discussion

It is generally agreed that the primary concern of regulators and legislators is the safety of the depositor's money. Some argue that the high number of bank failures last year and the continuing trend this year are evidence that deregulation of the banking industry needs to be slowed. Others argue that in today's changing financial marketplace, banks need new investment opportunities to effectively compete with the large nonbank industries that now offer a wide array of financial services and to provide consumers with one-stop financial service convenience. There is no question that banks are now having to compete for depositors' dollars with institutions other than the traditional financial institutions. Sears Roebuck is no longer just a department store retailer. It has acquired various financial firms which permits it to offer checking, saving, time deposits, installment loans, business loans, mortgage loans, credit cards, insurance, stocks, bonds, mutual funds and real estate. Merrill Lynch has billions of dollars under management in the Ready Asset Trust and Cash Management Account. Retailers, securities dealers and insurance companies all offer a full product line of financial services. Proponents of expanded powers for banks contend that banks should be allowed to compete on a level playing field with these new competitors.

Opponents of expanded securities powers argue that the policy of separating commercial and investment banking should be continued to ensure bank soundness. They contend that underwriting of corporate securities by banks would place too much of the bank's capital at risk. There is also potential for conflict of interest, in that banks might be able to exploit information given them by commercial loan customers. Proponents respond that underwriting isn't uncontrollably risky because underwriters do control risks by carefully selecting the issue price. The problem of conflicts of interests is now faced by large trust departments and they have handled it well. They also argue that if banks were allowed to underwrite, there would be lower costs, due to increased competition in the securities industry.

Proponents of expanded insurance powers contend that banks should be allowed to act as agents or brokers because there is no uncertainty as to financial risk in the agency or brokerage business. Bank holding companies should be allowed to organize subsidiaries to underwrite insurance. The consumer would benefit by reduced costs, increased range of choices, and improved services. Opponents point to the potential to coerce bank customers to buy insurance from the bank. They also cite the increased risk banks would face if allowed to underwrite insurance. They contend that this will lead to a concentration of economic power among large financial institutions.

Under current Kentucky law, a person, including a bank holding company, who owns more than fifty percent of a bank, may not act as an insurance agent except as to credit life and health insurance and insurance on the interest of a real property mortgagee in mortgaged property, other than title insurance.

Kentucky statutes permit banks and bank employees to be licensed as agents. Federal regulations permit a bank holding company to act as an agent or broker in connection with credit extensions. Federal statutes and regulations permit national banks and bank holding companies to engage in general insurance activities in towns of less than five thousand population, if the bank is located and doing business in the community. There are no statutes in Kentucky which prohibit a bank from leasing office space to an insurance agent or agency. The Comptroller of the Currency has ruled that national banks may lease excess office space in bank-owned buildings. State agencies in Connecticut, Tennessee, California and Florida have issued rules to govern the leasing arrangements in those states.

The General Assembly must determine whether it is in the best interests of Kentucky depositors and Kentucky financial institutions to expand the powers of banks. Then it must be decided which powers should be authorized. As seen in the discussion above concerning securities and insurance, each side has its arguments. When the powers are determined, it must be decided to what extent do those powers be granted. Should banks be permitted to underwrite securities and insurance or only engage in brokerage services? Should banks be permitted to invest in real estate development or only engage in brokerage services? These decisions are made more complex in light of the changing and confusing rules and regulations of federal agencies that regulate banks.

NONBANK BANKS

Prepared by Greg Freedman

Issue

Should nonbank banks be prohibited from doing business in Kentucky?

Background

A "bank" as defined in the Bank Holding Company Act (BHCA), is an entity that accepts demand deposits and makes commercial loans. Bank holding company subsidiaries that do not conduct both activities are not banks for BHCA purposes, even though they are chartered as banks, and are not subject to Federal Reserve regulation as bank holding companies. These entities that do not accept deposits or make loans, or that engage in only one of these activities are called nonbank banks. There are two reasons for establishing nonbank banks. First, a large nonbank corporation, such as a large retail company, may enter the banking industry without subjecting itself to the BHCA restrictions on nonbanking activities. Second, large bank holding companies may use the nonbank bank loophole to expand into every state without regard to the geographical expansion restrictions of the Douglas Amendment.

As of December, 1984, ninety-seven applications for nonbank banks had been approved by the U. S. Comptroller and well over two hundred were pending. Although the waiting list is dominated by large banks, it also includes small banks, insurance companies, finance companies, retailers, conglomerates, brokerage firms, mutual funds, and labor unions. An example of a retailer entering the banking business through the nonbank bank loophole is McMahan Valley Stores, a California-based family-owned furniture chain. It has established Western Family Bank, a nonbank bank, and, as of December, 1984, had installed small branch banks in the back of two of its stores. Five thousand customers bank at the furniture stores.

There are many kinds of businesses that are seeking or have already used the nonbank bank loophole to get in on what was once a restricted banking franchise. In 1980, Gulf and Western Industries bought a California bank and dropped its commercial lending. Dreyfus Corporation has operated a nonbank bank in New Jersey for two years. As of November, 1984, it had written $50 million in mortgage loans and enlisted 80,000 gold MasterCard customers. Beneficial Corporation, a consumer finance business, was granted a national bank charter in Delaware. It will use the bank in connection with its MasterCard and VISA operations. K Mart Corporation announced in October, 1984, a pilot program to open limited-service Financial K Marts in ten San Diego-area stores. Sears, Roebuck and Company announced in the same month its intention to buy a bank in Delaware and eventually operate bank-type offices in all of its stores. Citicorp intends to convert some of its ninety Person-to-Person finance offices, located in thirty-seven states, into nonbank banks. J.C. Penney has purchased a bank in Delaware. Louisville-based

Capital Holding Corporation, an insurance holding company, has purchased a New Hampshire nonbank bank. Dimension Finance Corporation sought charters for thirty-one nonbank banks in twenty-five states and received approval for operation of four banks with approval of the others, contingent on the success of the initial four banks.

Congress has failed to enact legislation to close the loophole. In May, 1984, the Comptroller declared a moratorium on processing nonbank bank applications. When Congress failed to pass legislation, the Comptroller resumed processing applications in October, 1984. The Independent Bankers Association of America (IBAA) challenged the Comptroller's authority to charter nonbank banks by filing suit against him. On February 15, 1985, a federal district court in Florida ruled in favor of the IBAA and enjoined the Comptroller from issuing final charter approvals for nonbank banks. The court ruled that the Comptroller does not have power under the National Bank Act to issue national bank charters to institutions that do not both accept demand deposits and make commercial loans. On March 15, 1985, the Federal Reserve Board suspended further processing of applications from bank holding companies to acquire nonbank banks during the time the Court's injunction is in effect. The Federal Reserve Board had tried to close the loophole by expanding the definitions of commercial loans and demand deposits. This effort was struck down by the 10th Circuit Court of Appeals in Dimension Financial Corp. v. Board of Governors, 744 F. 2d 1402 (10th Cir.1984). The U. S. Supreme Court has agreed to hear the appeal. The 11th Circuit Court of Appeals dealt another blow to nonbank banks on May 20, 1985, in Florida Department of Banking and Finance v. Board of Governors. The court overturned the Board's approval of an application by U.S. Trust Company to expand by means of a nonbank bank. The court found that "state control over banking, and the expansion and availability of branches, has been the consistent policy of Congress since passage of the Bank Holding Company Act in 1956." The latest attempt by Congress to close the loophole came on June 12, 1985, when the House Banking Committee adopted H. R. 20, the Financial Institutions Equity Act of 1985, which redefines "bank" as any FDIC-insured bank and any institution that both accepts transaction accounts and makes commercial loans.

A number of states have taken action on the nonbank issue while Congress tries to decide on a remedy and appeals wind their way through the federal courts. According to the Kentucky Department of Financial Institutions, sixteen states have enacted legislation to close the nonbank bank loophole.

Discussion

Proponents of nonbank banks contend that consumers will benefit from the competition through higher interst rates for deposits and lower rates for loans. The nonbank banks will provide consumers with the resources and expertise of a money center bank. Opponents claim that the initial competition may result in higher returns on deposits and lower rates on loans, but primarily for a select group of customers. The money center banks will establish their nonbank banks in high-growth states and posh suburbs and continue the disturbing trend in the financial services industry of serving the most affluent and ignoring low and lower-middle income customers. They contend that large banks see nonbank banks as a step toward unlimited

interstate banking. Some small banks argue that large money center banks will invade their markets through nonbank banks, offer higher rates and suck up deposits, and siphon the money out of the communities. They contend that this will leave small businesses starved for capital.

In testimony before the Subcommittee on Financial Institutions of the Interim Joint Committee on Banking and Insurance, spokesmen for the Kentucky Bankers Association and the Independent Community Bankers of Kentucky joined with the Commissioner of the Department of Financial Institutions in supporting legislation to prohibit the operation of nonbank banks in Kentucky. Although either Congress or the U. S. Supreme Court could act to prohibit the operation of nonbank banks, advocates of prohibition contend that states should enact legislation instead of waiting for Congress and the Supreme Court to act.

The General Assembly must take into consideration the arguments of proponents and opponents in the financial industry, as well as the demand by consumers for convenient financial services. The General Assembly will need to consider nonbank bank legislation in conjunction with any legislation on expanded powers for banks. Some argue that if banks' powers are expanded, there is no need to prohibit the operation of nonbank banks. Banks would be able to compete with nonbank banks and the competition would benefit the consumers. Others contend that nonbank bank legislation and expanded powers legislation should be linked. If nonbank banks are prohibited, thereby depriving consumers of the convenience and broader services of nonbank banks, the powers of banks should be expanded so they can provide consumers one-stop financial service convenience.

LONG-TERM CARE INSURANCE

Prepared by Bill Van Arsdall

Issue

Should health insurers be required to provide coverage for long-term health care?

Background

The average age of the population is increasing, and so is the cost of health care. As Kentucky's population ages, more and more people will face the problem of paying for long-term health care--the sort of treatment provided by nursing homes and intermediate care facilities. Although this is one of the major expenses the elderly face, most people have made little provision for the possibility of a long illness. Many believe they are already covered by the government or by private insurance; but public programs are very restrictive, and most private insurance policies provide little coverage for a long-term illness.

Medicaid, the state-federal program for the needy, ordinarily provides medical benefits only after a person's assets have been practically exhausted or have been passed on to members of the family. The amount of assistance provided under Medicaid is sometimes much smaller than the cost of treatment, and some institutions will not even agree to accept Medicaid patients.

Medicare, the other major government program providing medical assistance, normally offers nursing home coverage only if a person has been in the hospital and has been discharged to a facility offering skilled nursing care. Costs deemed "allowable" by Medicare are only fully covered for twenty days, and payments are cut off after one hundred days. The length of an approved stay is frequently much shorter than that.

This leaves the average elderly person without much government protection. In the absence of veterans' benefits, most people must rely on their life savings or on their private insurance coverage. Many erroneously believe that their "Medicare supplement" policies will pay most of the cost of long-term care. While these policies do provide some coverage for nursing home stays, they usually do so only if the stay is of the type covered by Medicare--skilled care for up to one hundred days after release from a hospital. Insurance policies aimed more specifically at long-term care are being offered to the public, but their use is not yet widespread.

An alternative is to require insurance companies to include long-term care benefits whenever they sell health insurance. Supporters say that this will take the burden off government programs and assure most people of better coverage. The people who can afford to provide for their own long-term care

will thus be forced to commit themselves early to a plan which will cover their needs.

A good long-term care insurance policy would significantly expand the sort of coverage most people now possess. Such a plan would probably cover nursing home care in both skilled and intermediate facilities, and it would cover home health care at some fraction of the institutional rate. It would provide for several years of nursing home coverage, after a waiting period of perhaps sixty to one hundred days. It would pay most of the cost of a nursing home stay, and it would not require any prior stay in a hospital. The need for nursing home care would, however, probably have to be confirmed by a physician or by a peer review organization.

Requiring this kind of insurance to be part of every health insurance policy would help society in several ways, according to supporters. For one thing, the Medicaid program would reportedly save billions of dollars if a majority of elderly Americans were covered by private insurance. Medicaid could then be used to protect the medically indigent, the group it was designed to protect, rather than helping those who have become poor only because medical bills have eaten up their savings. Another positive effect would be an improvement in public knowledge. Supporters quote studies showing that a majority of the elderly are mistaken about the amount of long-term coverage they possess, thinking that government programs and Medicare supplement policies will take care of most of their bills. When insurance companies are forced to market this new kind of insurance, the public will become better educated about the need to provide for chronic, long-term illness. There should also be a positive effect on employers, who would be encouraged to look for ways to help their employees purchase the kind of insurance that will be needed upon retirement. Insurance companies would be encouraged to aggressively market long-term care insurance to retiring workers.

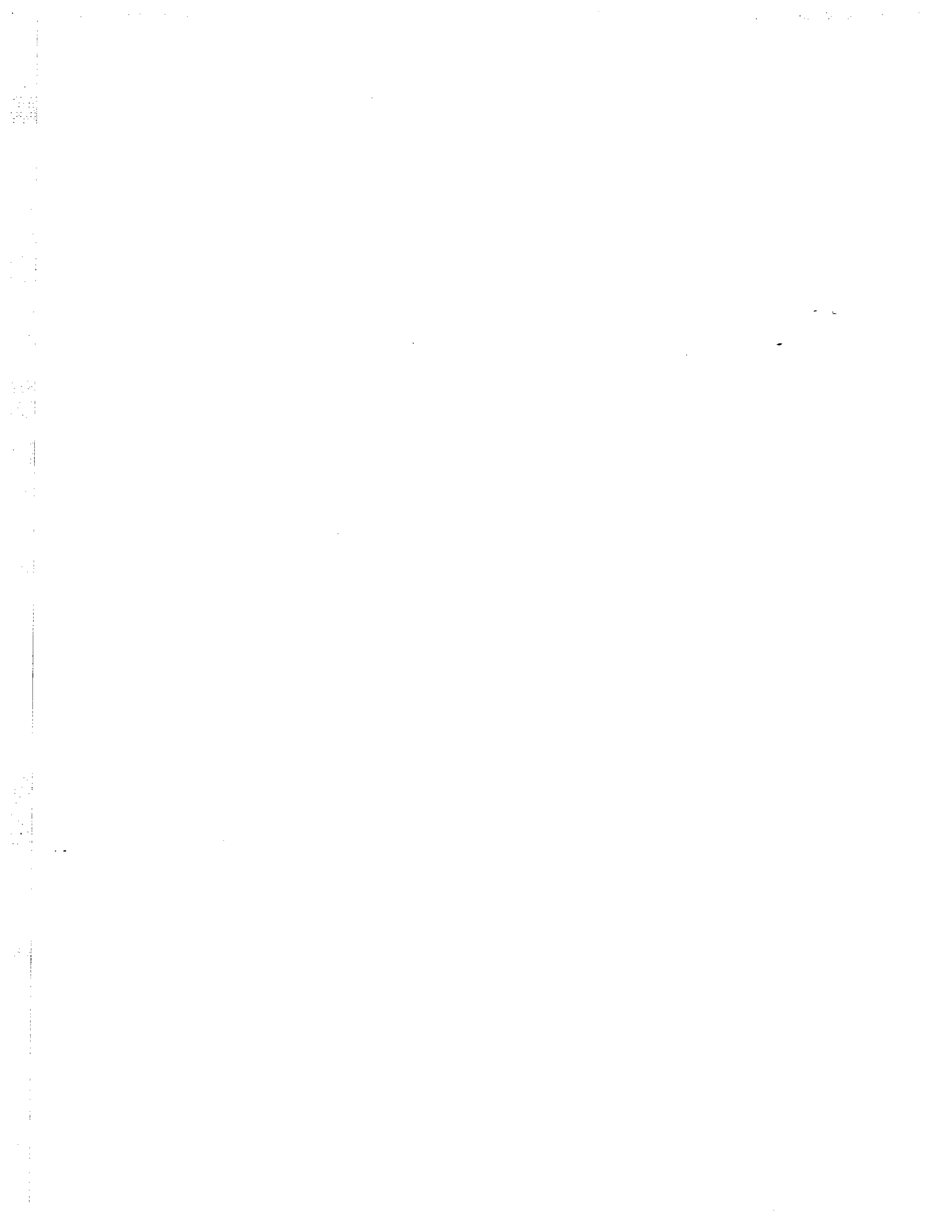
On the other side of the question, there are those who argue against mandating long-term care insurance. Any mandated benefit will tend to drive the price of premiums up, and this is particularly true for coverage of such a potentially expensive item. The increase in premiums would not be drastic for participants in group policies, where the risk would be evenly distributed among all members of the group. An individual policy, however, might become considerably more expensive, especially if it is purchased by a person who is already well advanced in years. In addition, some people contend that mandatory long-term care insurance would limit an individual's freedom of choice in selecting a health care program.

The insurance industry can point to an increasing number of good long-term care policies already being offered throughout the country. Why require this coverage by law, they ask, if it is becoming increasingly available on the open market? It may be too early to mandate specific items of long-term care coverage, they say, at a time when we should be encouraging experimentation and flexibility. Neither employers nor employees are said to be attracted to a package that will raise their premiums for a benefit they can already obtain elsewhere.

Discussion

Several states are currently discussing legislation which would permit or mandate long-term care coverage. In 1984, the Kentucky General Assembly considered Senate Bill 349, which would have required all companies offering group and major medical insurance policies to provide coverage for long-term health care in a facility licensed by the Commonwealth of Kentucky. This coverage would include "skilled nursing facilities, intermediate care facilities, personal care homes, and intermediate care facilities for the mentally retarded and developmentally disabled." An advisory council was to be set up to assist the Commissioner of Insurance in regulating the new program. This bill was reported favorably by the Senate Banking and Insurance Committee, and a similar measure may be introduced in the 1986 session. Other suggestions would encourage the sale of long-term care insurance without making it a mandatory part of each policy.

A bill designed to encourage private insurers to enter the long-term care market has been introduced in the United States Congress. It would set standards for such policies, but each state could decide whether to impose these standards. The states will remain the principal regulators of long-term care insurance, and in 1986 Kentucky will consider making such coverage a mandatory part of each health insurance policy.



BUSINESS ORGANIZATIONS AND PROFESSIONS

ADMINISTRATIVE PROCEDURES ACT

Prepared by Michael Greer

Issue

Should the Kentucky General Assembly enact an administrative procedures act for state agencies?

Background

The 1984 General Assembly considered a piece of legislation, HB 52, which would have established uniform procedures for occupational and professional licensing boards to follow in dealing with consumer complaints against licensees. The legislation was prompted by failure of some licensing boards to effectively deal with complaints, according to the sponsor. The bill did not pass but the Subcommittee on Occupations and Professions of the Interim Joint Committee on Business Organizations and Professions decided to make it a subject for subcommittee review and discussion during the 1984-85 interim.

In hearings on HB 52, representatives of boards and the attorney general's office testified that the intent of the bill was good but that it did not go far enough to address the real problem. They testified that what was needed was an administrative procedures act to standardize all adjudicative proceedings, not just the complaint process. The Subcommittee agreed with this approach and at its May, 1985, meeting instructed staff to prepare a bill draft.

The term "administrative procedures" is normally used in referring to two separate but related aspects of agency operation: rule making and adjudicative proceedings. After several unsuccessful attempts, the 1974 General Assembly passed a bill which established in KRS Chapter 13 a uniform procedure for promulgating administrative regulations. Since this enactment, "administrative procedures" in Kentucky has generally been used strictly in the context of adjudicative proceedings.

In 1976, a companion bill to the administrative regulations act, House Bill 137, was prefiled by the Interim Joint Committee on State Government to standardize adjudicative proceedings. The bill was not successful and no similar piece of legislation has been introduced in any subsequent session. This puts Kentucky in a very small minority of states without an administrative procedures act.

Presently, each agency has its own statutory authority under which its adjudicative proceedings are to be conducted. Some statutes are quite extensive, while others merely grant broad authority to the agency to prescribe procedures by regulation. Consequently a myriad of diverse policies have developed. In some cases, persons affected by agency actions are not

afforded due process, while in others they are granted more consideration than is necessary. The present system also creates confusion and difficulty for attorneys who practice before state agencies.

Discussion

There are several major policy questions presented in drafting an administrative procedures act. First, what should the scope of the act be? Should it apply to all state agencies or should it be limited to occupational and professional licensing boards, at least initially?

There seems to be strong sentiment for preparing an act applying to all agencies. Testimony before the Subcommittee on Occupations and Professions and before other committees this interim indicates that an inclusive act is needed and would probably receive broad support. Agency attorneys have voiced support in informal discussions and their support is important in the passage of the legislation. Agency opposition was a primary reason HB 137 did not pass in the 1976 session.

Another question is whether the act should include provisions for "administrative law judges." Several states have established, as part of their administrative procedures act, full-time administrative law judges who are required to be attorneys, to serve as hearing officers. Such a program would require a sizeable appropriation and, considering the absence of revenue for new programs, such a provision may not be fiscally advisable. If, however, it could be demonstrated that an administrative law judges provision could be funded from existing budgets by consolidating resources, it might have a chance of passage.

Of course, some people feel that the procedural provisions are the most important and that while administrative law judges might be ideal, they are not essential. They argue that as long as the procedural requirements are uniform and clear, the background of the hearing officer is not critical. Hearing officers who are non-attorneys can be trained in administrative procedures, which is being done now in some agencies. It has been suggested that a training provision be included in an administrative procedures act if the administrative law judges provision is not included.

Should the grievance or complaint process be addressed in an administrative procedures act? The complaint process was the genesis for discussion of administrative procedures this interim, but interestingly enough, neither HB 137 nor other legislation reviewed contained provisions dealing with complaints. Since complaints many times are the precursors of administrative adjudication, it would seem prudent to provide for a standardized complaint process in an administrative procedures act.

Another question concerns the treatment of conforming amendments. Generally, when a bill is enacted that affects other statutes, conforming changes to those statutes are included in the bill. The prefiled version of HB 137 did not contain conforming amendments, but rather a provision stating that the Act superceded existing statutes and directing LRC to identify

statutes in conflict and prepare a bill with conforming amendments for the next session. Conforming amendments were subsequently added to a House Committee Substitute adopted late in the session.

With the adoption of the House Committee Substitute, HB 137 grew from 23 pages to 549 pages. This intimidating size, as well as its late adoption, no doubt contributed to the failure of the legislation. Past experience would seem to suggest that conforming amendments be dealt with in a separate bill at a succeeding session. In addition, there is probably not sufficient time remaining in this interim to identify affected statutes and draft conforming amendments.

LRC staff is working with staff from the attorney general's office, agency legal staff and other interested parties to prepare a working draft by September, 1985. They are reviewing HB 137, a model act from the National Conference of Commissioners on Uniform State Laws and other acts to determine the best document to use as a base. When the working draft is completed and approved by the Subcommittee on Occupations and Professions, it will be sent to state agencies for review and comment.

GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE

Prepared by Randy Bacon

Issue

Should the state be permitted to engage in programs which are in direct competition with private enterprise? If so, to what degree?

Background

During the 1984 session of the General Assembly, the House of Representatives passed HR 50 and the Senate passed SR 59, which directed that the Legislative Research Commission, through the Small Business Task Force, identify governmental activities which may be in competition with private enterprise and study the desirability of contracting out government services to the private sector. As a result of the resolutions passed during the 1984 session, the Task Force held a series of public hearings out in the state in 1985.

At these hearings several businesses testified about government services which they felt were competing unfairly. Many marina, campground and resort owners, for example, felt that either the state should not be providing certain services at all, or that, if it did, the state's prices should not be set so low that state facilities competed unfairly with the private developments (i.e. the fees should reflect fair market value). Private day care operators, particularly in Jefferson County, were concerned about after school day care services which were being provided in some schools for the first time during the 1984-85 school year and were scheduled to be expanded during the 1985-86 school year. A drug testing laboratory was concerned that its services at Kentucky race tracks had been replaced by a state-created laboratory at the University of Kentucky. Other similar concerns were raised as well.

Discussion

There obviously are several areas in which Kentucky state government competes with private enterprise. The public school systems, for example, compete with private educational services from preschool through post-graduate programs. Public health facilities, from local health departments to university hospitals, are to various degrees in competition with physicians in private practice and with for-profit hospitals. State parks, marinas, and campgrounds compete head-to-head for the tourist dollar with their counterparts in the private sector. The state Transportation Cabinet is to some degree doing road repair and maintenance which could be performed through contract.

Each of these activities has a history. In some instances, state services may have preceded private services and, as in the case of tourism, stimulated private sector development.

The correct analysis of this issue will probably show the existence of a dynamic and ever-changing relationship between the private and public sector. A correct response to the issue will, therefore, probably call for a flexible, dynamic process to adjust, from time to time, the tension which builds up between the two sectors.

There is now no statewide policy on or focal point for evaluating where state government is appropriately or inappropriately in competition with the private sector. Government policy in this area has tended to vary from administration to administration, from legislature to legislature and from service to service. Judging from the response of the business community at the hearings, government competition, while a burning issue to several businesses, is probably not perceived as a major problem by the Kentucky business community in general.

One possible response to this issue is to pass legislation which would attempt to define where the legislature wishes to prohibit government competition altogether and where it wishes to carefully restrict state service delivery. For instance, as was voiced during the hearings, there may be a time and place for the state to restrict its building, expansion, and management of new and existing park lodges, swimming pools and campgrounds. However, in lieu of state involvement, and for a fee, the private investor could through contract or lease develop and operate these same kinds of facilities in our park system.

Several states have passed legislation which attempts to address when and where government competition with the private sector is and is not appropriate. Arizona, for instance, has given broad guidelines in the statutes and established an ongoing "review board," composed of people from both the public and private sectors to hear complaints, hold hearings, process grievances, and make recommendations to the governor and legislature.

During the 1986 session, the Kentucky General Assembly may want to consider establishing a similar board for the Commonwealth.

SMALL BUSINESS CAPITAL FORMATION

Prepared by Randy Bacon

Issue

Should legislation be enacted to increase the availability of capital for small business development?

Background

The heightened interest in the capital formation needs of small business can be traced to extensive studies of David Burch at MIT, who published data which indicated that between 1970 and 1980 eighty percent of all new jobs were created by companies with fewer than one hundred employees. Studies of the Kentucky economy, where ninety-seven percent of the 58,000 businesses have fewer than 100 employees, tend to confirm these national data.

Officials at the Commerce Cabinet indicate that they have found clear financing gaps for firms with fewer than one hundred employees, when compared to larger firms, and an even more significant gap for firms with less than twenty employees, given the capital demand of such firms.

Discussion

The capital formation needs of Kentucky small businesses appear to be for three kinds of capital: (1) Venture capital for high growth, rapidly expanding companies. These firms represent less than one percent of the firms with capital needs; (2) Affordable capital or long-term capital at fixed but affordable - near prime - rates. This kind of capital need affects many more firms than venture capital need does. These firms are generally growing more slowly and are somewhat less profitable than the venture firms. (3) Gap financing capital. This term refers to the gap which often exists between a company's assets and its short-term capital needs. Firms with such gaps may show a growth potential sufficient to carry the capital debt needed to adequately finance the business but lack the fixed assets or accounts receivable to secure the loan. The need for capital by this group of firms is the greatest of the three types discussed here.

There are several ways the state could intervene in the capital formation market to make more dollars available to Kentucky small businesses. One way is to fund a capital pool either directly through an appropriation or bond issue or indirectly through tax credits. Secondly, money could be earmarked from certain pools - such as retirement accounts with a guaranteed rate of return to the retirement fund of no less than they are now receiving - to be loaned through banks to small businesses in order to meet the affordable capital needs discussed above. Finally, gap financing needs for especially

promising companies could be served by a state sponsored insurance program which would guarantee certain loans.

In an attempt to address this issue twenty to twenty-five states have initiated some sort of program through state government. For example:

- Indiana has established a program of tax incentives whereby a firm may get a seventy percent tax credit for contributing capital to a pooled fund for research and development. This effort has raised some $20,000,000 since 1980-81. For example, if Eli Lily had a tax liability of $1,000,000 and contributed $1,000,000 to the fund, it would get a $700,000 tax credit, thus reducing its state tax liability to $300,000. In this case, the treasury of Indiana is, in effect, subsidizing the fund through a tax shift.

- Ohio created a $30,00,000 capital pool by tapping its state pension fund. The pool is administered by a private group.

- Pennsylvania has several model programs. For example, Allegheny County has mixed local pension funds with private funds in a pool.

- Michigan has raised some $40,000,000 by earmarking ten percent of its state's pension fund.

There is a need for private and public sector cooperation in state capital formation efforts. Most states show a preference for public sector leadership and initiatives and private control of the lending/distribution process.

REGULATION OF COUNSELING PROFESSIONALS

Prepared by Yair Riback

Issue

Should the state certify or license marriage and family therapists and mental health counselors?

Background

This issue came before the last two regular sessions of the General Assembly. In both sessions legislation passed the House of Representatives (1982 HB 369; 1984 HB 179).

Marriage and family therapists generally are in private practice or employed by various mental health agencies. Mental health counselors, for the most part, work through various agencies or the educational system.

It is difficult to determine how many practitioners there are in these two groups because of overlapping in the mental health professions. Many provide similar services and advertise themselves under different titles.

For example, only a few social workers list themselves as social workers in the Louisville yellow pages, while others list themselves as marriage and family counselors.

Discussion

Since mental health professionals began to be licensed in the state of Kentucky (psychologists, 1948; social workers, 1974; psychiatrists are licensed under the medical licensing statutes) there have been many changes and developments in the behavioral sciences. New disciplines have been developed along with new approaches and new specializations. Marriage and family therapy and mental health counseling have grown into recognized and separate disciplines and many academic institutes, including Kentucky institutes of higher education, offer degrees in these areas, as well as in other therapeutic areas.

While mental health professionals until recently fit into two broad groups - psychologists and social workers - this pattern is beginning to change, because of new methods, philosophy and target populations. With the growing importance and the diversification of methods, approaches, and theories, these professionals seek recognition on their own. Arguments similar to those used to justify the need to license psychologists and social workers are now used by those who counsel families in distress, couples who encounter marital

problems, or individuals who need professional counseling. Their therapeutic modalities encompass the entire family life and all age groups, quite often as one therapeutic unit.

Advocates of regulation argue that leaving these areas unregulated undermines the legislative intent of protecting the public from unqualified providers to individuals or families during times of distress and vulunerability. At present any person, regardless of his qualifications, can offer himself as a counselor or marriage and family therapist.

One problem which has been encountered is the historical development of the counseling field from different disciplines and backgrounds. Any form of licensing should take into consideration the diversified background of the people practicing in these areas.

On the other hand, there is much overlapping of services offered by various mental health professions among themselves and with other professions. This raises the issue about the degree to which other professionals, lawyers or physicians, for example, could be exempted without undermining regulatory intent.

A related issue is that of examinations and continuing education requirements. These requirements must reflect the diversity of backgrounds in the counseling field.

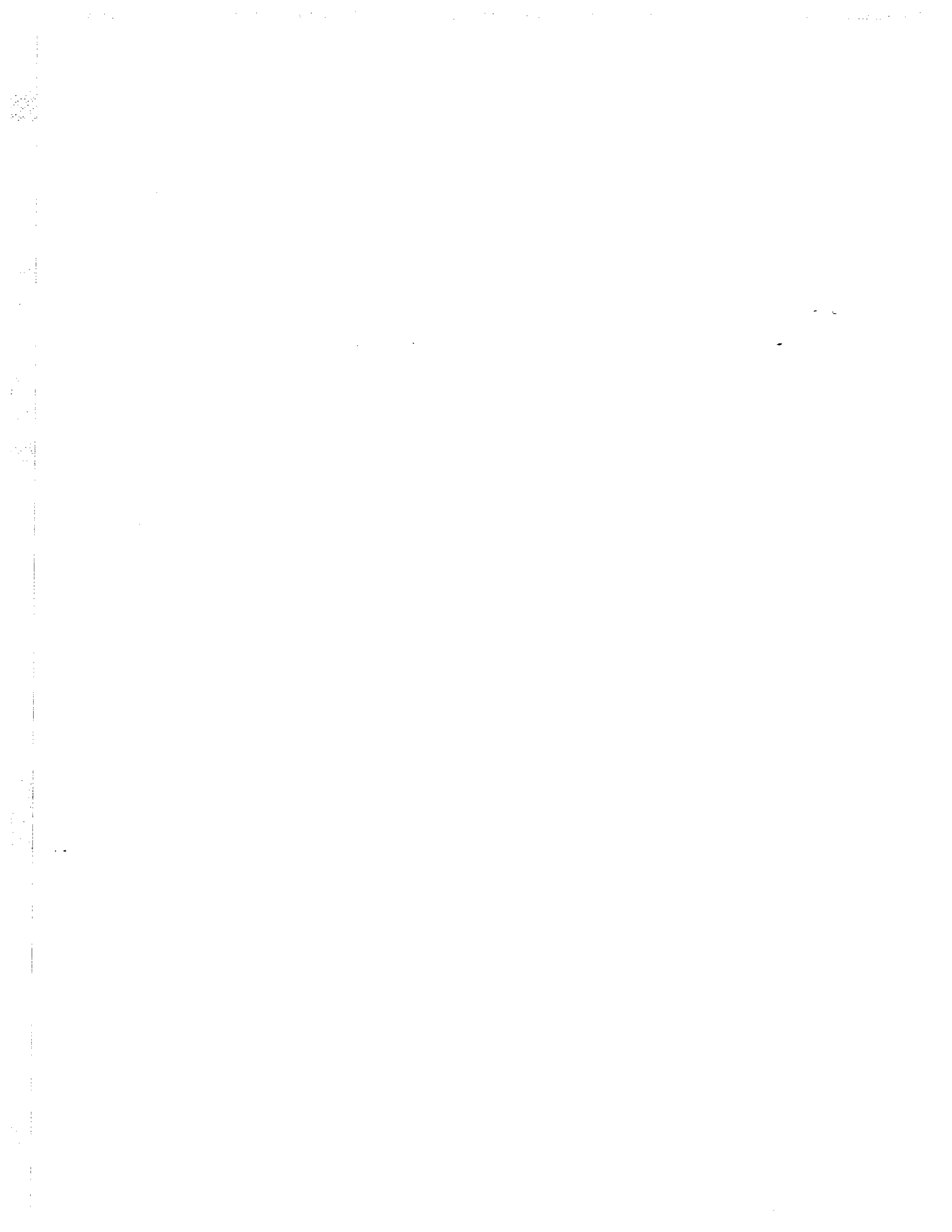
Other developments related to this issue are:

- The growing awareness of the importance and centrality of family life in light of the large number of failing marriages and child or spouse abuse.

- The lack of adequate preparation for marital and family life.

- The need of many individuals for professional counseling to resolve personal conflicts.

An alternative approach to licensing is to create an umbrella licensing board which would recognize all mental health professions under the same state practice law.



CITIES

LOSS OF FEDERAL AID TO CITIES

Prepared by J. David Morris

Issue

What action can be taken by the General Assembly to help cities make up the revenue loss through anticipated cut-backs in federal aid?

Background

President Reagan's budget proposal for fiscal year 1986 severely cuts the amount of federal assistance to local governments. Congress appears to be unwilling to agree to all the proposed reductions, but it is obvious that in the next few years most, if not all, municipal aid programs will be eliminated or sharply cut back. Most significant among such programs is federal revenue sharing, but other programs are slated for elimination or reduction: urban development action grants, public transportation operating grants, community development block grants, housing programs, and the historic preservation fund.

Federal aid, especially revenue sharing, has been fundamental to the financial health of Kentucky's cities. In recent years, cities have relied upon federal aid to compensate for losses in tax revenues caused by suburban migration, a slowing down of inflation, a depressed economy, and statutory tax rate limitations. In 1983, Kentucky cities received almost $37 million in revenue sharing funds. More than 50% of those monies went to support police and fire operations. The remaining half was used for everything from administrative salaries to parks and recreation projects. Cities, if they are to maintain the current level of services provided, must find additional revenue to replace the lost federal aid.

The Reagan budget proposal seeks to end or reduce most federal aid to local governments, because, as stated by their federal budget director, David Stockman: "There's simply no justification for the federal government, which is running a deficit, to be borrowing money to be spent by state and local governments, some of which are now running surpluses" (quoted in Time, March 11, 1985). Many local officials have vigorously taken exception to the assertion that most cities do not need the federal money. Instead they argue that most are financially strapped and the only reason they do not operate with large deficits is that state and local governments are usually required by state constitutions to have balanced budgets. Instead of borrowing money, cities can only respond to revenue shortfalls by reducing services.

The anticipated loss of revenue has local officials scrambling for new sources of funds. It is inevitable that city officials will look to the state and the General Assembly for funds to replace the lost federal assistance. The General Assembly has two available methods with which to assist cities. First, it could create programs to grant direct aid to cities (for example, it already returns a portion of the gas tax to local governments via the municipal road aid program). At this time, however, budgeting priorities appear to preclude any state-funded program which could replace a significant portion of the lost federal dollars.

As a second option, the General Assembly could review the statutes which govern cities to determine if the revenue-generating capabilities of cities could be enhanced. Cities currently have broad "home rule" powers, but several constitutional or statutory provisions limit municipal taxing authority.

The most visible limitation is KRS 132.027 et. seq., popularly known as HB 44, which imposes two limitations upon a city's taxing authority. Cities have chafed under the limitations since enacted in 1979, and the loss of federal aid is bound to intensify that discomfort.

Additionally, constitutional amendments could be proposed. Section 181 of the state constitution, relating to municipal taxing authority, could be amended to permit cities broader taxing powers, specifically the authority to levy income or sales taxes. Also Section 157 might be amended to permit cities to incur long-term general obligation debt without seeking approval by referendum.

INFRASTRUCTURE NEEDS ASSESSMENT

Prepared by Kathy Campbell

Issue

Should the General Assembly mandate that a comprehensive needs assessment plan be performed on publicly owned treatment works and community water systems?

Background

The financial hardships faced by many state and local governments during the past decade have caused many officials to ignore inadequate, underfunded and deteriorating infrastructures. Infrastructure needs have traditionally been ignored, since the needs associated with sewer and water systems are low on the list of budget priorities, lacking a vocal and persuasive constituency.

Many of the older urban areas of this state are faced with sewer and water systems that are crumbling, while many of Kentucky's smaller cities and rural areas have grossly inadequate systems or no systems at all. Inadequate public works systems pose a severe threat to the public health, are a major drain on limited resources to bring systems into compliance with federal and state standards, and ultimately become barriers to the economic growth of a community.

Discussion

Nationally, public works projects have grown dependent upon federal dollars for construction. Local revenues, however, are rarely set aside to provide for scheduled maintenance before costly repairs become necessary. Replacement of lost federal revenues is an issue which will have be addressed at a later date.

Several studies have been conducted by the U.S. Congress, the U.S. Environmental Protection Agency, the Kentucky Natural Resources and Environmental Protection Cabinet, and the Kentucky Water Management Task Force which provide cost estimates for the repair and replacement needs of Kentucky's infrastructures. The question of the age and physical condition of sewer and water systems across the Commonwealth, however, remains unanswered.

The Subcommittee on Urban Affairs has been conducting a review of infrastructure needs, specifically sewer and water needs. Committee discussion focused upon whether the state should help with infrastructure problems at the local level and, if so, what kind of help should be rendered. One of the recommendations received by the subcommittee was to develop a "needs survey" which would be administered throughout the state to determine actual local needs and what monies and resources would be required to satisfy those needs.

As a result of its review, the Subcommittee developed a legislative proposal, 86 BR 322, An Act relating to public works. Recommendations from the Natural REsources and Environmental Protection Cabinet were incorporated into 86 BR 322 which would create various new sections of KRS Chapter 224, relating to environmental protection, to require publicly owned treatment works or community water systems throughout the Commonwealth to prepare a comprehensive needs assessment plan. The Natural Resources and Environmental Protection Cabinet would have primary responsibility for the promulgation of administrative regulations for coordinating the needs assessment program. The Plan would have to be prepared and submitted to the Cabinet by January 1, 1989. The Cabinet may grant a three-month extension to any system which demonstrated a good faith effort in completing the needs assessment plan. Criteria to be included in the plan is established. Systems required to comply with this Act would be exempt from the provisions of KRS 278.040 (relating to the jurisdiction of the Public Service Commission in regulating rates and services of utilities), allowing those systems to increase their rates to offset and recoup the actual costs associated with the preparation of the needs assessment plan. The Natural Resources Cabinet would be required to submit a status report to the General Assembly no later than September 30, 1989, on the needs assessment program. No action has been taken by the subcommittee as of its August meeting.

ENTERPRISE ZONES

Prepared by Kathy Campbell

Issue

Should the General Assembly amend KRS 154.650-154.700 relating to enterprise zones?

Background

The 1982 General Assembly enacted House Bill 505 (KRS 154.650-154.700), which created a State Enterprise Zone Authority and authorized the establishment of seven enterprise zones. The enterprise zone program was designed to encourage new economic activity in depressed areas of the state by means of reduced taxes and removal of unnecessary governmental barriers to the production and earning of wages and profits and the creation of economic growth.

The members of the Subcommittee on Urban Affairs expressed an interest in reviewing the status of the enterprise zone program, since it had been functioning for two years. The Subcommittee received enterprise testimony from the staff of the State Authority and directors of enterprise zones from across the Commonwealth. The General Assembly initially authorized the creation of seven zones--two during 1983, two during 1984, two during 1985 and one in 1986. The program has been extremely successful, especially in Louisville, where the first zone was created in 1983. A recurring question before the Subcommittee has been whether KRS 154.650-154.700 should be amended to authorize the creation of additional zones.

Staff to the State Authority have proposed several procedural amendments to the statutes, and members of the Subcommittee have some questions regarding the process whereby the boundaries of existing zones may be altered. 86 BR 91, An Act relating to enterprise zones, has been drafted to address the concerns of the Subcommittee. The provisions of 86 BR 91 include:

1) Amending the definition section to include the definition of a "new business", "existing business" and "qualified business". An new provision is included under "qualified business" to allow subsidiaries or franchises to qualify for certification;

2) Establishing a procedure and criteria to be followed by two or more cities, counties, urban-county governments or any combination thereof, when jointly applying for designation of or amendment to an enterprise zone;

3) Prohibiting changes in boundary lines of existing zones from becoming effective until after written approval has been granted by the authority and establishing guidelines and procedures to be followed when amending zone boundaries;

4) Permitting the designation of three additional enterprise zones by December 31, 1988 and allowing qualified businesses to retain certification and remain eligible for tax exemptions if the State Authority removes the designation of any area as an enterprise zone;

5) Allowing the Authority to prohibit the certification of any future qualified business within an enterprise zone if the local jurisdiction does not comply with the provisions of the Act; and

6) Requiring the Revenue Cabinet to assist the State Authority in preparing a joint questionnaire to be administered by the Authority to qualified businesses for the purpose of the State Enterprise Zone Authority reporting to the General assembly on the fiscal impact of the enterprise zone program.

The Subcommittee on Urban Affairs unanimously agreed, at its August meeting, to refer 86 BR 91 to the full Interim Joint Committee on Cities with a favorable recommendation for prefiling.

MUNICIPAL TORT IMMUNITY

Prepared by By J. David Morris

Issue

Should governmental immunity be restored to Kentucky cities?

Background

Governmental or sovereign immunity denies a citizen the right to sue a governmental unit. Although it was historically the general rule for state and local governments, beginning in the 1950's many states judicially or legislatively abolished governmental immunity either in whole or in part. In Kentucky, Section 231 of the constitution grants immunity to the state, counties and urban-counties, unless waived by the General Assembly. Kentucky cities are not protected by Section 231 and do not have governmental immunity.

Governmental immunity for cities was first abolished in 1964 by the Kentucky Court of Appeals (then Kentucky's highest court) in Haney v. City of Lexington: "so far as governmental responsibility is concerned, the rule is liability--the exception is immunity."[1] In subsequent cases the court seemed reluctant to hold cities liable for all torts and created ever broadening exceptions to the "rule of liability." The expansion was accomplished on a case-by-case basis as the court experimented with various legal theories. It became impossible for city attorneys to predict with any degree of certainty what would be the result in a given case. The most common theory is known as the "singled-out individual" doctrine. City of Louisville v. Louisville Seed Co., set out the test for liability:

> Where the act affects all members of the general public alike, it would be unreasonable to apply to it the broad principles of tort liability.... But when the city, by its dealings or activities separates the individual from the general public and deals with him on an individual basis, as any other person might do, it then should be subjected to the same rules of tort liability, as are generally applied between individuals.[2]

In March of 1984, the Supreme Court, in Gas Services Co., Inc. v. City of London, rejected the cases following Haney:

> Haney abolished municipal immunity "for ordinary torts." It retained immunity only for acts which could be classified as 'the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions.' We are not called upon to abolish municipal immunity. That was done

> 18 years ago. We are called upon simply to test the courage of the convictions previously expressed by this court.[3]

The plurality opinion, written by Justice Liebson, strongly criticized the post-Haney opinions, calling the classifications used "arbitrary pigeonholes for conclusions arrived at intuitively."[4] He further complained that the decisions "have so circumscribed its [Haney's] language that we have regressed beyond its starting point."[5]

Justice Liebson returns to the principle set out in Haney because he feels that "the concept of liability for negligence expresses a universal duty owed by all to all."[6] Therefore "with a municipal corporation as with all other legal entities, the question is not whether such a duty exists, but whether it has been violated and what are the consequences."[7]

The only exception to liability is for "legislative or judicial or quasi-legislative or quasi-judicial functions." The phrase "quasi-legislative/judicial functions" used in Haney has never been defined, but Justice Liebson interprets it as "directed at the type of regulatory activity...[where] the government was not charged with having caused the injury, but only with having failed to prevent it by proper exercise of regulatory functions which have elements appearing quasi-judicial and quasi-legislative in nature."[8]

Discussion

While the common law doctrine of governmental immunity for cities has largely disappeared in the United States, it has been replaced in most jurisdictions by legislative protections. Generally immunity is not restored completely, but instead specific activities or functions are shielded. Such protective acts usually are known as tort claims acts. Municipal immunity has been abrogated in whole or in part in forty-five states. Most states have enacted some form of protective legislation, although an exact figure is difficult to determine because of the many forms such legislation takes.

There are several arguments for the restoration of governmental immunity:

(1) Funds collected for public purposes should not be diverted to compensate a private person;

(2) Local governments perform necessary but risky services not performed by private business, and fear of liability may discourage the performance of such services;

(3) A large judgment could have a catastrophic effect upon the limited resources of a local government.

The argument against immunity was expressed by Justice Liebson in City of London: "The duty to exercise ordinary care commensurate with the circumstances is a standard of conduct that does not turn on and off depending on who is negligent."[9]

Because immunity is no longer favored, the purpose of a tort claims act is not to totally shield a city from suit, but "to balance the respective equities between persons injured by governmental actions and the taxpayers...whose revenues are utilized by governmental entities on behalf of those taxpayers."[10] In balancing the rights of an injured citizen against the needs of a city, the most significant factor is the limited resources possessed by cities to satisfy a judgment. In Kentucky, three laws severely limit a city's ability to generate revenue:

(1) Section 157 of the constitution prohibits the incurrence of long-term debt unless approved by an extraordinary majority in a referendum;

(2) Section 181 limits municipal taxing authority to property taxes and license fees; and

(3) KRS 132.027 (popularly known as HB 44) places a cap on increases in property tax revenues.

Together the above three laws could make it impossible for a city to absorb a large judgment against it. Therefore the ultimate goal of a tort claims act must be, "to create an equitable system through which a city can foresee and respond in reasonable damages in those instances where liability is appropriate, as well as be shielded from liability in those instances where financial exposure
would threaten the public entity's solvency or ability to govern."[11]

The concurring and dissenting Justices in City of London specifically urged the General Assembly to enact some form of legislative protection for cities. Dissenting Justice Shephenson made an emotional appeal: "My only suggestion to city fathers is to run for the hills and seek help from the legislature."[12] Concurring Justice Wintersheimer analyzed tort claims acts in other states and urged the General Assembly to enact such measures for cities "after examining the empirical data regarding the potential liability exposure and exploring the availability of methods of defense."[13]

A tort claims acts can take many forms. The following lists possible options are open to the General Assembly. Of course, one option can be combined with another.

(1) Re-establish governmental immunity, but waive it for enumerated categories of activities (i.e., operation of motor vehicles);

(2) Continue to consent to general liability, but exempt certain activities from liability (i.e., quasi-legislative or judicial functions);

(3) Retain "open-ended" liability as established by common law, but place a cap upon judgments;

(4) Prohibit recovery for non-economic losses or for punitive damages;

(5) Limit a plaintiff's recovery to insurance coverage and require cities to carry insurance;

(6) Impose strict procedural requirements upon a plaintiff bringing an action against a city (i.e., special statutes of limitation or special notice requirements);

(7) Permit a city to pay a judgment in installments over several fiscal years;

(8) Authorize special taxing or bonding authority for a city ordered to pay a judgement; or

(9) Establish a state-wide special fund to be used to assist cities in the payment of judgements.

The first two options may run afoul of Section 14 of the Kentucky constitution, which guarantees citizens a right to redress for injuries. "It is well settled that the legislature may not abolish an existing common law right of action for personal injuries or wrongful death caused by negligence."[14] Limiting a city's potential liability with a cap is the most commonly used element of tort claims acts. Twenty-four states have placed such caps upon liability. The National Institute of Municipal Law Officers, in its "Uniform Law for the Regulation of Tort Claims Against Public Bodies," proposes an act retaining opened-ended liability, but limiting liability to $100,000 for a claimant. Placing a cap upon liability in Kentucky may be prohibited under Section 54 of the Kentucky Constitution, which states that the General Assembly has no power to limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.

Additionally there is a choice of forums available. Municipal claims can be handled either in the state court system or through a special tribunal (e.g., the tort claims board in Kentucky).

NOTES

1. Haney v. City of Lexington, Ky., 386 S.W.2d 738 (1964).

2. City of Louisville v. Louisville Seed Co., Ky., 433 S.W.2d 638, 643 (1968).

3. Gas Services Co., Inc. v. City of London, Ky., 687 S.W.2d 144, 148 (1985).

4. Ibid.

5. Id at 147.

6. Id at 148

7. Ibid.

8. Id at 149.

9. Id at 148.

10. Wyo. Stat. Ch. 39, §1-39-102.

11. D. Holmes, et al. 1984 Report to the Annual Conference, Committee on Municipal Tort Liability of the National Institute of Municipal Law Officers, p. 10 (October 29-31, 1984).

12. Gas Services Co., supra note 3, at 153.

13. Id at 151.

14. Saylor v. Hall, Ky., 497 S.W.2d 218, 224 (1973).

LOCAL PLANNING AND ZONING

Prepared by Gordon Mullins

Issue

Should KRS Chapter 100 be amended to permit local governments more flexibility in the design and implementation of local planning and zoning operations?

Background

Primary responsibility for land use planning and regulation in Kentucky, as in most states, resides in local governments. Since 1922, when the Kentucky General Assembly enacted this state's first local planning and zoning enabling legislation, local governments have gradually turned to comprehensive planning as the basis for municipal construction and land use regulation.

Today, the power and authority for local governments to plan and regulate growth within their borders is enabled under KRS Chapter 100, and to a limited extent under KRS Chapter 147. Chapter 100, which was comprehensively revised in 1966, permits the creation of four types of planning commissions, all essentially with the same powers.

L.R.C. Research Report No. 134, which was issued in July, 1977, made several observations and recommendations regarding KRS Chapter 100. It was noted that although KRS Chapter 100 is relatively progressive, it is complex and, in part, contradictory. The study also reported that numerous amendments had been proposed since 1966, and most had failed. Since 1977, fourteen separate bills have been enacted by the General Assembly which have revised KRS Chapter 100. Most of those amendments have been technical, and have dealt with zoning--primarily publication of notice.

Based on recent news articles and comments received from interested citizens and community leaders, local planning and zoning continues to be a major concern at the local level. In response to these concerns, the 1984 Kentucky General Assembly enacted Senate Concurrent Resolution 45, authorizing the establishment of a special committee to study local planning and zoning issues and to report its findings to the 1986 Kentucky General Assembly.

Discussion

Since the beginning of the 1984-1985 Interim, the Special Committee to Study Local Planning and Zoning has met nine times. Testimony has been received from numerous local officials, interest groups, planning experts, attorneys, state officials and interested citizens. The committee also held a

series of meetings outside of Frankfort in an effort to encourage local citizens to speak out about their concerns and interest regarding local planning and zoning issues. Attention centered primarily on rural land use issues, subdivision development, and other related land use control issues.

Of major concern to many local officials is the issue of agricultural use, and how changes in the definition of agricultural use may affect rural land use, especially the subdividing of land. Other issues include: (1) land growth development measures that do not employ zoning, i.e. the Hardin County Development Guidance System; (2) use of hearing examiners; (3) transfer of development rights; (4) streamlining the permitting procedures to permit the issuance of dimensional variances at the time a zoning map amendment is granted; (5) permitting local governments to employ conditional zoning as a means of controlling growth; (6) specifying time limits on appeal of actions regarding zoning map amendments; and (7) the streamlining of the planning process to permit more flexibility in what constitutes a comprehensive plan.

CABLE TV

Prepared by Jamie Jo Franklin

Issue

Should the General Assembly formulate a state policy regarding the regulation of the cable television industry within Kentucky?

Background

The U.S. Congress by the enactment of the federal Cable Communications Policy Act of 1984 has for the first time established a national cable television policy. The new federal law has set the basic standards by which state and local governments may regulate cable television (CATV) systems within their jurisdictions. But, while setting minimum basic standards in many areas the federal law still leaves areas open for possible state or local regulation. Among these areas are franchising, subscriber privacy, program content, pole attachments, and theft of service.

In Kentucky, the state legislature has basically delegated control of CATV systems to its local governments, especially in the area of franchising. But with the increased technological advances in the CATV industry, as well as the growing number of Kentucky communities being served by CATV, there seems to be a developing need for state-wide statutory guidance in many of these areas.

The topic of cable television has been reviewed during the 1984-85 interim by the Subcommittee on Small Cities of the Interim Joint Committee on Cities. The subcommittee has subsequently recommended to the full committee the specific inclusion of CATV in the committee's work program for the 1986-87 interim. The subcommittee felt that due to the complexity of the subject, the time remaining for interim activities, and Kentucky's relative infancy in this area, a thorough, well-developed legislative package in 1988 would be preferable to a hastily prepared program for the 1986 General Assembly.

At this time, the development of a comprehensive CATV legislative program for the 1988 General Assembly seems to be the optimal approach. But in order to accomplish this the 1986 General Assembly should insure interim research on this topic. This could be assured by the enactment of a study resolution by one or both houses which would direct the Interim Joint Committee on Cities to study this issue during the 1986-87 legislative interim. If the legislature should want to formally include local officials, cable industry officials or representatives of special interest groups in this process, there could be the creation of a special committee to study the topic and report its findings to the Cities Committee and the 1988 General Assembly.

COUNTIES

ADJUSTING COUNTY FINANCE TO LOSSES IN FEDERAL REVENUE SHARING

Prepared by William Wiley

Issue

What can be done to enable Kentucky counties to adjust to anticipated losses in federal revenue sharing funds?

Background

County governments in Kentucky are limited by the Kentucky constitution to two sources of tax revenue: property taxes and occupational license taxes. There are limitations and restrictions placed upon these taxes which make it difficult to increase revenues derived from them, or in the case of the occupational license tax, to impose it initially.

Property tax increases are limited by legislation which is popularly referred to as "HB 44". 1979 HB 44 was the vehicle for revising existing property tax limitations and giving us the system by which we operate today. Basically, a fiscal court may not increase property taxes by more than 4% over the previous year's revenue derived from property on the tax rolls during the previous year without threat of a referendum on the increase. The fiscal court may not increase the tax rate above the previous year's rate except to compensate for losses in the tax base due to the homestead exemption. The result of these restrictions is that in times of high inflation, county revenues from property taxes may not keep up with inflation, and in times of low appreciation in property values, the county cannot receive much in additional revenue without being restricted by the ceiling of the previous year's tax rate.

Application of the occupational license tax is limited by the requirement for a referendum on the question in counties exceeding 30,000 population but less than 300,000 population (only Jefferson County exceeds 300,000).

Because of these restrictions on local taxation and the reluctance of fiscal courts to approach their citizens with proposals for tax increases, Kentucky counties have come to depend heavily on the state and federal governments to provide funds for their operations. Audits for 1982 indicated that Kentucky's counties, taken as a whole, were raising only 27.4% of their revenues through local taxes and permits. They were depending on state transfers for 46.75% of the funds, and on federal revenue sharing for 16.19%.

Larger counties, those with cities of the first and second class, were doing better, raising 56.6% of their own funds locally. Counties with an occupational license tax raised 55.79% of their revenues locally.

Figures for the 1983 fiscal year are substantially the same, and figures for a number of counties reveal a heavy dependence upon federal revenue sharing. There are fifteen counties which derive at least 20% of their budget from revenue sharing. There are another thirty-one which derive between 15% and 20% of their budget from revenue sharing.

Discussion

If losses in general revenue sharing are to be overcome, there are two possible sources of funds. Locally, taxes may be increased or service charges imposed, or there may be increases in revenue sharing from the state.

If county property taxes are to be increased in any meaningful way, changes in "HB 44" will be necessary. Increasing the 4% increase limit without the threat of a referendum would be useful during times of high inflation, but we are currently in a period of low inflation. It would be more appropriate today to permit increases above the maximum, or previous year's tax rate.

Another tax option would be to allow fiscal courts in counties of population between 30,000 and 300,000 to levy an occupational license tax without a referendum on the question.

A third option is for county governments to begin charging for certain services which they provide. This is difficult for counties, however, because the facilities and services which they fund, such as roads, county buildings, officials' salaries and the like, are for citizens generally and are not specific to individual consumers. Several counties are experimenting with charges for solid waste pick up, and it would be possible to charge for such things as health services. Kentuckians are most accustomed to paying individually for services when they deal with the county clerk or the sheriff. It is possible to extend the charge-for-service concept to county government generally, but the limitations on this approach should be understood.

If the state is to relieve the burden on counties by increasing state revenue transfers, two possibilities seem most apparent. Since counties as a whole spend approximately 50% of their revenues on roads and bridges, an increase in the gas tax allocation to counties would address a major problem area. A second possiblity involves jails. Since many counties are significantly increasing their jail expenditures in order to comply with state standards, a shift to a state-operated and state-funded jail system would relieve this burden.

MINIMUM SALARY FOR SHERIFFS

Prepared by William Wiley

Issue

Should the General Assembly Provide For a Minimum Salary for Sheriffs?

Background

A 1983 LRC Research Report, No. 200, pointed out that in 1980 nearly 25% of the state's 120 sheriffs were making less than $15,000 per year. This problem occurred primarily in counties with low tax bases since, on the average, sheriffs make about 70% of their income from tax commissions. Research Report No. 200 pointed out that for law enforcement duties sheriffs are largely uncompensated. Data for 1983 indicates that the fortunes of sheriffs have not changed much. While half the sheriffs in the state made the constitutional maximum salary of $29,486, more than 25% still lie below $20,000 per year, and the majority of those may still be at or below $15,000. (Exact figures are not available because not all sheriffs are audited for fees each year.) Prior to the 1985 general election, sheriffs could not succeed themselves in office, and this limitation tended to distract from the law enforcement professionalism of the office. Now, however, sheriffs may succeed themselves, and a large percentage did in the 1985 election. Continuity in office offers the opportunity to upgrade the law enforcement capabilities of sheriffs. This growth will not occur in many smaller counties, however, if there are not qualified candidates for office because of low pay, or if sheriffs choose not to run again because of financial difficulties. The Kentucky Sheriffs Association is on record as wanting a $25,000 minimum salary for sheriffs.

Discussion

The 1986 Session will be a difficult one for county officials seeking higher incomes unless the funds can be generated by their offices. Counties themselves face a cut-back in funds due to the potential reduction or elimination of federal revenue sharing. Jail expenditures are up, and fiscal courts are in need of additional revenues for road and bridge programs. Coal sales are not strong so the counties' share of severance taxes are down. Additional revenues from the state will be difficult to generate because of education and road program needs.

Raising sheriffs' fees for services is a viable way to increase incomes and places the added burden on those who use the services. Across the board

fee increases are inefficient, however, because they benefit most the sheriffs who need help the least. A way must be found to direct revenues to the counties of greatest need.

PAYMENTS FOR STATE PRISONERS IN COUNTY JAILS

Prepared by Bruce Simpson

Issue

Should the state pay county governments more than $10 per day to incarcerate a convicted felon?

Background

The 1984 General Assembly mandated that state government pay county governments $10 per day to incarcerate a convicted felon in jail. There are approximately seven hundred such prisoners in county jails today (this figure has remained constant over the last several months).

Actually, the Corrections Cabinet had been contracting with individual counties to house state prisoners in jail at the $10 per diem rate since August of 1982. The Corrections Cabinet began looking to county jails to house some of its prisoners shortly after it entered a federal court consent decree in 1980 which imposed a ceiling on the number of inmates that could be housed in state prisons. As a result, county jails began to show a steady increase in their population. In some instances, this has led to jail overcrowding.

County government officials contend that $10 per day to feed, clothe and guard a state felon is insufficient. These officials also point to increased exposure to law-suits based on jail overcrowding and mixing pretrial detainees and misdemeanants with convicted felons. It should also be noted that the 1983-1984 per diem rates for housing state prisoners at the two major state prisons were considerably higher than $10 per day. The per diem rates for Kentucky State Reformatory and Kentucky State Penitentiary were $30.90 and $38.20, respectively.

It should also be pointed out that state government is already making a substantial financial contribution for local jail support. In FY 1984-1985, the state gave county governments nearly $14 million to off set county jail expenses and in 1985-1986 the state will spend approximately $14.6 million on local jail support. State support accounts for approximately 40-50% of all county jail revenues. This percentage of support varies significantly among the 120 counties. It has been suggested that when state government support for county jails is considered in its entirety, the $10 per diem for housing state prisoners is not inappropriate.

Disscussion

Assuming that 700 state prisoners will be incarcerated in county jails over the next year, the Corrections Cabinet estimates it would cost an additional $1,277,500 to increase the per diem rate to $15 and $2,555,000 to increase the rate to $20. The Corrections Cabinet has indicated to the Subcommittee on Jails of the Interim Joint Committee on Counties and Special Districts that a $15 per diem rate would be reasonable compensation.

Several county officials have indicated that the state should reimburse the counties according to their actual per diem prisoner cost. This, of course, would mean different amounts would be paid to each county and would require a substantial amount of paperwork and state government oversight. Additionally, since the per diem costs of most county jails is higher than $15, this option would be more costly to implement.

INTER-COUNTY CONTRACTS FOR JAIL SERVICES

Prepared by Bruce Simpson

Issue

Should the General Assembly set the rates one county government may charge another county government to incarcerate its inmates?

Background

Concern has been expressed by a number of county officials that some county governments are charging unnecessarily high per diem rates for the incarceration of inmates from a county which has no jail or whose jail is overcrowded. Currently, there are no statutory restrictions on the amount a county government may charge for keeping another county's prisoners. There are twenty counties in the Commonwealth which do not have a jail and several other counties that, from time to time, have overcrowded jails and are forced to send prisoners elsewhere.

A county's ability to negotiate an equitable jail service contract depends in large part on its geographical location and the availability of other jails with which it can negotiate a contract. Counties do not always have the opportunity to "shop around" for the best deal. Some rural counties are so situated that transportation problems (i.e. travel time between the jail and court) make it impractical to negotiate with more than one county.

Discussion

An Attorney General's opinion (OAG 83-26) issued January 19, 1983, expressed the view that, in absence of any statute, the prisoner compensation to be paid by a sending county to a host county should be reasonable and decided by mutual agreement. The Attorney General suggested that certain cost factors could be used in determining what is reasonable compensation including: (1) a consideration of the original construction cost of the jail; (2) the space allocated per prisoner; (3) the cost of utilities; (4) the present cost of replacement of the jail if it had to be rebuilt; (5) the level of standards in terms of what would be considered adequate jail housing, and; (6) the operational and salary costs relating to the jailer and his deputies, including furnishing food.

The aforementioned criteria and others could, of course, be incorporated into law by the General Assembly. However, arguments have been advanced by some people in state government and at the local government level that this kind of a problem should be decided by those directly involved and that it should not be the role of the General Assembly to dictate what a given county may

charge for its jail services. It has also been suggested that the various professional associations representing county officials work out problems of this nature.

On the other hand, if the counties do not work out a satisfactory agreement among themselves, those counties which are being charged unnecessarily high rates for jail services will continue to suffer. It should be pointed out that the Corrections Cabinet has reported that this problem of a host county charging unusually high rates to a sending county is less of a problem in 1985 than it was during previous years. Even so, some counties are vulnerable.

EDUCATION

SPECIAL EDUCATION PROGRAMS

Prepared by Bonnie Brinly

Issue

Should the General Assembly revise the method of funding special education programs?

Background

Under the 1974 Consent Agreement and Public Law 94-142, Kentucky is required to identify and evaluate all children who are suspected of needing special education services. Those children identified as handicapped must be provided with an educational program and related services designed to meet their individual learning needs.

Special education programs are funded by appropriating a specified number of units in the biennial budget. The local school district applies to the Office of Education for Exceptional Children in the Department of Education for these units. In order to qualify, the district must have an approved teacher, adequate classroom space, an approved program plan, and the minimum number of children for the type of unit requested.

The 1984 Executive budget requested the same level of funding for special education as in the previous three years, 4,210 units. The General Assembly reduced the request by 100 units for the home instruction program. The balance of 4,110 units is the same number of units appropriated in 1979-80. During the same time period the child count of those identified as handicapped increased by 7,343 students, from 64,448 identified in 1979 to 71,791 in 1984. In January, 1984, the Department's Special Education Task Force recommended that an additional 250 units be requested in 1984-85 and another 250 units in 1985-86. The recommendation was based on a formula whereby the number of currently identified students in each classification of handicapping condition was divided by the median membership allowed by regulation for the classification, to determine the number of units needed for each classification. In 1984-85 the Office of Education for Exceptional Children received requests from local school districts for 4,398.4 units, with only 4,110 units available.

Due to the unavailability of special education units, many districts have more students enrolled in the classes than allowed by regulation. In an effort to provide consistency in approving local district requests for adjustments in class sizes, the Office of Education for Exceptional Children sent the local districts a letter in the fall of 1984 outlining the procedure for such requests. This procedure permits districts to increase the class size for the category of handicapping condition by the number of students equal to 40% of the minimum class size. For example, a self-contained class for educable mentally handicapped students has a minimum class size of ten and a maximum class size of twenty. Increasing the maximum by forty percent of

the minimum would allow the districts to enroll twenty-four educable mentally handicapped students in a class.

Discussion

The foundation program allots funds to local school districts for regular classroom units on the basis of the number of students in average daily attendance, while the funding for special education is not based upon the number of students needing services. The present method does not assure that a district will receive a unit, even though it may have the students which must be served. This method leads to two problems. Some districts may be less likely to identify handicapped children if they do not have the units to serve them. It also means that some children may not be served in a program most appropriate to their educational needs.

One proposal for changing the method of funding special education would be to allot these units according to the number of students qualifying for these services, much as the foundation program basic units are allocated. This would assure that a school district would receive the number of units required to serve its handicapped students and encourage it to provide students with the most appropriate program for their educational needs.

Another problem for local districts is providing related services which are required to enhance a handicapped child's ability to benefit from an educational program. Examples of related services are occupational therapy, physical therapy, speech therapy, audiology, medical services for evaluation, social work, assessment and special transportation. Currently, there are no state funds appropriated specifically for these services, though there are several sources school districts may use at their discretion. These include funds received through administrative and special instructional services units, power equalization, and from federal and local sources.

Evaluation and psychological testing play a key role in the proper identification and placement of handicapped students, yet there is no funding directly tied to a school psychologist position. Another related problem is that there is no funding for a director of special education position per se. As a result, in some districts these responsibilities are assigned to central office personnel, who may have no training or background in special education.

One solution would be to allot units for these positions according to the number of exceptional children units in the local district. Another solution would be to provide local districts with a fund based upon the number of units or the number of children served, which could then be used to help subsidize the cost of related services, training for staff and aides, or positions such as school psychologist and director of special education. A district would have the freedom to use this money to fill in the gaps in its services.

Another issue the General Assembly may wish to consider is the special education class sizes. At present with the approvable adjustments previously discussed, a physically handicapped self-contained unit may have up to 19 students, an educable mentally handicapped self-contained class may have up to

24 students and a multiple handicapped unit up to 12 students. These class sizes exceed what experts in the field of special education, as well as Kentucky regulations, consider appropriate. Handicapped students require intensive individual instruction, which cannot be provided if the teacher has too many students. If the General Assembly chooses to allot more funds for classes for handicapped students, it may want to also speak to the effects of class size on the quality of the instructional program.

TEACHERS' RETIREMENT

Prepared by Bonnie Brinly

Issue

The transfer of excess funds in the Kentucky Teachers' Retirement System (KTRS) to the General Fund.

Background

The Actuary for the KTRS in 1982 estimated that an average rate of interest return of 7.5% on investments would keep the retirement program actuarially sound.

In 1982-83, a return of 7.5% on invested funds would have produced $97,705,323. Funds invested by the system actually earned an average of 8.5%, or $111,979,463. This was $14,274,140 more in investment earnings than required to keep the system on a sound financial base.

Based on those figures, the Senate Appropriations and Revenue Committee included a provision in the 1984 budget bill that $285,000 (or 2%) of the excess earnings be transferred to the General Fund each year of the biennium. Funds were also transferred from forty-six other agencies, boards, and commissions.

Discussion

The funds in the KTRS include the member contributions, the state contribution and the income from the investments of the contributions. The funds of the KTRS by statute are to be used for the purpose of providing member benefits and for reasonable costs for administering the system.

The KTRS uses investment income to offset its unfunded liabilities, and during the 1984-86 biennium the system absorbed the increased state portion of the cost of providing health care coverage to retired members. Without the investment income, either the member contribution rate, the state contribution rate or both might have to be increased to absorb the cost of unfunded liabilities.

The KTRS and its membership are opposed to transferring its funds which are held in trust, to the general fund. Even though these transfers did not jeopardize the actuarial soundness of the system, they believe such transfers set a dangerous precedent.

Issue

A cost-of-living increase for retired teachers.

Background

Since July, 1983, retired teachers have received no cost-of-living increases above the 1% annual increase required by KRS 161.620. The 1984-86 KTRS budget request to the Governor included a 3% cost-of-living increase, but the requested increase was not included in the Executive budget submitted to the Legislature. In 1984, HB 787 originally provided a 3% increase, as well as an increase in the contribution rate to the medical fund by the active teachers and the state. At that time KTRS estimated that an amortized 3% cost-of-living increase would require an appropriation of $6,227,000 for the two years. Due to the state's bleak revenue situation, the bill was amended to eliminate the increase and permit the KTRS to pay the state's share of the increased medical contribution during the 1984-86 biennium.

The cost of a one-time 1% increase is $10 million, which if amortized over a twelve-year period would require an annual appropriation of approximately $833,000.

With the rising cost of health insurance, the retired members were also required to pay $10 per month for themselves and $25 per month for a spouse, beginning January 1, 1984. This is in addition to the state and active member contribution rate increases.

The combination of no cost-of-living increases and the payment of insurance premiums has placed a considerable hardship on the older retired teachers. These retirees earned extremely low salaries and, as a result, have low retirement allowances. In addition, they have also felt the negative effects of the high inflation rates which began in the mid-1970's and lasted through 1981.

Issue

Full retirement for twenty-seven years' service.

Background

Members of the KTRS may retire with full benefits after thirty years' service--a provision which is comparable to those of the Commonwealth's other retirement systems, excluding the state police system. Legislation passed by the 1982 General Assembly allows members to retire with twenty-seven,

twenty-eight, or twenty-nine years' service, but with reduced benefits.

The teachers' major professional organization and others have proposed reducing the required years of service from thirty to twenty-seven for retirement with full benefits.

Discussion

Proponents of the twenty-seven year provision suggest that such legislation is needed to combat teacher "burnout," a result of teacher stress, and to help attract and retain excellent teachers. Such a change is estimated to cost the state $4,877,000 and to require an increase of .51% in the active member contribution rate .

VOCATIONAL EDUCATION

Prepared by Sandra L. Deaton

Issue

Should there be programmatic and structural changes in Kentucky's system of vocational education?

Background

Kentucky's educational reform movement has not made major changes in the system of vocational education, though there have been many recommendations to do so. A strong vocational education program is a vital resource necessary to meeting the reform goals of enhancing educational and career opportunities for Kentucky citizens and contributing to Kentucky's economy.

Discussion

During the 1985 Extraordinary Session of the General Assembly, Senate Joint Resolution 7 created a Commission on Vocational/Technical Education to examine the system and develop a plan of action for its improvement. The Commission was directed to submit specific proposals to the Governor and the 1986 Regular Session of the General Assembly. The Commission will address the following areas:

(1) The governance of postsecondary vocational/technical education in Kentucky;

(2) The administration of secondary vocational education;

(3) Program plans to meet labor market needs in mid-management and technical areas;

(4) Program plans to address the low literacy level of adults in coordination with adult education and literacy programs;

(5) The curriculum to be offered in secondary vocation; and

(6) The relationship of vocational education to state manpower programs.

HIGHER EDUCATION FUNDING

Prepared by Sandra L. Deaton

Issue

Should there be changes in the higher education funding formula to allow for specific allotments for such special needs as faculty salaries and deferred maintenance costs?

Background

In 1977 the Council on Higher Education developed mission statements for each of the Commonwealth's public institutions of higher education which recognize that the universities differ in role, size and responsibility. Since that time the Council has moved toward a funding model based on a program-driven formula. The new formula has been used during the last two biennia to determine the budget request for the state appropriation for each university. The formula is based on the universities' needs and mission statements and has been helpful in assuring that each institution has received its fair share.

Though the formula is used to develop the budget request to the General Assembly based on identified program needs, it does not relate directly to the application of the appropriated dollars to specific areas. Formula funding for higher education has been successful as a method of making appropriations to higher education because the General Assembly has assurance that each university is receiving a fair share of the appropriation. However, the method is limited because the General Assembly cannot direct dollars toward priority areas. Two such areas of concern to legislators because they currently need additional funds are faculty salaries and facility maintenance that has been deferred over several years because of budget restraints.

Kentucky's faculty salaries compared with those of comparable schools, called benchmarks, are below the median of those schools. They are even farther below the median of all schools in the United States. In 1984 the Legislature placed a cap on faculty salary increases at two percent for the 1984-85 fiscal year and three percent for the 1985-86 fiscal year. The General Assembly in the 1985 Extraordinary Session removed the three percent cap from university personnel salaries, but because there was no state appropriation, raises will only be above the three percent if the universities have the financial resources.

Maintenance of buildings that has been deferred over several years is another critical area. During the last four years, budgets have been restrained and universities have used their limited funds for human resources rather than for the maintenance of facilities.

As of 1984, approximately $53 million in deferred maintenance projects had been documented on the campuses. The 1984 General Assembly appropriated $2.5 million for a deferred maintenance fund. The problem, however, continues to grow faster than the appropriations available to deal with it.

The 1986 General Assembly will be faced with the problems of low faculty salaries and deferred maintenance and will need to decide how to appropriate the needed funds, if the members choose these areas as priorities. Three possibilities are to:

- continue appropriations through the formula, which will not allow priority setting (by the General Assembly) at the universities; or

- change the formula at the risk of disturbing its delicate balance; or

- make special appropriations for priority areas while keeping the formula as it is.

HIGHER EDUCATION

Prepared by Joe Fiala

Issue

Should the Kentucky General Assembly enact legislation to strengthen the centralized, statewide coordination and governance of public universities and community colleges?

Background

In 1984, the Kentucky General Assembly passed Senate Concurrent Resolution 30, mandating a study of higher education. This study included the areas of governance, programming, duplication, administration and funding. The study arose, in part, from concerns about the rising cost of higher education despite declining enrollments. Additional concerns involved the existence of duplicate, high cost professional programs in medicine, dentistry and law, and the need for maintaining these programs based upon the state's projected manpower demands in these areas. Continued growth and expansion of professional-oriented and graduate programs at all the public four-year institutions has also contributed to the concern that greater statewide control is necessary to temper the individual growth interests of the separate institutions.

Discussion

The current system of public higher education in Kentucky is composed of eight universities and thirteen community colleges, coordinated by the Council on Higher Education. Each university has a separately appointed Board of Trustees or Regents, responsible for administration of the university. Community colleges are governed by the University of Kentucky's Board. These Boards have authority over financial management, personnel, administration, degree granting and student affairs. The Council on Higher Education, established in 1934, currently has coordinating and policy making powers which include needs planning, tuition and minimum admission requirement setting, budget review, capital construction approval, financial and education reporting, approval of new and existing degree programs and private college licensing. Concerns have arisen among the members of the General Assembly regarding how best to control the rising costs of higher education and the unnecessary duplication of programs, particularly in the fields of medicine, dentistry and law. Other states have dealt with these concerns by changing the structure and power relationships among the components of their higher education systems.

Kentucky's system is commonly characterized as having a statewide coordinating board with regulatory powers, the Council on Higher Education (CHE). That is, the CHE has statutory authority to coordinate the efforts of the individual universities and, in some areas, regulate their activities. On a continuum from highly centralized regulation of all activities to fully autonomous local control, with coordinating at the midpoint, Kentucky's CHE falls between a coordinating board and a governing board. Twenty-two states have a single state governing board or multi-institution governing boards. Nineteen states have coordinating boards with regulatory powers, Connecticut and Kentucky being the strongest. The remaining states have coordinating bodies with advisory powers only. In the last few years such states as Washington, Colorado and North Carolina have made modifications to increase the regulatory authority of their central statewide agency.

Differences between coordinating boards with regulatory powers and those with advisory powers are in the ability of the board to mandate activities in certain areas, generally programming and statewide functions or missions. Coordinating boards with regulatory powers and governing boards differ in the amount of power and also in the types of power they have. Generally, coordinating boards do not have authority over the fiscal or personnel affairs of the institutions. Governing boards have authority over the budgeting and fiscal affairs of the institutions, presidential and other personnel appointments, salary schedules, missions and planning, programming, and admission and tuition policies.

Another dimension of statewide control involves the types of institutions. The powers of statewide boards over the four-year institutions, community colleges and vocational-technical schools differ. Seven governing board states have separate boards for their community colleges and/or technical schools. Most coordinating board states include community colleges and/or technical schools under the auspices of the statewide board.

The problem for Kentucky is whether a change in the powers and authority of the statewide board is necessary in order to control the costs and growth of institutions. Greater centralized control and governance may be effective in ensuring that the development and operation of the individual institutions reflect the best interests of the state as a whole. However, greater centralized control and governance can negatively impact the institutions' ability to react quickly to changing community, educational, student and fiscal needs and may result in higher statewide administrative costs. Another alternative is to modify and expand current CHE powers to make them more explicit and enforceable. If the CHE had powers of enforcing statewide plans, developing a consolidated budget, determining institutional missions and functions, and merging or closing institutions or programs, it might better be able to control costs and duplication.

ELECTIONS

MILITARY BALLOT DELIVERY

Prepared by Linda Wood

Issue

Should absentee ballots for military personnel be mailed forty-five days prior to a primary or general election?

Background

Absentee ballots are printed when the ballot labels are printed. These labels are required by KRS 117.145 to be printed 30 days prior to a primary and 15 days prior to a general election. Many Kentuckians who work or live in other countries cannot vote because this schedule does not provide adequate time after the printing of the ballot for the ballot to make the round trip to certain locations. The Director of the Federal Voting Assistance Program, Office of the Secretary of Defense, has written Kentucky officials outlining the problem and requesting several statutory changes.

Approximately 94,700 Kentuckians who are in other countries are eligible to vote in the state. Of these, approximately 31,700 serve in the Armed Forces, 23,000 are voting age dependents accompanying these military personnel, and another 40,000 are not affiliated with the federal government. Surveys of international and U. S. military postal services indicate that 45 days are needed for absentee ballots sent through international mail or military overseas post offices to insure timely receipt of ballots by local election officials. This transit time is made necessary by the remoteness of many military personnel and other citizens, especially sailors and marines aboard ship, or those at remote tracking sites around the world, as well as missionaries or employees of American multi-national corporations in remote areas. Eight states not allowing 45 days transit time were required by federal court order to count ballots received for a specified number of days after the 1984 general election.

The Director of the Federal Voting Assistance Program also recommends that military personnel and dependents using federal post card applications to request absentee ballots for a primary automatically receive absentee ballots the remainder of the calendar year.

The Director further recommends that Kentucky follow the procedures established in five other states to provide for voting for those who are out of communication for extended periods, such as those on submarines, Peace Corps volunteers and missionaries. Those states provide that voters who are out of the country may request a blank ballot 90 days in advance of an election and write in the names of the candidates or party preferences.

STATE LOTTERY

Prepared by Linda Wood

Issue

Should the Constitution of Kentucky be amended to permit the establishment of a state lottery?

Background

Bills have been introduced during the last three sessions of the General Assembly to amend the Kentucky Constitution to empower the General Assembly to establish a state lottery. Senate Bill 125, introduced in the 1980 Session, proposed to empower the General Assembly to establish a state lottery, the net proceeds to defray current expenses of the Commonwealth. A committee substitute proposed to simply repeal Section 226, which is the section prohibiting lotteries. A second committee substitute proposed to empower the General Assembly to establish an annual lottery on the Kentucky Derby, the net proceeds to provide a one-time bonus to Vietnam veterans and subsequently to be allocated as follows: 50% to education, 25% to the transportation fund, and 25% to be divided among all city and county governments according to population. The substitute also proposed to remove the prohibition against bingo and similar lotteries operated solely by charitable organizations using their own membership. The second committee substitute passed the Senate and failed in the House by a 55-36 vote, five votes less than the three-fifths vote necessary to pass a proposed constitutional amendment.

Senate Bill 110, introduced in the 1982 Session, was similar to the second committee substitute for 1980 Senate Bill 125, except that funds were to be allocated as follows: 25% to education, 5% to supplement purses at all Kentucky thoroughbred racetracks, 20% to aid handicapped persons, 25% to fund foster care for the indigent and 25% to be divided among all city and county governments according to population. This bill was not reported out by the Senate Committee on Elections and Constitutional Amendments.

Senate Bill 116, introduced in the 1984 Session, was identical to 1982 Senate Bill 110. A committee substitute would have empowered the General Assembly to authorize a state agency to conduct sweepstakes, the net proceeds to be used for education. This committee substitute passed the Senate, was reported favorably by the House State Government committee, and recommitted to the Committee on Appropriations and Revenue.

Twenty-one states and the District of Columbia now have lotteries. Of the states bordering Kentucky, Illinois and Ohio have had lotteries since 1974, and Missouri and West Virginia are now establishing state lotteries. Ten lottery states have designated lottery revenues to the general fund, with one of those states also contributing to a local transportation assistance fund, and another also contributing to political subdivisions; five states have

designated funds to education, with one also setting aside a portion to study compulsive gambling; one state contributes exclusively to senior citizens; one designates $3 million to the arts, with the remainder to cities; and one designates half for capital construction, 40% to a conservation trust fund, and 10% to parks and recreation.

Discussion

A proposed constitutional amendment, 86 BR 56, has been prefiled to empower the General Assembly to establish an annual sweepstakes, the net proceeds to be used to support education. The sponsor has publicly stated the bill could be amended to pay a debt from a bond issue which financed a bonus to veterans of World War II and to pay a bonus to Vietnam veterans.

The president of Churchill Downs has testified before the Task Force concerning an annual sweepstakes. He stated that the Downs would expect to be paid if the state establishes a sweepstakes on the Derby. New York City's Off-Track Betting now pays Churchill Downs 5.75% on straight wagers and 7.75% on triple wagers placed with it on the Derby.

Kentucky proceeds from an annual lottery or sweepstakes cannot be estimated, since there is currently no similar operation upon which to base estimates. An average of $84.28 per capita is grossed from on-going lotteries in the lottery states. If Kentucky were to meet this average, based upon a state population of 3,667,000, the annual gross would be $309,055,000. If Kentucky were to net 40% of the gross, which is the current average in lottery states, the state would net approximately $123,622,000 annually. The later figure is increased from an earlier estimate in excess of $105,639,000 to reflect increasing state lottery revenues.

CREATION OF THE OFFICE OF AN APPOINTED SUPERINTENDENT OF PUBLIC INSTRUCTION

Prepared by Rhonda Franklin

Issue

Should the Constitution of Kentucky be amended to eliminate the elective office of Superintendent of Public Instruction and create the office of an appointive Superintendent?

Background

The Superintendent of Public Instruction is an elected state official pursuant to Section 91 of the Constitution of Kentucky. Duties of the Superintendent are prescribed by law in accordance with Section 91. Changing the method of selecting the Superintendent is not a new concept; proposed amendments to delete the Superintendent from the list of elected constitutional state officers were defeated when submitted to the voters in 1921, 1953, 1957 and 1973. Emphasis currently placed on reform of Kentucky's educational system has brought the issue of appointing, versus electing, the Superintendent to the forefront. As chief administrator of the state's school system, the Superintendent is viewed by some as a key to smooth reformation of the system.

Discussion

Proponents of removing the Superintendent from the list of elected constitutional officers express a desire to remove "politics" from the state's school system. Inherent in their argument is the fact that a political race must be run to win the office of Superintendent, and running a political race allegedly involves politicizing the state Department of Education and the state's school system. Further, the fact that several former Superintendents have sought other statewide elected offices at the end of their term as Superintendent is a basis for the argument that the Superintendent's office attracts candidates interested in a political career, rather than improvement of the state's school system.

Continuity in management of the school system is regarded as essential by proponents of an amendment. Proponents favor a term in excess of four years or a provision for reappointment. The inability to complete programs and provide long-range planning due to the restriction of a four-year term without reelection of the elected Superintendent is advanced as a serious barrier to improving education.

Opponents of appointing the Superintendent argue that such an amendment would take away the power of the people to select their leaders. Appointing a

Superintendent is not viewed as a panacea for removing "politics" from education, they argue, since the successful appointee would require the favoritism of the appointing authority, particularly if reappointment was sought, and politically based decisions would be made by the appointee. In addressing the continuity in management issue, opponents of appointment argue that amending the Constitution to permit re-election of the Superintendent would solve the problem.

Various methods of appointing the Superintendent have been proposed. One method would provide for amending Section 183 of the Constitution to require the Governor to appoint the Superintendent. Other proposed alternatives provide for constitutional creation of a State Board of Education composed of elected, appointed or a combination of elected and appointed members, with appointment of the Superintendent by the Governor or the State Board, to act as executive director for the board.

Appointment of the Superintendent by the Governor raises the question of which master the Superintendent would serve, the Governor or the State Board. Inclusion of a provision that the State Board could remove a Superintendent for cause would help insure that the gubernatorial appointee would perform the duties prescribed by the Board.

Appointment of the Superintendent by an appointed State Board raises the same question as appointment by the Governor, since gubernatorially appointed Board members could act as mere agents of the Governor. Inclusion of a prohibition of gubernatorial removal of State Board members would enhance independence of State Board members, unless they were subject to reappointment and sought to remain in the Governor's favor by making decisions influenced by the Governor with the prospect of reappointment.

Another alternative would involve gubernatorial or State Board appointment of the Superintendent, subject to approval by the Senate or the General Assembly. Since alteration of the current method of selecting a Superintendent entails amending the Constitution, legislative approval of an executive appointee would not run afoul of the state Constitution. Section 28 of the Kentucky Constitution provides:

> No person or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, <u>except in the instances herein expressly directed or permitted.</u> (Emphasis added)

Therefore, inclusion of legislative approval of the appointee would be a valid exception, contained within the Constitution, to the separation of powers doctrine.

Further details of alternative methods for appointing the Superintendent include prescription of qualifications and duties of the appointee to insure adequate leadership and remove political overtones. One proposed method includes the constitutionally delineated qualifications of a doctorate in education, with additional qualifications to be prescribed by the State Board or by statute. However, some proponents of appointing a Superintendent argue that management skills are the key qualification for the job, not an

impressive educational credential. A second alternative leaves precription of duties and qualifications to the State Board or the General Assembly. Finally, a third alternative is to leave delineation of all duties and qualifications to the General Assembly.

CAMPAIGN FINANCE REGULATION

Prepared by Rhonda Franklin

Issue

Should campaign finance reporting thresholds be established to alleviate the burden on candidates who receive and spend small sums, and should the enforcement powers of the Registry of Election Finance be increased to insure timely and accurate reporting?

Background

The current Constitution of Kentucky, adopted in 1891, recognizes the principle that political campaigns should be subject to regulation of finances (Constitution of Kentucky, Sections 150 and 151). Various statutes through the years have dealt with bribery and corruption involving campaign finances, but it was not until 1966, when the Registry of Election Finance was created, that an institutional framework was provided to administer the laws. In 1974, campaign finance laws were recodified in Chapter 121, part of a national wave to strengthen disclosure requirements in the wake of the Federal Election Campaign Act of 1971 and the creation of the Federal Election Commission in 1974, which followed documentation of campaign abuses in the 1972 Presidential elections.

The provisions of KRS Chapter 121, entitled "Campaign Finance Regulation," were designed to:

- Limit the disproportionate influence of wealthy contributors by limiting contribution amounts;
- Require public disclosure of campaign finances, through reports to the Registry, to inform the electorate and deter abuse;
- Prevent evasion of disclosure provisions; and
- Prohibit corporate contributions to candidates

Under current law all candidates for public office, except those seeking federal office, county and local district offices of less than countywide constituency and offices in cities of the third through sixth clases, are required to make reports of campaign contributions and expenditures to the Registry of Election Finance. There is no threshold on the dollar amount received or expended; therefore, candidates receiving $1.00 and candidates receiving $1,000,000 are subject to the same reporting requirements. The result of the current law was Registry receipt of three reports from 3,292 candidates for the 1985 primary, or 9,876 reports.

Discussion

Requiring reports from all candidates, regardless of the amount received or expended, is attacked by opponents as a burden on the candidates who receive small sums and on the Registry of Election Finance. Opponents further contend that the spirit and intent of campaign finance regulation would be better fulfilled if dollar thresholds were established, leaving the Registry free to look at reports involving large dollar amounts.

Many candidates from across the state, particularly for county offices, complain that the time and expense involved in filing financial reports is not necessary, because contributions they receive are minor. The Registry is concerned with the backlog of audits that result from the volume of reports required to be filed. As of April 1, 1985, thirty-six audits for the 1983 election campaign were incomplete, due to the volume of reports filed and the audit time required.

The Task Force on Elections and Constitutional Amendments has reviewed the reporting problems and discussed the possibility of establishing a reporting threshold for candidates receiving and expending more than $1000 in any campaign. It has been suggested that establishing a threshold for reporting would eliminate the burden on candidates and the Registry, while still fulfilling the purpose of campaign finance regulation.

A second recommendation on reporting requirements reviewed by the Task Force would increase the dollar amount from $100 to $200 as a threshold for reporting the contributor's name, address and occupation. The value of the dollar as a result of inflation is argued as the basis for increasing the reporting threshold.

In conjunction with establishing a threshold for reporting campaign contributions, increasing the Registry's enforcement powers to insure adequate and timely reporting has been discussed. Proponents of increasing enforcement powers view campaign finance regulations as worthless if the Registry does not have the power to insure compliance. Opponents argue that filing reports for public perusal is sufficient to encourage compliance with the law. Proponents disagree, indicating that leaving dissemination to the public by the press places too much responsibility with a private concern not required to make the information known, and that dissemination, if made at all, is not timely enough to keep a candidate out of office if he has failed to make adequate or timely reports. Opponents counter that the decision should be left to the electorate.

DECREASE IN NUMBER OF ELECTIONS

Prepared by Linda Wood

Issue

Should the Constitution of Kentucky be amended to permit the elimination of elections every second or fourth year?

Background

The Kentucky Constitution provides in Section 148 that only one election a year is to be held except as otherwise provided in the Constitution. The primary is considered to be a nomination process rather than an election. Currently an election is held every year, resulting in enormous cost to both the state and the counties.

When the Constitution was being drafted in 1890-91, federal legislation was pending which would have given the federal government supervision over elections at which a federal officer was to be elected, which were those held in every even-numbered year. The delegates inserted Sections 148 and 167 into the Constitution to prohibit the election of certain local officials in even-numbered years, thus avoiding the possibility of federal supervision. Those local officials who cannot be elected in even-numbered years are all officials of a city, county, or a subdivision of a city or county; an exception is made for the election of members of city legislative bodies.

Elections for state officers are conducted in those odd-numbered years in which local elections are not held; certain other officers are elected in odd-numbered years for six-or eight-year terms; and elections for federal officers, state school board members, Supreme Court justices and District judges are held in even-numbered years.

Recent election data from the State Board of Elections indicates that the combined cost of a primary and a general election to the state and counties is in excess of $3.4 million. The cost to the counties is approximately $2,857,400; state costs are in excess of $548,000.

Proposed constitutional amendments were introduced during both the 1982 and the 1984 General Assemblies to eliminate elections every fourth year. These bills proposed to provide for a one-time, one-year extension of the terms of those officials listed underneath the horizontal line in the following table.

	'86	'87	'88	'89	'90	'91	'92	'93	'94	'95	'96	'97	'98	'99
President			X				X				X			
U.S. Senate	X				X		X				X			
U.S. House	X		X		X		X		X		X		X	
State Officers		X				X				X				X
General Assembly	X		X		X		X		X		X		X	
Railroad Commissioners		X				X				X				X
School Board	X		X		X		X		X		X		X	
Supreme Court Justices	X		X		X		X		X		X		X	
Court of Appeals Judges						X								X
Circuit Court Judges						X								X
Commonwealth's Attorneys		X						X						X
Circuit Clerks		X						X						X
County Officers				X				X				X		
City Officers				X				X				X		
District Judges				X				X				X		

MUNICIPAL FILING DATES

Prepared by Linda Wood

Issue

Should municipal independent candidates be permitted to file prior to the general election, rather than prior to the primary, in municipalities conducting partisan elections?

Background

KRS 118.105(4) has for many years exempted candidates to selected municipal offices in certain classifications of municipalities from participation in the primary process. Candidates for these offices have been, and are, required to file prior to the general election, while candidates to other offices in the same municipality which are permitted to participate in a primary have had the option of either filing prior to the primary to run as a party candidate or filing prior to the general election as an independent candidate. Thus, there have been two filing dates in some municipalities, with some candidates having the option of filing prior to the general election rather than prior to the primary.

Legislation which was passed in 1984 requires independent candidates to offices which are not prohibited from participation in a primary to file prior to the primary. Thus, two different filing dates remain in some municipalities, but the option is removed for independent candidates to wait and file prior to the general election.

The new filing schedule has been widely criticized as inconvenient to some candidates, particularly in smaller municipalities. Candidates in these municipalities have frequently chosen to not participate in a primary as party candidates, but rather have waited and filed prior to the general election as independent candidates.

MAYORAL REELECTION

Prepared by Linda Wood

Issue

Should mayors of cities of the first and second class be eligible for reelection?

Background

Section 160 of the Kentucky Constitution prohibits a mayor of a city of the first or second class from serving two successive terms. This subject has been targeted for discussion by the Subcommittee on Constitutional Amendments during the current interim.

A proposed constitutional amendment was introduced during the 1984 General Assembly to permit mayors of cities of the first and second classes to run for reelection for a maximum of three successive terms. Provisions of this proposed amendment would not have been applicable to the present office-holders. The suggestion has been made that some cities currently classified as cities of the third class may be reluctant to be reclassified as cities of the second class because of the restriction on mayoral reelection.

PRESIDENTIAL PREFERENCE PRIMARY

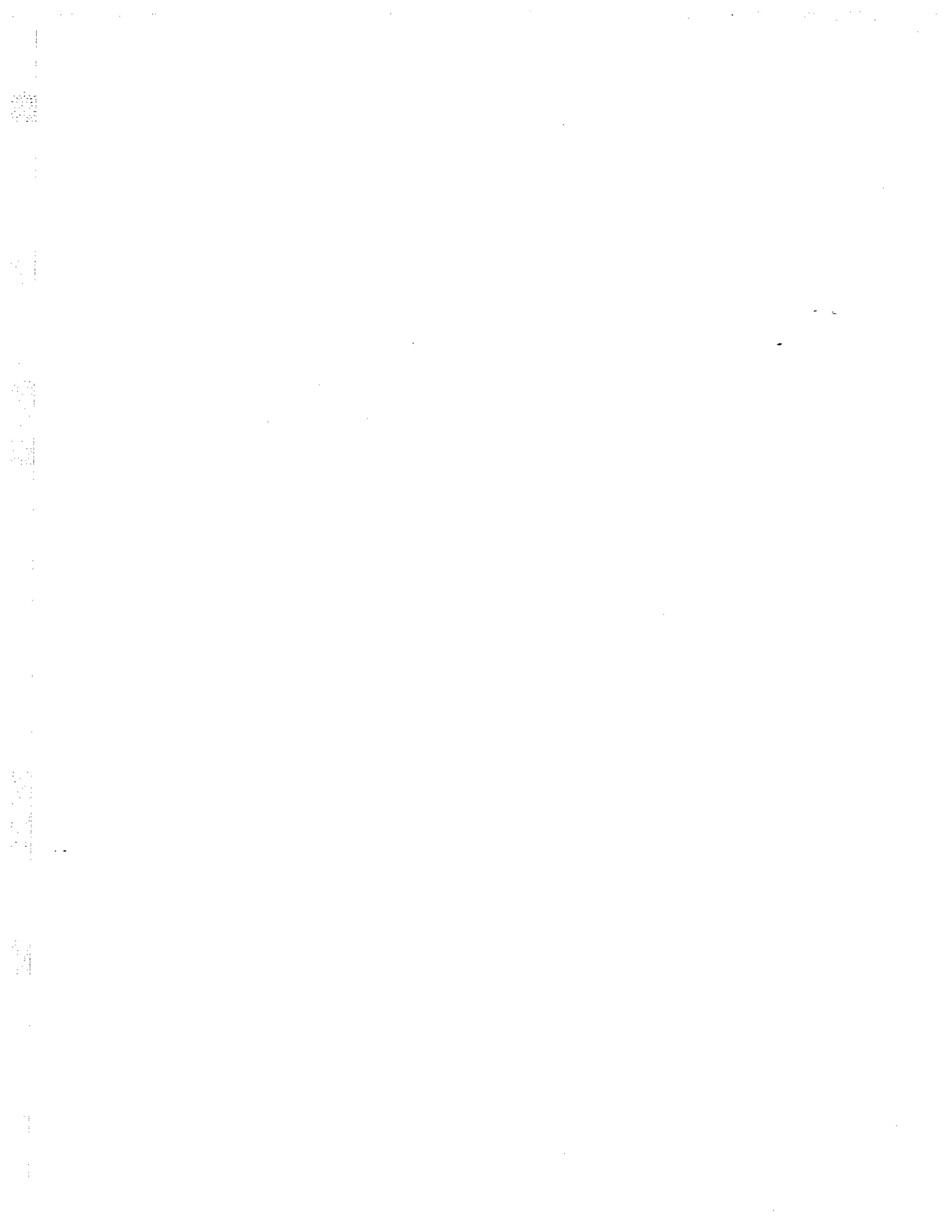
Prepared by Linda Wood

Issue

Should the presidential preference primary be reestablished?

Background

Legislation was passed in 1972 to establish a presidential preference primary, to become effective with the 1976 election. Presidential preference primaries were held in Kentucky in 1976 and 1980, before the legislation was repealed in 1982. Party caucuses were held in the state prior to the 1984 presidential election as a substitute for the presidential preference primary being held and names being placed on the ballot.



ENERGY

ELECTION OF PUBLIC SERVICE COMMISSION MEMBERS

Prepared by Linda Kubala

Issue

Should Public Service Commissioners be elected or appointed?

Background

The Public Service Commission regulates the rates and services of all non-municipal public utilities in the Commonwealth. Decisions of the Commission, particularly those which set rates to be charged by utilities, affect almost everyone and are highly visible and usually controversial. Debate over the method of selecting commissioners reflects public concern that these officials should be fair and competent and responsive to the public but not unduly influenced by any one group.

Commissioners in Kentucky are appointed by the Governor, as they are in 37 states. Commissioners are selected by the legislature in two states and are elected in eleven.

Several bills were introduced in 1982 and 1984 to elect, rather than appoint, members of the Kentucky Public Service Commission. At least 12 other states considered similar legislation last year, and there have been several public initiatives and referenda on this subject since 1981. While none of these efforts have been successful to date, they reverse a fifty-year trend away from elected commissions.

Very briefly, those who support an elected Public Service Commission argue that elected officials are more responsive to the wishes of the people, since they must face the voters periodically. Supporters of an appointed commission stress the need for commissioners with considerable expertise in utility matters, and argue that appointed commissioners, who do not have to conduct and finance campaigns, are less vulnerable to the short-term interests of special groups.

Several studies have looked at characteristics of elected and appointed commissions to see if the method of commissioner selection is associated with differences in performance. Results have been inconclusive. Reports that average residential electricity rates are significantly lower in the elected commission states raised great interest, and may be one reason for renewed interest in this subject. Later studies have shown that regional factors, such as the availability and cost of fuel, and prevalence of public power, explain these differences, and that, if anything, states with elected commissions have rates slightly, but insignificantly, higher than their neighbors. Similarly, elected commissions have much smaller budgets and staffs, on average, than appointed commissions; yet their staffs are slightly

larger than those of appointed commissions when compared to the state population. Minor differences in utility bond ratings (slightly higher under appointed commissions) allowed rate of return (higher for appointed commissions) or actual earned rate of returns (higher for elected commissions) also appear to have little to do with the method of selecting commissioners. The eleven states with elected commissions (Tennessee, Alabama, Georgia, Mississippi, Louisiana, Oklahoma, Nebraska, North and South Dakota, Montana and Arizona) are concentrated in the Southeast and the Great Plains and, as a group, differ from the national average in many ways other than in their method of selecting those who regulate utilities.

The Illinois Department of Energy and Natural Resources conducted a comprehensive survey of Public Service Commission characteristics in 1983 ("Commissioner Selection and Qualification, Presented to Sunset Task Force on Utility Regulatory Reform, April 1983"). While the study found no major differences in performances, it did show considerable differences in the characteristics of the commissioners themselves.

In 1981, commissioners on appointed commissions were considerably more likely to have an advanced degree than elected commissioners. Only two of the elected commissions, but 33 of the 39 appointed commissions, had at least one lawyer member. Sixty-nine percent of the appointed commissions, but only 30 percent of the elected commissions, had at least one woman commissioner.

Discussion

Most of the bills which have proposed to elect Public Service Commissioners in Kentucky have envisioned a seven-member commission, with one member elected from each of the state's Congressional districts. The Commission presently has three members, so the addition of four commissioners would entail additional expenditures for commissioners' salaries and possibly for support personnel. As an alternative, Kentucky could elect three commissioners on a statewide basis.

Continuity appears to be an important consideration in utility regulation. In all but ten states, commissioners serve terms longer than the four years imposed by Kentucky's constitution. If commissioners are to be elected, they should serve four-year terms, and be allowed to succeed themselves. Terms also could be staggered to assure continuity of membership.

ENERGY ASSISTANCE FOR LOW-INCOME HOUSEHOLDS

Prepared by Mary Lynn Collins

Issue

Should the General Assembly change the way in which Kentucky now addresses the home energy needs of low-income households?

Background

All consumers were faced with the dramatic rise in energy costs that began in the seventies, but low-income households were particularly hard-hit. Those on fixed or limited incomes saw increasingly larger proportions of their income being committed to energy. To compound the problem, many low-income households lacked the resources to reduce energy bills through weatherization or relocating to more energy-efficient housing. The burden for the poor is still there, even though prices have, for the most part, leveled out. The National Consumer Law Center, a Washington-based organization dealing with energy issues affecting the poor, estimates that in 1984 the average low-income Kentuckian spent $924 for home energy. Indicative of the problem, the state's regulated utilities report over $9 million in uncollectables - part of which is due to the inability of low-income households to meet their energy obligations.

Kentucky, like many other states, has no state funds committed to energy assistance for the poor. There is, however, a mix of federal and private funds available to help low-income Kentuckians pay their energy bills. The largest single source for direct assistance, by far, is the federal block grant, the Low-Income Home Energy Assistance Program (LIHEAP), administered by the Department for Social Insurance. Over $19.3 million was distributed under the 1985 LIHEAP program to low-income households to help pay energy bills. In addition, the state's twenty-three community action agencies have funding from the Community Services Block Grant which may be used to provide blankets, heaters, and in some cases, pay energy bills of needy families. Most communities also have local sources, such as churches and civic organizations, to deal with a household energy crisis. In the last two years a number of the state's utilities have either initiated or participated in special energy funds.

Customers of regulated utilities have some additional protection under the Public Service Commission's heating season regulations. While a utility may disconnect a household for not paying its utility bills, certain procedures must be followed. Also, there are provisions enabling a low-income household to be reconnected by paying only a portion of the outstanding bill.

Helping a low-income household pay this year's utility bills will do nothing to help pay next year's bills. However, weatherizing the homes of low-income people will. Kentucky has several programs available which provide weatherization for low-income households. The Department for Employment Services administers the largest of these programs through federal dollars

from the U.S. Department of Energy and from a transfer of LIHEAP monies. Over $8 million was available in Fiscal Year 1985 for weatherizing homes of those at or below 125% of the poverty guideline. Up to $1,500 is spent to weatherize each home under the program.

In addition, there are weatherization grants available from the Kentucky Energy Cabinet, the Kentucky Housing Corporation, the Community Development Block Grant, and the Farmers Home Administration. There are several local projects in the state which use volunteers to provide the poor with basic, low-cost weatherization measures.

Discussion

Despite the programs and regulations in place, there is the feeling among many of those affiliated with these programs that the demand for energy assistance and weatherization far exceeds current resources. Historically, the largest assistance program, LIHEAP, has only been able to assist 30 to 50 percent of its eligible population. The Interim Joint Committee on Energy formed the Subcommittee on Energy Services in the summer of 1985 to look at the problem and to consider alternatives in how the energy problems of the poor are addressed.

Kentucky is not alone in its search for a way to better meet the energy needs of the poor. Many states have found the direct assistance from the federal government inadequate. Nine states have committed funds of their own for assistance programs. Most states, however, because of their monetary difficulties, are looking for less expensive alternatives.

The newest approach to the problem being considered by the states is a guaranteed service plan, also called a percent of income plan. Guaranteed service plans are based on the concept that people who truly cannot afford utility service should not be threatened with service cutoff as long as they do manage to pay an equitable share of their income on energy bills.

At least seven states have either proposed or adopted a guaranteed service plan. What these plans have in common is a requirement that qualifying low-income households pay - instead of their actual bill - a percentage of the household income (from 3% to 15%, depending on the state). Some of these plans also have built into them incentives for the participating households to conserve energy.

Customers who do participate in a guaranteed service plan usually bring with them arrearages. In many cases, particularly during the winter, the percent of income they pay does not cover their entire bill and the customer builds up new arrearages under the plan. The guaranteed service plans of the different states address arrearages in different ways. There is a basic assumption that some federal or private energy assistance money will be available and can be applied to the customer's account. Some plans then allow the utility to write off the rest as uncollectables; others require the arrearages to remain the responsibility of the customer. At least one proposed plan calls for an additional payment of 2% of income to be applied to any arrearages.

These plans are experimental. There is a lot of uncertainty about the costs. In Ohio, where one of the first guaranteed service plans was implemented, there has been a significant decrease in cutoffs, but some of the participating utilities report high arrearages. If the General Assembly should favor this concept, a pilot project might be the best way to begin implementation of a guaranteed service plan.

Guaranteed service plans, it should be noted, do not address the problems of those households who heat with a source other than a utility. In Kentucky, there are a number of households which use wood, coal, or fuel oil for heat. Over 40% of LIHEAP recipients do not use a utility service for heat.

The General Assembly may, instead, consider how to better channel the resources the state does have. Coordination, for example, between the energy assistance program and the weatherization programs administered by the state could perhaps be strengthened. A conservation education program could be developed as part of the LIHEAP program.

A number of states are moving to consolidate their programs. The state of Michigan has even developed a system whereby welfare clients voluntarily allow the state to vendor a portion of their monthly welfare check to pay their utility company directly. There is currently a lot of interest in a one-stop shop where applicants for direct energy assistance and weatherization could receive information on all available programs and make applications.

Making significant changes in the way this state addresses home energy needs of the poor could prove to be a difficult task, requiring the cooperation and knowledge of those most involved with energy assistance on a day-to-day basis. The General Assembly, in the end, could opt to direct the establishment of a task force made up of utility representatives, social agencies, the Public Service Commission, advocacy groups, and legislators to develop a comprehensive statewide approach to low-income energy assistance and conservation.

STATEWIDE ELECTRIC PLANNING

Prepared by Linda Kubala

Issue

Should Kentucky increase its involvement in electrical energy planning?

Background

Large new power plants are extraordinarily expensive to build. While nuclear plants have received more publicity, a large coal-fired plant, with required pollution control facilities, easily can cost more than $1 billion. Long construction times and high interest rates compound the cost. In earlier decades, completion of a new, more efficient, generating plant often lowered customer rates. Today, rates rise, often dramatically, as customers begin to pay for the new facility.

With the benefit of hindsight, it is now clear that utilities generally constructed or started too many new plants during the 1970's and early 1980's, a period of very slow demand growth. Again, the plight of nuclear projects has received the most national attention, while new capacity in Kentucky has been coal-fired. Yet all but one of Kentucky's major utilities has postponed or cancelled some planned construction during the past two years, and we have more capacity than is needed to meet current needs.

The decade of the 70's, with its oil and natural gas shortages, recessions, emphasis on conservation, development of alternative energies, and tough new pollution standards, was a difficult time for utility forecasters. If the strong demand growth of 1983-84 continues through this decade, today's "excessive capacity" could be absorbed quickly. Forecasting future needs now requires considerably more than an extrapolation of past trends.

Critics of proposed new plants have argued for years before the Public Service Commission that utility growth forecasts are too optimistic. They also argue that new plant construction by one company is an expensive way to meet additional needs, and that utilities have chosen this option without seriously investigating alternatives. Alternatives may include investments in load management or conservation which, by reducing current usage, make "new" power available; power purchase agreements with other utilities to better utilize existing capacity; power pooling, especially between utilities with different peaking requirements; and steps to encourage cogeneration by firms within the service area, adding capacity in small increments.

Seven companies supply most of the power used by Kentuckians. These companies are interconnected with one another and with systems outside Kentucky. They coordinate operations in a variety of ways, yet each works primarily to meet the needs of its own service area. There may be cost saving benefits to greater statewide or regional coordination.

Discussion

The term "statewide planning" has come to refer to a range of activities to oversee, coordinate, or direct facility planning of individual utilities. Kentucky already performs several of these statewide planning functions. The Public Service Commission must approve all major construction by issuing a Certificate of Convenience and Necessity, under KRS 278.020, and a Certificate of Environmental Compatibility, under KRS 278.025. Proceedings in certificate hearings typically consider alternative forecasts and a variety of alternatives to the proposed construction. The commission also has established guidelines for utility purchase of power from cogenerators or small power producers under the Public Utility Regulatory Policy Act of 1978 (PURPA).

The Public Service Commission completed a detailed assessment of power planning during 1983 and 1984, in conjunction with a consultant, Energy Systems Research Group, and the six major electric companies under its jurisdiction. Summary recommendations from this study were as follows:

- Utilities should move toward "state of the art" forecasting techniques and data bases, to improve the accuracy of their future demand predictions;

- Each utility should submit a formal system plan for Commission review, updated annually. The plan should encompass load forecasts and plans for meeting demand in an optimal manner, taking various alternatives into account. The Commission should review each plan biennially.

- Utilities should make greater use of conservation and load management options to allow further deferral of new generating capacity.

- Several of the utilities should move toward centrally dispatched power pooling or other power sharing. Combined with deferral of planned construction, this could reduce overall costs.

The study also recommended that specific construction plans be deferred or cancelled, which in part, has been done.

1984 HB 1014 would have required the Public Service Commission to conduct a comprehensive planning effort every two years and make reports to the Governor. A prefiled bill, BR 2, contains similar provisions, and would require the Commission to make its own forecasts of short- and long-term statewide demand for electricity.

UTILITY CONSTRUCTION WORK IN PROGRESS

Prepared by Mary Lynn Collins

Issue

Should the General Assembly limit the use of Utility Construction Work in Progress accounts for rate-making purposes?

Background

Large construction projects embarked on by utilities, such as the building of a power plant, can take a number of years to complete. How the costs of borrowing the money for the construction are treated by regulatory commissions has become a hotly debated issue. A regulatory agency may not allow the utility to charge its customers for the money borrowed for construction until the project is in service. Or the regulatory agency may allow the utility to include in its rate base the cost of borrowing the money for the project - even though the project is not completed. The accounting term for this latter treatment of costs is Construction Work in Progress (CWIP). By allowing CWIP in the rate base, the utility will earn a return on the construction costs immediately, rather than having to wait until the project is completed.

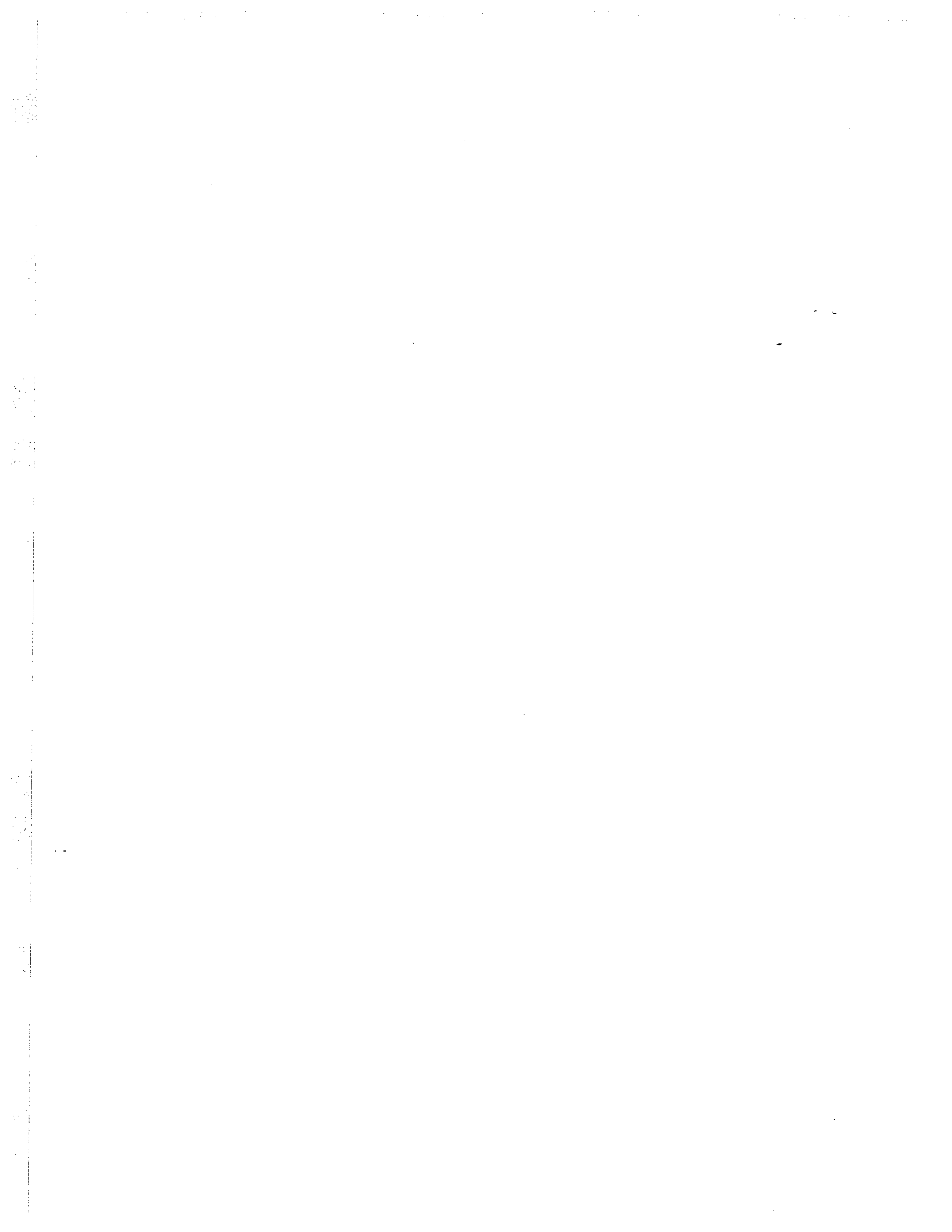
Proponents for using CWIP point out that CWIP does cushion rate shock - by gradually adding into the rate base some of the construction costs over a period of years, as opposed to keeping all costs associated with construction out of the rate base until the plant is "used and useful." An argument is made that even though customers will initially pay more on their monthly bill under CWIP, they will actually pay less in the long run.

On the other hand, CWIP opponents argue that CWIP shifts the risks of building new power plants from the stockholders to the ratepayers, reducing the incentive to tightly manage construction. In a day when there have been a number of power plant projects cancelled, it has been questioned whether it is fair to ask today's ratepayer to pay for projects from which the ratepayer may never get the benefits.

State legislatures seem to be moving toward specific exclusions of CWIP. At least seven states now prohibit CWIP in the rate base. In those states where the issue has been left to the discretion of the regulatory commissions, only sixteen commissions are commonly allowing some cash return on CWIP.

Kentucky statutes concerning rate setting are broad and only set out general principles. CWIP is not addressed specifically. It has therefore fallen to the state Public Service Commission, which is empowered by statute to set rates and oversee all activities undertaken by the regulated utilities, to decide when a utility may or may not include CWIP in the rate base. Currently, two of the state's largest electric utilities are permitted to

include CWIP-related charges in their rates. The General Assembly may decide to take a more direct role in utility rate-setting, either by prohibiting CWIP charges or by defining in the statutes under what conditions CWIP will be allowed.



HEALTH AND WELFARE

CONTROLLING EXPENDITURES FOR LONG-TERM CARE

Prepared by Carol Scheele

Issue

Should the Kentucky General Assembly institute controls on the further expansion of the nursing home industry in Kentucky?

Background

There has been increasing concern about the growth in the number of long-term care beds in Kentucky, due primarily to the increased expenditures for long-term care in the Kentucky Medical Assistance Program (Medicaid). Those expenditures have increased from $103.3 million in FY 1979 to $199.3 million in FY 1985 for general intermediate care facilities (ICF), intermediate care facilities for the mentally retarded (ICF-MR) and skilled nursing facilities (SNF). Medicaid does not reimburse for another category of nursing home care, called personal care. The Medicaid budget comprises 32.8% of the budget of the Cabinet for Human Resources and has been one of the fastest growing executive budget items since its inception in 1966.

Medicaid expenditures are funded by 70% federal/30% state dollars; thus the current state share of FY 1985 Medicaid long-term care expenditures is about $60 million. The $199.3 million expended for long term care services comprises 36.4% of FY 1985 Medicaid expenditures. These dollars are expended for fewer than 5% of the total number of Medicaid recipients.

There are currently 30,638 licensed long-term care beds in Kentucky, including 5,441 skilled nursing beds, 16,121 ICF beds, 1,203 ICF-MR beds and 7,873 personal care beds . Nearly 52% of SNF beds, 80% of ICF beds, and 97% of ICF-MR beds are filled with Medicaid patients, so the state's interest in controlling the number of available beds is substantial. In pursuance of that goal, a moratorium on the approval of new beds by the Kentucky Health Facilities and Health Services Certificate of Need and Licensure Board has been in place, with only a few gaps in time, since 1981. The Governor recently extended the moratorium through December 1, 1985, in Executive Order 85-441. Nevertheless, the Board approved an additional 1,000 new beds in FY 1985, and currently has an additional 3,000 beds proposed for its consideration. Each additional 100 beds approved by the Board will cost the Medicaid program an additional $1.1 million in 1985 dollars, and greater expenditures in the future as costs increase with inflation.

Compounding the dilemma is the fact that occupancy rates of Kentucky's nursing homes are extremely high, 92% for ICF beds and 97% for SNF beds. Thus there is considerable controversy regarding whether additional beds are needed. The State Health Coordinating Council has estimated that 2,118 SNF beds and 14,574 ICF beds are actually needed in Kentucky, given the age and functional abilities of the population. Thus, by these estimates Kentucky has

3,323 excess SNF beds and 1,547 excess ICF beds. Only a few area development districts show a need for more beds, and in these districts the total need for more beds is less than 100 additional beds statewide. Nationwide, Kentucky ranks 25th in the number of long-term care beds per 1,000 persons aged 65 and over, with 66 beds per 1,000 in 1985. In order to maintain this ratio, Kentucky will have to add 4,758 beds by 1990, at an estimated cost of $52.3 million to the Medicaid program.

Some nursing home providers have said that the level of illness of long-term care patients has increased, due to a new hospital payment system for Medicare recipients. This statement has been contradicted, however, by the Kentucky Peer Review Organization (KPRO), which has shown that persons in skilled and intermediate care have on average no more "daily living dependencies" in 1984 than they had in 1979.

One comment frequently made about the high demand for long-term care beds has been that there is a lack of available alternatives to allow persons requiring long-term care services to remain in their homes. Recently the availability of these alternatives has expanded greatly, with the introduction of the Home Care Program and the expansion of the home health industry. The Home Care Program, created by the 1982 General Assembly, served about 7,200 clients in their homes in 1984, at a cost of $6.8 million. Many of the Home Care Program clients might otherwise be institutionalized. In addition, the Bluegrass ADD Waiver Project, under the Medicaid Program, served about 300 clients with moderate to extremely heavy care needs, at a cost of about $3800 per year per recipient. The waiver program provides support services not normally reimbursed by Medicaid, as well as the usual Medicaid benefits.

The home health industry has expanded greatly in the last two years, adding 93 new or expanded agencies in Kentucky since 1984. Many of these agencies serve Medicaid recipients, although home health services still comprise less than 2% of total Medicaid expenditures.

Discussion

The main issue surrounding the need for controls on the future expansion of the nursing home industry in Kentucky is whether Kentucky will have enough beds to accommodate the needs of the elderly population.

Planners have determined that there is a sufficient number of existing beds to serve the growing elderly population through at least 1990. Despite the presence of numerous "excess" beds, the existing beds are nearly full. How can these two facts be reconciled? The only reasonable explanation is that there are people in the existing beds who could be served in their homes. KPRO has estimated that 25% of persons in intermediate care beds could be served at home if adequate alternative services were made available. Once a person is institutionalized, he or she very rarely returns home, resulting in a long-term commitment of Medicaid dollars for that individual. This is true even when the individual is initially a private pay patient, since few people can afford to continue paying the high costs of institutionalization and eventually "spend down," thereby becoming eligible for Medicaid.

Some alternatives for remediating the problem of high Medicaid costs for long-term care services are as follows:

1. Enact legislation mandating a cap on the approval of all new long-term care beds or conversions of beds to the ICF or SNF level of care.

2. Prohibit transfer or eviction of residents due to changes from Medicare or private insurance to Medicaid as their source of payment, and prohibit discrimination against the admission of patients due to payment status.

3. Expand the Community-Based Services Waiver under the Medicaid Program now operating in the Bluegrass ADD to fully fund support services designed to keep people in their homes as long as possible.

4. Increase funding for the Home Care Program, which is also designed to keep people out of institutional placement.

5. Enact legislation to implement a mandatory pre-admission screening program for all persons entering long-term care facilities, including a referral mechanism to home care services where appropriate.

6. Investigate alternative methods of reimbursing long-term care facilities, including patient-based methods being tried in other states to insure fair payment, remove the incentive to admit less seriously ill patients, and reduce the incentive to build additional beds.

7. Institute a state tax credit for families desiring to care for their family members in their homes.

8. Require the Cabinet for Human Resources to actively assist and foster the development of organizations desiring to provide such services as chore assistance, respite services, homemaker services and other support services in their communities.
9. Enact legislation requiring health insurance companies to offer long term care insurance.

HEALTH CARE DATA CLEARINGHOUSE

Prepared by Carol Scheele

Issue

Should the Kentucky General Assembly establish a health care data clearinghouse?

Background

Data on health care costs and expenditures, reimbursement for health care services, the health insurance industry and health care utilization has been generally unavailable to legislators, government officials, consumers and employers (purchasers) of health care services in Kentucky. As a result, policymakers attempting to make key decisions have been forced to rely on estimates or partial data which do not provide an adequate basis for evaluating possible outcomes of policy decisions. In addition, decisions regarding such issues as the approval of capital expenditures, health insurance regulation, coverage of services under the Kentucky Medical Assistance Program and state financing for indigent care are often made without knowledge of their impact on other programs and services. The result is conflicting policy decisions, disharmony among the various programs and services and a lack of a uniform, coherent health care policy in the state.

Examples of important areas where reliable health care data is lacking include the following:

1. Data on the total amount of health care expenditures in Kentucky by service area (such as hospitals, nursing homes, or physicians);

2. Data on prices for hospitals, nursing homes, or physicians and other services;

3. Data on the utilization of health care services by diagnosis for each payor group (including coverage under Blue Cross/Blue Shield, Medicare, and Medicaid);

4. Data on capital expenditures in the health care industry and the effects of capital expenditures on operational costs;

5. Data on the number and characteristics of subscribers under various health insurance plans, and information on premiums and coverage under the various plans;

6. Data on physician practice patterns, such as office visits, specialty referrals, hospital utilization and drug profiles;

7. Data on the amount of charity care and bad debts of hospitals, using uniform definitions of these terms;

8. Data on expenditures in the Medicaid program by diagnosis, and on hospital and drug utilization of Medicaid recipients;

9. Data on enrollment, premiums, and coverage under health maintenance organizations and preferred provider organizations;

10. Data on the number and characteristics of the uninsured population in Kentucky; and

11. Data on the Medicare program in Kentucky, including number of enrollees, utilization of services and extent of supplemental Medicare coverage.

Discussion

A health data clearinghouse would employ health policy analysts and data specialists who would gather and analyze data to be freely provided to legislators, the news media, state and local government officials, health care providers and consumers. Routine data reports in such areas as health care expenditures, beds and capital expenditures approved by the Kentucky Health Facilities and Health Services Certificate of Need and Licensure Board, numbers of operational hospital and nursing home beds and occupancy rates for health facilities, health status indicators, Medicaid and Medicare expenditures and the health maintenance organization development would be made available.

The clearinghouse would pull together a number of data systems currently in existence in several agencies and departments of state government. The clearinghouse could be administratively attached to the Cabinet for Human Resources, so long as free access and distribution of the data was assured. A data users technical advisory committee might be established to facilitate the gathering of the data and to make recommendations for further health data system development.

Regular publication of reports and handbooks for consumers, businesses and providers would assist in efforts to promote competition in the health care marketplace. An "inquiry" or data request function would assist in answering special requests. A policy would have to be developed regarding fees for such requests and for the various publications. In any event, it would be important to set fees at levels which would not inhibit the free flow of data and information.

ORGAN TRANSPLANTS

Prepared by Karen Shrock-Jones

Issue

Should Kentucky enact legislation to increase the availability of donor organs for transplantation?

Background

In 1962, the first transplantation of a human kidney was accomplished in Boston. In 1968, Dr. Christian Barnard successfully transplanted a human heart. With these transplantations, a new era in medical technology began. However, the success of these early attempts was limited because of problems with organ rejection. When the anti-rejection drug, cyclosporin A, was approved for use by organ transplant patients in the early 1980's, transplantation as a "therapeutic treatment" alternative, as opposed to an "experimental" alternative, became feasible. The number of successful transplants increased. Today doctors across the nation are successfully transplanting kidneys, hearts, lungs, liver, bone, corneas, and skin. Many such operations are performed in Kentucky.

In the early 1980's, Congress began to investigate ways to promote the procurement and transportation of human organs. This investigation culminated in the passage of P.L. 98-507, the National Organ Transplant Act, which creates a Task Force on Organ Transplantation to look at long-range national problems and to make recommendations. In addition, the Act prohibits the purchase of organs; authorizes the United States Department of Health and Human Services to make grants for the planning of organ procurement organizations; establishes a national organ computer matching system; and establishes a scientific registry of the recipient of transplants.

Although this Act addresses many of the problems at the national level, barriers have continued to exist at the state level. The individual states have tried to address some barriers to increased availability in various ways. All fifty states and the District of Columbia have adopted the Uniform Anatomical Gift Act as a part of their statutes. Kentucky enacted the Uniform Anatomical Gift Act (KRS 311.165 to 311.235) in 1970. In conjunction with passage of the Uniform Anatomical Gift Act, all states have adopted some mechanism for using the driver's license as a donor card.

In 1980, Kentucky's statutes were revised to add provisions for donation of corneas when the potential donor is under the jurisdiction of the coroner, due to the nature of his death. Eleven states have similar statutes, with four states (Virginia, Maryland, Louisiana, and Connecticut) thereby allowing donation of other organs.

At least three states have established task forces to determine barriers to organ transplantation and to propose remedies. Massachusetts and Iowa have issued reports; Maryland's report is due in October, 1985.

Although the donor cards provided for under the Uniform Anatomical Gift Act are effective tools for public education, states are finding they are not an effective means of locating potential donors of transplant organs. Many times the card is misplaced or forgotten at the hospital or the scene of an accident. As only one to two percent of all deaths nationwide occur under circumstances that would permit the organs to be used for transplantation, quick action is needed to preserve the viability of the donor organs. Many states are exploring innovative ways of providing quick identification of potential donors, primarily before death occurs, in hopes of facilitating the increased availability and procurement of donor organs.

Some states have established central statewide donor registries for quick identification. Utah maintains a registry through the health department, Minnesota through Vital Statistics and Connecticut through its Department of Health Services. Florida has one of the most comprehensive systems, which includes an intensive public and professional education program (discussed below) in conjunction with a central registry through the Department of Motor Vehicles.

Some states have mandated that hospitals develop protocols encouraging organ donation. Virginia has been cited as a forerunner in this area, following its passage of a law requiring the development of a protocol as a condition of hospital licensure. Tennessee requires hospital staff to cooperate in arranging organ donations when the patient has indicated that he wishes to be a donor. Massachusetts requires hospital staff to specify whether the patient wishes to be an organ donor on his patient record and to maintain a log of potential donors. Florida is considering introduction of similar legislation. Oklahoma's statutes require that in coroner's cases law enforcement and medical personnel investigate to determine whether victims are donors and, if so, pass that information on to the proper officials.

Florida appears to be the only state which has legislated its public education program. Florida allocated state funds through its Department of Health and Rehabilitative Services for establishment of a consortium consisting of many diverse groups whose goal is increased organ procurements through public and private education activities. Similarly, in 1985 Virginia passed a resolution requiring education of the state's physicians on transplantation and organ donation, either through training in medical school or through continuing education for practicing physicians.

Discussion

The driving force behind recent changes, both at the federal and state level, has been the organ procurement agencies. Virginia, Maryland, Massachusetts and Florida have procurement systems regarded nationally as successes, successes in part because of the close interaction between the

active regional organ procurement agencies located in their states and their state legislatures. The state statutes facilitate the educational goals of the procurement agency by providing funding directly for educational purposes or by giving them greater access to health professionals and the public through hospital licensure requirements and through drivers' licensing procedures.

There is little opposition to the actual transplantation of human organs. Most regard the issue as a personal and family choice, but a few groups, especially religious groups such as Christian Scientists, are personally opposed to such intervention. Most of the discussion concerns the level of involvement the government should have, especially who will pay for the transplantation, and who receives the donor organ in times of short supply.

In 1984, there were 308 liver, 6,730 kidney, 23,500 cornea, 865 bone marrow, 87 pancreas and 17 heart-lung transplants in the United States. For each person receiving a transplant, many more potential recipients are still waiting. For many potential recipients, the cost of transplantation itself is a limiting factor. Kidney transplant surgery alone costs between $25,000 and $30,000; a bone marrow transplant is $120,000; and a liver is $200,000. In addition to the cost of the actual surgery, the cost of preparing the patient for surgery and the followup after surgery can run into thousands of dollars more, depending on the type of transplant. The cost of the anti-rejection drug can be as much as $100 per week. Insurance coverage of organ transplants is beginning to be commonplace. However, some procedures, especially heart and liver transplants, are still considered experimental and are therefore not covered under most policies.

In 1972, Congress decided to provide services under Medicare for patients with end-stage renal disease. In the beginning, Medicare funded primarily renal dialysis treatments, but increasingly coverage has been extended to kidney transplant surgery and followup. In the period from 1974 to 1982, Medicare expenses for end-stage renal disease rose from $242 million for 10,000 beneficiaries to $2 billion for 65,000 beneficiaries. The Health Care Financing Administration (HCFA) estimates Medicare will spend $5.5 billion for 90,000 patients in 1995. Based on the unexpectedly rapid rise in these expenditures under Medicare, Congress has shown little inclination to extend Medicare coverage in a similar manner to other types of transplant surgery.

Many states, including Kentucky, have paid for organ transplant surgery under their Medicaid program; however, the states are also being faced with making the decision of whether they will continue funding transplantation and, if so, to what extent. Because of the expense, states are reluctant to provide extensive coverage under Medicaid. In 1983, Kentucky's Medicaid program had one request for a transplant. In 1984, they had 21 requests.

Given an already short supply of donor organs and limited private and public funding, the issue of who receives the available donor organs arises. Should the patient's ability to pay dictate who receives a life-saving transplant? Should the decision be made by the selection committee? If so, on what criteria should the decision be based: age of the patient, likelihood of success, severity of illness, the social worth of the patient? Should a

lottery be used to allocate the organs, thereby, at least in theory, giving each person an equal chance?

If the General Assembly enacts legislation to increase the availability of donor organs, discussions surrounding organ transplantation will not subside but rather will move into other areas. Discussion of these issues can be delayed but they cannot be avoided. In deciding whether to increase availability of the organs, the General Assembly will be asked, either now or in the next several years, to address the level of support or intervention Kentucky will provide to actual and potential transplant recipients.

PRIVATE CHILD-CARE AGENCIES

Prepared by Mary Yaeger

Issue

Should the rate of reimbursement to private child care agencies for 24-hour care given to children committed to the Cabinet for Human Resources be increased?

Background

The 1984 General Assembly passed House Concurrent Resolution 30, directing the Legislative Program Review and Investigations Committee to study the Cabinet's system of reimbursement to private child care agencies. The completed study report was approved by the Committee on April 1, 1985.

The study findings showed that in 1984, 1,135 (17%) children in the foster care system were placed in private non-profit agencies. Reimbursement rates to these agencies varied by as much as 58%, from a low of $6.06 per day to a high of $37.25. The rate structure proved to be complex, confusing and inequitable. The average daily reimbursement rate for FY 1983 was $14.18, while the average daily costs of care for those same agencies was $41.96. Additionally, the study reported that a small number of private child care agencies provide services similar to those provided by the Cabinet's own group homes, but at significantly lower costs and reimbursement rates.

Recommendations by the Committee included an increase in reimbursement to private child care agencies as a means of assuring continued service by these agencies, and a revision of the rate structure to assure equity in reimbursement among agencies.

A VETERANS' NURSING HOME

Prepared by Kent Downey

Issue

Should the Commonwealth establish a state veterans' nursing home?

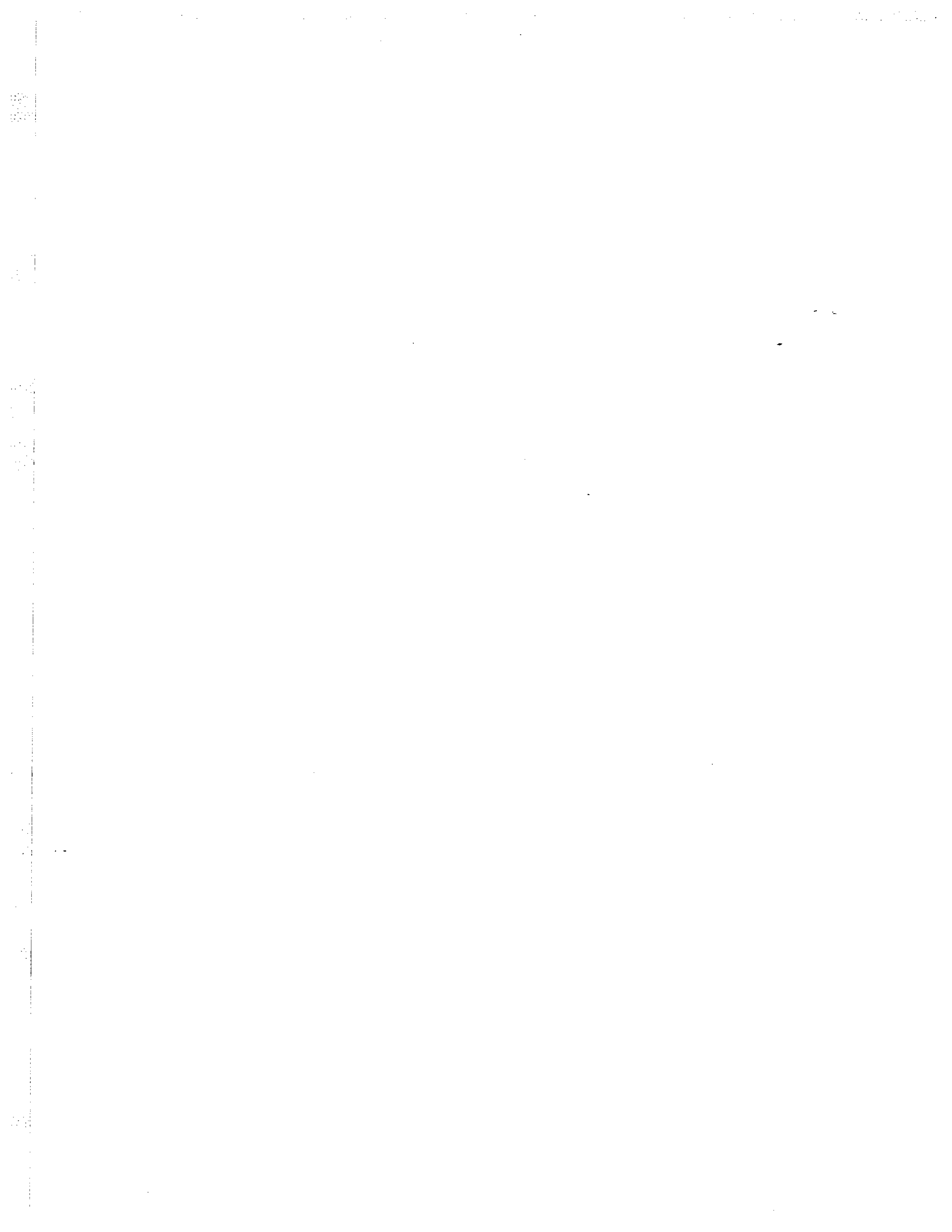
Background

Following the Civil War, many indigent and disabled veterans were unable to provide for themselves and needed care. The Federal Government operated homes for volunteer soldiers but was unable to keep up with the demand from veterans for service. In response to this, several states established state veterans' homes for the care of disabled veterans. These homes were operated at state expense because of the debt which the states felt they owed their veterans.

Other states have established homes and some states operate more than one home. There are now forty-eight homes operated in thirty-four states and the District of Columbia.

Discussion

Limited funding for the operation, construction, and renovation of state veterans' nursing homes is controlled through the Veterans Administration. Federal funding for the construction and renovation of state veterans homes is generally considered to be unavailable until Federal Fiscal Year 1991-92, but this situation may be radically altered by HR 505, currently pending in Congress. State funding, state bonding authority, and authorizing legislation may be requested during the 1986 Regular Session of the General Assembly.



JUDICIAL

USE OF DOMESTIC RELATIONS COMMISSIONERS

Prepared by Robert Sherman

Issue

Should the General Assembly enact legislation which would regulate the use, duties, qualifications and compensation of domestic relations commissioners?

Background

The circuit court is the court of general jurisdiction in Kentucky. There are presently fifty-six judicial circuits within the Commonwealth. Forty-one of those circuits are served by one circuit judge, twelve circuits are served by two judges, one circuit by four judges, one circuit by six judges, and one circuit by sixteen circuit judges. Although the vast majority of judicial duties at the circuit level are performed by circuit judges, state statutes and rules promulgated by the Supreme Court recognize that certain duties may be undertaken by commissioners.

CR 53.03 states that matters pertaining to domestic relations may be referred to commissioners

> ... including contested and uncontested divorces, child support, custody and visitation, maintenance pendente lite, adoption, termination of parental rights, and contempt proceedings.

Commissioners performing domestic relations functions shall be qualified as attorneys, according to this rule. CR 53.03 also contemplates reference of proceedings to commissioners in "special cases," which are so regarded due to their complexity. A commissioner assigned to a special case must also be an attorney.

According to CR 53.04, subject to the order of reference to him, a commissioner shall have procedural authority similar to that of a judge. CR 53.06 directs the commissioner to file a report containing findings of fact and conclusions of law with the clerk of the court. Parties to an action may serve written objections to a report within ten days of receiving notice of its filing.

Rules 53.07 and 53.08 provide that commissioners shall be paid by fee for services performed. Fees shall be in accordance with schedules published by the Administrative Office of the Courts. A commissioner is limited in total personal fee compensation to $24,000 per annum.

As of January 1985, twenty-one of the fifty-six judicial circuits referred matters relating to domestic relations to the preliminary jurisdiction of

commissioners. Those circuits were the 2nd, 4th, 6th, 8th, 13th, 14th, 17th, 19th, 20th, 25th, 27th, 28th, 30th, 31st, 32nd, 35th, 37th, 42nd, 48th, 50th, and 54th. Fees for commissioner services varied among these circuits from a low of $20 per case to a high of $150. The average fee approximated $35 for the first hearing of one hour, with additional expenses assessed for additional time used. Many of the circuits assessed fees per motion filed.

On January 22, 1985, the Supreme Court of Kentucky issued an order specifically relating to the use of domestic relations commissioners. The order stated that domestic relations matters could not be referred to commissioners in circuits where the weighted caseload per judge was less than 5% above the average weighted caseload for all circuits. Thirty-three circuits were listed in the order as being below this caseload level and thereby ineligible to use domestic relations commissioners. Among those thirty-three were nine circuits that, up to the time of the order, had been using the commissioners, and were thus forced to cease such use: the 2nd, 8th, 19th, 20th, 25th, 27th, 37th, 48th, and 50th circuits.

The order stated further that of the remaining circuits eligible for use of domestic relations commissioners, no such commissioner could be used until a plan for the usage was submitted by the circuit and approved by the Chief Justice prior to May of 1985. Plans for commissioner use were to include, with specificity, information relative to the duties to be performed by the domestic relations commissioner, fees to be imposed for proceedings before the commissioner, number of commissioners to be utilized (not to exceed one in single-judge circuits), and weekly hours expected to be devoted by the commissioner to his duties. Further, the order requires any commissioner to have the qualifications of a circuit court judge, receiving at least fifteen hours per year of continuing legal education relating to domestic relations. Uncontested divorces will no longer be allowed to be heard by commissioners, but must be submitted directly to a circuit judge.

Discussion

Prior to the issuance of the aforementioned Supreme Court Order, the Interim Joint Committee on Judiciary-Civil had expressed its concern over the use of domestic relations commissioners and had begun investigation of such use. Principal concern focused upon the assessment of fees as the manner of commissioner compensation. Fees are charged to those persons utilizing the services of the commissioner, namely, parties to domestic relations proceedings. This arrangement results in a system whereby a person seeking dissolution of marriage and residing in a circuit having commissioner services must pay fees in addition to the filing fee paid by petitioners and plaintiffs in judicial circuits throughout the state. A divorce thus costs more in fees in a circuit that uses a commissioner than in a circuit that does not.

Another concern relates to citizen contact with the judiciary. In many circuits, domestic relations cases may make up one third of the total circuit caseload, and in certain circuits, an even greater proportion. It can be expected that in many of these actions the parties involved are making perhaps their only entry into the judicial process. The opinion has been expressed

that these litigants ought to have the subject matter of their cases considered by a judge who is subject to voter approval through election and supported by tax dollars, rather than an appointed commissioner.

The uniformity of use of domestic relations commissioners may also need to be considered by the General Assembly. Prior to the January order of the Supreme Court, uniformity of use was not the case. In circuits using commissioners, variance between circuits could be seen in fees collected for services and actual duties performed. It cannot be said that complete uniformity of use is assured by the action of the Supreme Court. That order merely sets guidelines for commissioner use approval, asking that plans be submitted setting out details of usage, and does not require circuits to use and compensate commissioners in a like manner.

Because of concerns such as those discussed, it would seem logical to assume that commissioner use is a practice to avoid unless a particular circuit court's caseload is so overloaded that serious case backlog results, threatening the quality of court output. The Judiciary-Civil Committee was presented with statistics that seemed to show that use based upon need was not always the case. Those statistics indicated that a listing of circuits using domestic relations commissioners did not correspond to a list of circuits having the greatest weighted caseload. The Supreme Court order does, of course, directly address this particular issue.

Approaches that might be taken by the General Assembly in regard to the use of domestic relations commissioners are varied. The most basic option might be the statutory elimination of the position on the grounds that all circuit court litigation procedure should be overseen by a circuit judge. Should particular circuits find dockets overcrowded, the legislature would be faced with the necessity of creating additional judgeships. Court cost differentiation among circuits for domestic relations cases due to commissioner fees would be removed.

Instead of eliminating commissioners, consideration could be given the possibility of eliminating the fee method of commissioner compensation in favor of payment of a uniform salary paid from the judicial budget. This option would also help equalize domestic relations court costs among circuits. A problem arises here, however, should the recent Supreme Court order continue in effect, with at least thirty-three of fifty-six circuits prohibited from using commissioners. Citizens residing in circuits so prohibited would be paying, indirectly through their taxes, the salaries of commissioners permitted in other circuits.

Finally, the legislature could rewrite the presently vague KRS Chapter 31A so as to specifically create and define positions held by persons who will perform various judicial functions in lieu of judges. Qualifications and salaries for these officers could be set, as well as specific duties to be performed. Although it is probably more desirable that elected judges perform all judicial functions, given the realities of caseload burden and the cost of creating new judgeships, it might at least be possible to statutorily describe an employee of the judiciary who can shoulder some of the circuit court docket load in a manner which would be uniform statewide.

A cautionary note should be added here. Tinkering with the judiciary's use of domestic relations commissioners by statute may be constitutionally impermissible. Section 116 of the Constitution of Kentucky states that:

> The Supreme Court shall have the power to prescribe rules ... for the appointment of commissioners and other court personnel ...

What room this provision leaves for statutory definition of qualifications, duties and compensation of domestic relations commissioners is unclear. It is also possible that the options available to the General Assembly are reduced by the Supreme Court's direct activity on the matter through its order of January 22. On the other hand, it can be seen that the Court recognizes statutory guidance in the area, in that its own CR 53.01 accepts commissioner appointment "as authorized by statute." In any event, should the use of domestic relations commissioners be seen as an issue of particular importance, the constitutional amendment vehicle is always available.

PRIVATE ADOPTION

Prepared by Robert Sherman

Issue

Should the General Assembly consider omnibus revision of statutes relative to private adoption?

Discussion

During the 1984-85 interim period, the Interim Joint Committee on Judiciary-Civil received testimony that evidences potential problems that may arise with private adoptions undertaken according to statute. These problem areas, described below, are varied in scope and could be addressed individually or through omnibus legislation. Adoption statutes may be found in KRS 199.410 et seq.

The first subject of concern involves the scenario of a pregnant woman acting in reliance and furtherance of a plan to offer her child-to-be for adoption to particular adoptive parents. Where such a woman is an out-of-state resident, coming to Kentucky merely for the purpose of the birth and subsequent adoption by particular parties, should she be required to be domiciled in this state for a residency period prior to petitioning for termination of parental rights? It has been argued that to do otherwise allows the natural mother to avoid jurisdiction of her home state with application of its adoption statutes, and invokes an undue burden on Kentucky should the adoption not achieve finality subsequent to the natural mother returning to her state of actual residence. Further, in such a scenario, should there be statutory limitations on the expenses of a natural parent relative to an adoption that may be assumed by the adoptive parents? The purpose of such a limitation would be to discourage open ended expense reimbursal agreements between natural and adoptive parents that might degenerate into threats of withholding children from adoption absent exorbitant reimbursals only vaguely related to the expense of pregnancy.

Another subject area receiving attention relates to the time period after a birth, subsequent to the passage of which a natural parent may voluntarily petition to terminate parental rights. KRS 199.601 presently requires such a period consisting of five days. The point of view has been expressed that this is too short a time in which to allow a parent, particularly a mother, to make a clear and reasoned decision regarding termination, free from such factors as natural depression following childbirth.

Similarly, the legislature may wish to examine the timing of the placement of the child in the physical custody of the adoptive parents. Should this placement be allowed to take place prior to the filing of the voluntary petition to terminate parental rights, as is alleged to occur presently, or

should such physical custody be delayed for a longer period of time? It has been suggested, as one extreme, that physical custody be withheld until some point in the process where eventual finality of the adoption can be perceived as occurring, so as to avoid the trauma to child and adoptive parent of separation upon any collapse of the proceedings.

Also of interest to the legislature may be the business practices of service professionals attending the needs of adoptive and natural parents as they travel through the adoption process. For example, in Kentucky there is no statutory prohibition (and no prohibition by the bar) of an attorney representing both the natural and adoptive parents in a private adoption proceeding. It has been asserted that this is a per se conflict of interest situation, with one party certain to receive inadequate representation should an adoption break down prior to finality. On the other hand, should statutory law require separate representation to both parties, will the state bear the cost of providing counsel to indigent parties (in many instances, the natural parent)? In a related matter, should the fees charged by adoption service professionals be regulated by statute, including placement agency fees and attorney fees? It could be argued that standardization of fees can eliminate any appearance that an exorbitant fee charged has more to do with adoptive child procurement than services rendered attendant to beneficial child placement.

Finally, the Interim Joint Committee on Judiciary-Civil has received suggestions that the General Assembly enact legislation which would protect adoptive parents from asset and time consuming litigation which occurs after an adoption has been declared final. As an example, this might occur should a natural parent attempt, through litigation naming the adoptive parents parties defendant, to set aside a voluntary termination of parental rights, alleging that duress was associated with the decision to terminate. It was suggested that prior to allowing adoptive parents to be named parties to such litigation, the local circuit court conduct a "threshold hearing" in which to determine whether the petitioner has reasonable grounds or probable cause to proceed. Such a safeguard could prevent a waste of the adoptive parents' time and money should a frivolous claim be raised. As a contrary view, it might be reasoned that adoptive parents would not wish to be excluded from any proceeding which might determine their rights to a child, including a proceeding designed to protect them. Further, the opinion has been offered that it may be impossible to statutorily make any legal proceeding, including an adoption, final and invulnerable to subsequent attack.

SHARED PARENTAL CUSTODY OF CHILDREN AFTER DISSOLUTION OF MARRIAGE

Prepared by Robert Sherman

Issue

Should the General Assembly encourage by statute the "shared parental custody" of minor children subsequent to dissolutions of marriage?

Discussion

The primary statute in Kentucky relative to child custody associated with dissolution of marriage is KRS 403.270. The statute states that custody will be determined by the court with the best interests of the child as the principal concern. Other factors of relevance in making the custody determination include the wishes of the child and the parents, the child's adjustment to his present home and community, and the mental and physical health of all parties concerned. The court shall not consider past conduct of a parent not affecting his relationship to the child. Subsection (3) of the statute states in passing that joint custody is a possibility, if in the best interests of the child.

86 BR 271, relating to shared parental custody and prefiled by Representative Dan Seum, has been referred to the jurisdiction of the Interim Joint Committee on Judiciary-Civil. Committee membership has expressed interest in the examination of this proposal, and the issue is expected to be discussed during the summer of 1985. If enacted, the bill would repeal KRS 403.270.

This proposed legislation states, as a policy matter, that, all things being equal, shared custody is to be preferred over sole custody, in that it assures continued contact by the child with both parents. "Shared parental responsibility" is defined as both parents retaining full parental rights over the child subsequent to separation or divorce, conferring over decisions affecting child welfare. Child support is equalized between the parents based upon need of the child. One parent is given resident status and maintains the primary residence of the child. "Sole parental responsibility," on the other hand, is defined as one parent having exclusive child custody with the other parent granted visitation rights.

The bill allows the court to consider the wishes of the parents, in determining the primary physical residence of the child. Other factors to be used in making this decision include determining which parent would be more likely to allow continuing contact with the nonresident parent, the permanence as a family unit of the proposed home, the moral fitness of a proposed resident parent, the mental and physical health of the parents, and the preference of the child. The designation of resident parent shall not be

based upon the sex of the parent. A resident parent may not move the residence of the child outside of the county or state absent notice to the other parent and a hearing on the issue. Should the move negate rights of the other parent, residential custody may be transferred.

Should 86 BR 271 become law, a court would be required to give first consideration to the shared custody or responsibility concept in providing for the care of the minor children of a marriage undergoing dissolution. If the court should determine sole parental responsibility to be the only viable alternative, reasons for such determination would have to be set out in writing.

The General Assembly, in examining this issue, may wish to determine whether the merits of the proposal are such to mandate the particular preferences of consideration a court must make in providing for the care of the children of a dissolved marriage. There are those who will assert that involvement by both parents to as great a degree as possible in the rearing of a child will be beneficial in most all instances. Others may argue that the present custody statute, KRS 403.270, provides adequate guidelines to the court, including the option of granting joint custody, while at the same time acknowledging the court's advantageous position in making a custody decision, attained through first hand contact with the parties involved.

COMPARATIVE NEGLIGENCE

Prepared by Pat Hopkins

Issue

What action will the General Assembly take in response to the ruling by the Kentucky Supreme Court in Hilen v. Hays, Ky., 673 SW 2d 713, in which the Court said: "Henceforth, where contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence."?

Background

The doctrine of contributory negligence originated in English common law early in the last century and was first applied on record in a Kentucky case in 1892. Since that time it has been followed in Kentucky in all cases. The courts have consistently refused to overturn the rule.

Through the years, the General Assembly has carefully considered and consistently refused to adapt, in place of contributory negligence, the doctrine of comparative negligence (See 1980 HB 617; 1982 HB 480; 1984 SB 172; 1984 SB 211).

In the face of such legislative consideration , the Supreme Court stated, "The next important fact, historically, is that the Kentucky General Assembly has failed to address this subject." Hilen v. Hays, supra. So saying, the Court then did away with contributory negligence as a complete defense and replaced it with comparative negligence in the pure form.

Discussion

The tort system in Kentucky is based on the concept that liability attaches to a person as a result of his fault or negligence. When a person who is at fault (the defendant) is sued by an injured party (the plaintiff), if it is proved that the plaintiff was <u>also</u> at fault, or negligent, then the plaintiff was contributorily negligent. Under the doctrine of contributory negligence, the plaintiff would be barred from recovering any damages.

The doctrine of comparative negligence, takes two forms. The pure form provides that the plaintiff may recover if it is found that the defendant is negligent to any degree at all. While the plaintiff may recover if defendant is negligent to any extent, his recovery is reduced by the percentage of the plaintiff's negligence. The Supreme Court in Hilen v. Hays, supra., adopted the pure form of comparative negligence. The modified form essentially provides that the plaintiff may not recover unless his negligence is less than 50% of the total negligence involved in the incident.

PERSISTENT FELONY OFFENDERS AND LEVELS OF PUNISHMENT

Prepared by Mary Yaeger

Issue

Does the Kentucky Persistent Felony Offenders Statute establish excessive sentences by subjecting persons convicted of relatively minor property offenses to the same levels of punishment as provided for those convicted of more serious or violent crimes?

Background

In 1974, the General Assembly repealed the old Habitual Criminal statute with the passage of House Bill 232 (KRS 432.080), the Persistent Felony Offender (PFO) law. That statute, as amended, provides that a person over twenty-one who is convicted of a second felony offense is to be classified and sentenced as a PFO in the second degree. The PFO II is subject to enhanced sentencing, based on the penalty prescribed for the next higher degree of offense. One found to be a PFO II is not eligible for probation, shock probation or conditional discharge. A PFO in the first degree is one over twenty-one who stands convicted of a third felony offense. A PFO I who is convicted of a Class A or B felony is subject to receive a sentence of twenty years to life or ten to twenty years if found guilty of a Class C or D felony. A PFO I is not eligible for probation, shock probation or conditional release, nor for parole until a minimum of ten years has been served.

Discussion

Proponents of the PFO legislation believe that enhanced sentences for PFO II's and mandated sentences of a minimum of ten years for PFO I's are an effective deterrent to crime. Commonwealth Attorneys have increasingly used this provision, resulting in an increased PFO prison population. Currently, 25% (1264) of the prison population consists of PFOs.

The legislative Program Review and Investigations Committee is currently conducting a study to learn more about the convict who has been sentenced under this law. The study, to be presented in the fall of 1985, should reveal whether those sentenced under the PFO legislation are chronic recidivists and give some measure of the relative seriousness of the offenses for which they have been convicted.

Related issues prompting the review are overcrowding in Kentucky prisons and the costs of extended incarcerations of repeat offenders. A third issue is whether inclusion in the PFO statute of Class D felonies which involve the theft of property valued in the low hundred dollar range represents harsh treatment of those convicted of relatively minor offenses.

PERSISTENT FELONY OFFENDERS

Prepared by Norman Lawson

Issue

Should the persistent felony offender statute be amended to include nonviolent offenders?

Background

The persistent felony offender statute in its present form dates to the enactment of the Penal Code in 1974 but prior to that existed in the form of the habitual offender act. Under these statutes, second, third, and subsequent felony offenders are subjected to longer periods of imprisonment and to longer periods before they can be paroled. Increased use of the persistent felony offender statute has increased the population of such persons in the prison system from less than 100 to more than 1,000.

Discussion

Proponents of the move to take nonviolent offenders from the persistent felony offender statute cite prison overcrowding and allege that many offenders have been sent to prison for relatively minor property crimes. They feel that this circumstance contributes to prison overcrowding, permitting the release of more violent offenders upon the public. Opponents of the move cite the fact that violent offenders normally serve longer sentences, due to the fact that the sentencing ranges for violent crimes are longer and that new laws, such as the 25 years before parole act for murder, adequately protect the public from violent offenders. They feel that the public needs protection from "career criminals," who are normally thieves and burglars. These people believe that career criminals are deterred only by lengthy prison sentences and reiterate that the persistent felon statutes are only used against repeat offenders who have not learned from previous incarcerations. They feel that the deletion of nonviolent offenders would make Kentucky a haven for thieves and burglars.

FELONY THEFT LEVEL

Prepared by Norman Lawson

Issue

Should the amount of money or property stolen to make a crime a felony be raised from $100 to $300 or $500?

Background

In past years the amount of money or property stolen to make a crime a felony varied according to the property stolen. Hogs were $5, most other property was $50. When the Penal Code became effective in 1975, all property offenses became felonies at $100. Proponents of the legislation say that inflation has advanced and the limit should be raised.

Discussion

Proponents of the legislation cite inflation and prison overcrowding, and allege that many offenders have stolen just over the limit, although there are no current statistics showing the actual amounts stolen. Proponents feel that increasing the amount will decrease criminal defense costs for the state, because of the fact that a lesser number of hearings are required in misdemeanor cases than for felony cases. Opponents of the legislation feel that the state will be trading prison overcrowding for aggravating the existing overcrowding at county jails and will demean the seriousness of theft and burglary as offenses. Likewise, they cite an increase in property crimes, the high rate of probation for such offenses, and the low arrest rate in property crimes as reasons for keeping the limit where it is.

JAILING CHILDREN

Prepared by Norman Lawson

Issue

Should the General Assembly ban the jailing of children in adult jails?

Background

For many years Kentucky has permitted the jailing of children in adult jails for felony offenses, misdemeanors and for "status" offenses. A status offense is one which applies to children only and cannot be committed by an adult, such as being a runaway. The present law requires sight and sound separation of children from adult prisoners. Presently Fayette County and Jefferson County and a few other counties have juvenile detention facilities but most counties have no facility other than the jail.

Discussion

Proponents of the legislation cite federal legislation which will cut juvenile funding to the states if children are not removed from adult jails, the high suicide rate for children incarcerated in jail, and the lack of suitable training of jailers and lack of suitable facilities in adult jails for children. A particular problem is runaway juveniles who, if placed in less secure facilities, will escape. Opponents of the legislation cite the costs of construction and operation of a separate system of juvenile detention facilities which do not now exist, the problems with children escaping from existing nonsecure facilities with the attendant problems of theft and prostitution by which the children support themselves, and the idea that jail, while less than ideal, is the only suitable place to hold children who are felons, who run away, or who are in temporary need of secure custody.

PRETRIAL RELEASE FOR CHILDREN

Prepared by Norman Lawson

Issue

Should the General Assembly initiate a pretrial release program for children?

Background

Traditionally, children have been treated differently by the criminal justice system. While adults are permitted bail and pretrial release, children are not. Children are presently handled by the juvenile session of juvenile court and in most counties are not covered by the pretrial release program. A pretrial release and counseling program was included in the proposed juvenile code but the code was repealed because of lack of money for funding.

Discussion

Proponents of the legislation cite the lack of uniformity in the present system of dealing with juveniles and a need for giving children at least the same rights as adults. Proponents of the legislation do not believe that the present pretrial release system for adults cannot be adapted to children because of workload, differing standards, and other factors. Opponents of the legislation feel that the creation of an entirely new system would be duplicative and costly, and that the present system is working adequately and that presently most children are released to parents or guardian within a short time. Alternatively, opponents would like to see the present adult pretrial release program include juveniles, which they say would not increase costs dramatically as would an entirely separate system.

THE UNIFORM COMMERCIAL CODE

Prepared by Mike Fleming

Issue

Should KRS Chapter 355 be amended to exclude motor vehicles from the requirement of filing a financing statement in order to perfect a security interest?

Background

The Bill Draft, 86 BR 51, would not exclude motor vehicles from the requirements of filing a financing statement with the county clerk in regard to motor vehicles.

Chapter 186 and 186A would be affected by a change in the filing system. The alternatives of either keeping the statute as is or amending KRS Chapter 355 are at issue.

Discussion

If motor vehicles are excluded from filing requirements of the UCC, then KRS Chapters 186 and 186A will control perfection. Currently, those chapters do not define perfection. There would be a fiscal impact on county clerk fees if the filing system is altered.

INCLUDING CONSECUTIVE CROP YEARS IN AN AFTER-ACQUIRED PROPERTY CLAUSE

Prepared by Mike Fleming

Issue

Should KRS 355.9-204 be amended to allow crops grown more than one year after a security agreement is executed to be included in an after-acquired property clause?

Discussion

The basic issue is whether to allow a security interest to attach to crops as collateral for a prior loan when the crops become such more than one year after the original security agreement is executed.

Various proposals have been discussed and a memorandum has been submitted to the Commission by Professor Weinberg, of the University of Kentucky. This proposal would amend KRS 355.9-402, to mandate a description of the "production season" in the financing statement.

LABOR AND INDUSTRY

WORKERS' COMPENSATION:

PERMANENT PARTIAL DISABILITY

Prepared by Linda Bussell

Issue

Should the General Assembly amend the permanent partial disability provisions to remove the 425-week benefit limitation from the most serious permanent partial disability cases?

Background

The 1980 General Assembly, through enactment of HB 532, increased weekly benefits for permanent total and permanent partial disability and reduced the duration of permanent partial disability from life to 425 weeks.

The 425-week limitation on permanent partial disability was adopted in response to allegations from the insurance community that employers in Kentucky were paying high workers' compensation premiums because of lifetime permanent partial benefits. As indicated in the chart below, approximately 62% of each benefit dollar before 1980 was spent for permanent partial disability.

As a result of the 1980 legislative changes, workers' compensation premiums decreased approximately 32% for each employer.

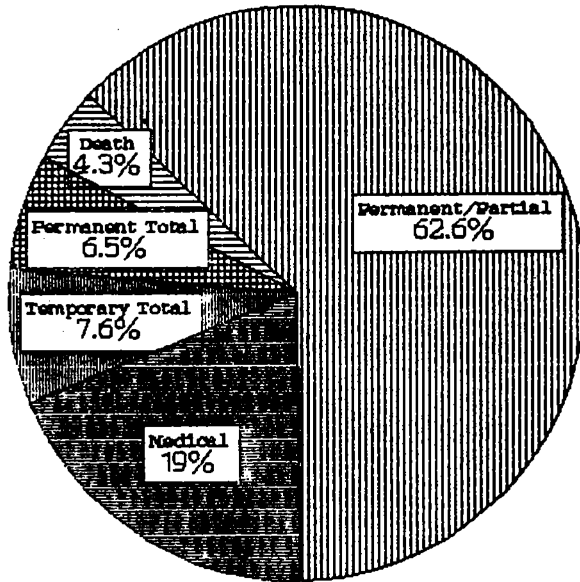
Discussion:

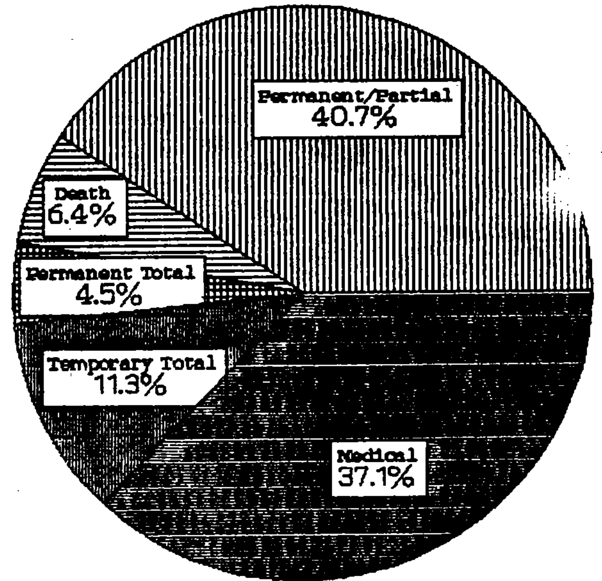
The 425-week provision has been a major point of controversy since its enactment. Labor groups contend that application of the 425-week cap to all permanent partial cases, serious and nonserious, is grossly unjust.

As a result, legislation to remove the cap on serious permanent partial cases was considered during the 1982 and 1984 sessions of the General Assembly. However, the legislation was not enacted, largely because of its possible impact on workers' compensation premiums.

In an effort to determine the actual impact of the 425-week cap on injured workers, the Legislative Research Commission hired a consultant to conduct a permanent partial case survey. The objective of the survey, which should be completed in mid-September, is to determine the economic status of injured workers who have been awarded benefits for 425 weeks. The results of the survey will probably influence the workers' compensation legislation in the 1986 General Assembly.

BENEFIT DOLLAR DISTRIBUTION—KENTUCKY





SOURCE: NATIONAL COUNCIL ON COMPENSATION INSURANCE

PRE-1980 - Lifetime PPD Benefits

WBA - 60% SAWW

POST-1980 - PPD Benefits Awarded for 425 weeks

WBA - 75% SAWW

UNEMPLOYMENT INSURANCE

Prepared by Cindy DeReamer

Issue

Should the General Assembly allow the maximum weekly unemployment insurance benefit, which was frozen in 1982 at $140 per week, to increase if the trust fund reaches a balance of $120 million on December 31?

Background

In 1982, the General Assembly enacted several changes to the UI system to restore solvency to the trust fund, which went broke in February 1981, forcing the state to begin borrowing from the federal government to meet its benefit payment obligations. One of these changes included a cap on the maximum weekly benefit amount, which had previously increased on July 1 of each year as 55% of the then calculated average weekly wage (KRS 341.380). Projections showed in 1982 that this action alone would save the trust fund $12.2 million in FY 1982-1983 and, with an increase in employer taxes, would bring the fund closer to solvency.

Prior to the second quarter of 1982, Congress permitted the states to borrow money interest free from the federal trust fund for the payment of benefits. Kentucky borrowed $95.7 million on that basis up until that time. However, the Omnibus Reconciliation Act of 1981 required that loans to states made after April 1, 1982, carry an interest charge at a rate not to exceed ten percent. Kentucky subsequently borrowed an additional $215.6 million through January, 1985, which was subject to the interest charge.

When it became clear that states might have difficulty making interest payments because of the size of their loans, Congress included an amendment in the Tax Equity and Fiscal Responsibility Act of 1982 which permitted a state with high unemployment to reduce its interest payments to 25% of the amount due in any year, and thereby extend the payment of the total interest obligation over a four-year period.

In March, 1983, Congress enacted the Social Security Amendments of 1983, which included provisions for additional relief to states owing interest on loans made subsequent to April 1, 1982.

Under the amendments, a state could qualify for deferral of 80 percent of the interest due for a fiscal year, effective for interest accrued in fiscal

years 1983, 1984, and 1985. A state was required to meet certain conditions to qualify for the deferral: a state could take no action to reduce its tax effort or trust fund solvency; it must have taken action after March 31, 1982, which increased revenues and decreased benefits by a total of 25% the first year, and 35% and 50% the second and third years. Once a deferral was approved, the state had to continue to maintain its solvency effort. Failure to do so would result in immediate payment of all deferred interest. Based on action taken by the 1982 General Assembly, Kentucky qualified for interest deferral in 1983 and 1984. If it qualifies for deferral in 1985, it will not make its last interest payment until 1988.

The interest due on loans from the federal government for the payment of benefits is paid from the unemployment insurance penalty and interest account, which contains the penalty and interest obtained on unpaid or delinquent employer taxes. Federal law prohibits payment of the interest from trust fund receipts.

Discussion

Certification of interest deferral was made by the U.S. Department of Labor (USDOL) for 1983 and 1984 based on KRS 341.380, which included the provision to freeze the maximum weekly benefit amount at $140 per week. The language in KRS 341.380, which provided for the continuation of the freeze until the trust fund reached a balance of $120 million on December 31 of any calendar year preceding the July 1 maximum benefit amount computation date, was not used in the USDOL's estimations for certification of interest deferral, because it was felt at that time the provision would not apply.

Kentucky's economy has improved beyond that anticipated when the state applied for interest deferral. In fact, Kentucky was able to pay off entirely its interest bearing loan in November, 1984. The lifting of the cap in 1986 on the maximum weekly benefit amount should the trust fund reach a balance of $120 million on December 31, 1985, would result in additional costs to the trust fund. USDOL reports that such action, if permitted to occur, will be viewed as a reduction of the state's solvency effort and thus result in the requirement of payment of all interest outstanding prior to October 1, 1986. The Kentucky Division for Unemployment Insurance estimates the outstanding interest as of that date will equal $4.9 million.

The USDOL recommends that Kentucky change its law to require that the freeze provisions remain in effect, in order to avoid the requirement for payment of all interest outstanding on the date of certification.

I.

Title XII Advances***

Non-Interest Bearing

Date		
1st Quarter 1981	52.1 M	
1st Quarter 1982	43.6 M	
		95.7 M

Interest Bearing

2nd Quarter 1982	8.6 M	
4th Quarter 1982	25.7 M	
1st Quarter 1983	85.7 M	
2nd Quarter 1983	7.5 M	
3rd Quarter 1983	8.6 M	
4th Quarter 1983	19.9 M	
1st Quarter 1984	33.9 M	
2nd Quarter 1984	4.1 M	
4th Quarter 1984	11.1 M	
January 1985	10.5 M	215.6 M
		311.3 M

Repayments

August 1982	8.6 M	
May 1983	7.5 M	
August 1983	60.0 M	
September 1983	7.0 M	
November 1983	18.0 M	
February 1984	9.0 M	
May 1984	73.0 M	
June 1984	10.9 M	
November 1984	78.8 M	
Loans Repaid By FUTA Credit Reduction	16.9 M	
		289.7 M

Outstanding Advances January 31, 1985 — 21.6 M

II.

Schedule of Interest Paid and Payable***
Title XII Advances

Year	Interest Accrued	Interest Paid	Interest Payable
1982	251,220.76	251,220.76	-
1983	6,682,063.10	1,336,412.62	-
1984	3,809,499.32	* 2,553,258.86	
1985	** 407,231.00		2,391,806.89
1986			1,984,575.89
1987			1,984,575.89
1988			
	11,150,014.18	4,140,892.24	7,009,121.94

This schedule shows total interest accrued on Title XII advances, total interest paid on Title XII advances, and the scheduled deferred payments to be made through September 30, 1988.

* This figure includes a deferred interest payment of $1,984,575.89 and additional interest of $568,682.27 on the $38 million borrowed in the first four months of 1984, which became due when $11 million was borrowed in December after the loan repayment in November 1984. Loans secured and repaid between January 1 and September 30 in any calendar year are interest free unless subsequent borrowing in that year is made following repayment in the same calendar year.

** This is the estimated interest which will accrue on the $11 million borrowed in December, 1984, at a rate of 10% per annum until the proposed May 2, 1985 repayment date.

*** Source: Cabinet for Human Resources, Department for Employment Services, Division for Unemployment Insurance.

WORKERS' COMPENSATION:

SPECIAL FUND

Prepared by Linda Bussell

Issue

How should the legislature deal with the increasing liability of the workers' compensation Special Fund?

Background

The workers' compensation Special Fund pays at least forty percent of all occupational disease awards and a varying percentage of all second injury awards.

The current liability of the Special Fund is approaching $800 million, which is paid by employers in Kentucky in addition to their workers' compensation premiums.

The liability of the Special Fund has been increasing at the rate of about $60 million annually. As the chart below indicates, approximately sixty percent of the Special Fund disbursements are for occupational disease (blacklung) awards and the remaining forty percent are for injury awards.

The reasons attributed to the increasing liability of the Special Fund are both legislative and judicial. In 1972, the General Assembly greatly expanded the definition of injury to include "any work-related harmful change in the human organism." The Supreme Court has interpreted the definition of injury to mean that heart attacks are compensable under our workers' compensation law and assigned liability for such compensation to the Special Fund. The effect of this type of decision is that more of the financial burden of the workers' compensation system has been transferred to the Special Fund, thereby increasing its liability.

Occupational disease claims in Kentucky are, for the most part, blacklung claims. The liability of the Special Fund for blacklung claims has been increasing an average of $50 million annually. Liberal eligibility requirements, lifetime awards for blacklung, a high approval rate for claims, an inadequate social security reverse offset provision and the lack of a decline in the number of blacklung claims being filed are reasons for the increasing liability.

F.Y.	Claims Filed	Board Opinions	Awards Inj.	Awards O.D.	Spec. Fund Exps. Inj.	Spec. Fund Exps. O.D.	Spec. Fund Liability# Inj.	Spec. Fund Liability# O.D.	Spec. Fund Tax & Assess. %	Max. Weekly Benefit Amount	Appeals from Initial Decisions
1980-81	4,644	2,655	1,254	640	$18 M	$26 M	$90 M	$154 M	16.68%	$217 PTD	403
			$87 M	$71 M	Claims - 2,498	Claims - 908				162 PPD	
					Awards - 1,872	Awards - 820					
					Total: $44 M						
1981-82	3,827	3,016	1,515	753	$18 M	$32 M	$105 M	$222 M	21.31%	$233 PTD	520
			$103 M	$101 M	Claims - 2,594	Claims - 531				190 PPD	
					Awards - 1,664	Awards - 862					
					Total: $49 M						
1982-83	4,060	2,881	1,666	470	$18 M	$34 M	$126 M	$277 M	21.31%	$254 PTD	648
			$109 M	$81 M	Claims - 2,497	Claims - 754				190 PPD	
					Awards - 1,693	Awards - 675					
					Total: $53 M						
1983-84	4,014	2,921	1,584	508	$17 M	$37 M	$140 M	$329 M	24%	$277 PTD	633
			$94 M	$104 M	Claims - 2,325	Claims 1,018				208 PPD	
					Awards - 1,182	Awards - 697	Total:	469 M*			
					Total: $54 M						

SOURCE: Kentucky Labor Cabinet

#Cumulative Figure

*Refers to pre 7/83 claims and does not include $270 M projected liability for post 7/83 claims.

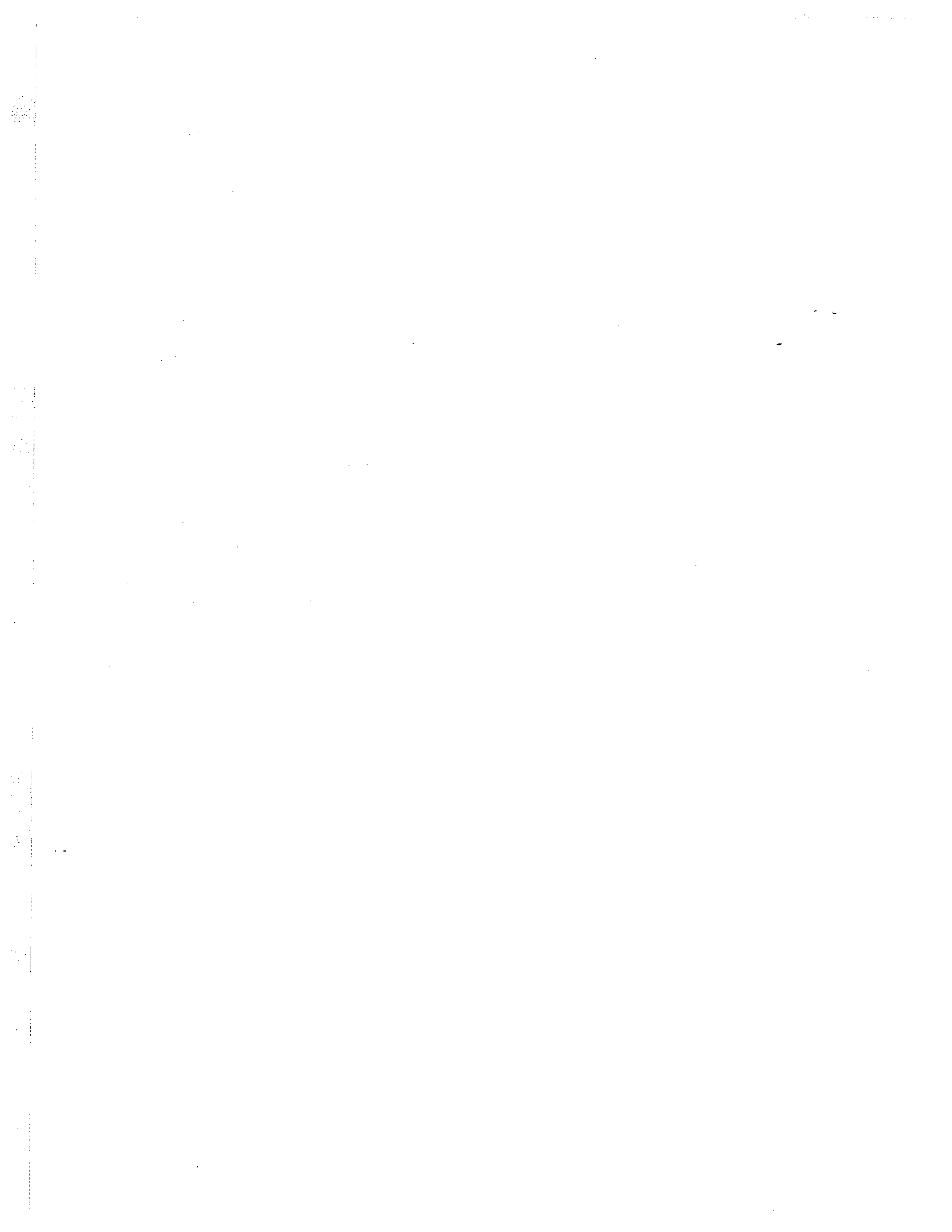
Discussion

The Special Fund is a very controversial part of our workers' compensation program and the level of controversy increases as the liability increases.

Reducing the liability of the Special Fund can be accomplished in several ways, including decreasing benefit levels, revising the definition of injury, limiting the provisions that allow the Special Fund to be made a party to claims and revising the apportionment provisions between the employer and the Special Fund.

In 1982, the General Assembly enacted SB 274 to deal with the growing liability of the Special Fund. The legislation created the Kentucky Reinsurance Association (KRA) in an attempt to stablize and reduce future employer costs for the Special Fund, through the use of investment income and actuarial techniques.

The KRA is responsible for Special Fund liability arising after July, 1983. Currently, KRA's liability is estimated to be approximately $240 million. The KRA was created as a nonprofit corporation and charged with the responsibility of providing funding through assessments to its subscribers, insurance carriers and self-insured employers, for Special Fund liability arising after July, 1983. Unfortunately, the KRA has been involved in a lawsuit with the Finance Cabinet since May, 1984, and has made only one assessment to cover its liability. The lawsuit resulted from a dispute with the Finance Cabinet and the Office of the Attorney General relating to the authority to invest funds and the transferral of KRA funds by the General Assembly to the state's general fund. The parties are awaiting a decision from the Supreme Court on these issues.



STATE GOVERNMENT

DEPARTMENT OF FISH & WILDLIFE RESOURCES: CONSTITUTIONAL AND BUDGETARY ISSUES

Prepared by Joyce Crofts

Issue

Should the General Assembly amend the statutes relating to fish and wildlife to address potential constitutional issues and the current degree of autonomy of the Department of Fish & Wildlife Resources?

Background

During the 1984-85 Interim, the Subcommittee on General Government extensively reviewed statutes relating to the Department of Fish & Wildlife Resources. During the course of the study, two major concerns arose: (1) that parts of the statutes relating to fish and wildlife were subject to possible constitutional attack, and (2) that the General Assembly had allowed the Department of Fish and Wildlife a higher degree of autonomy than most other state agencies were allowed. Discussion of these concerns with citizens, farmers, sportsmen, members of the Fish and Wildlife Resources Commission, and the Department of Fish & Wildlife Resources has resulted in the emergence of four basic issues:

A. Should the method of selecting members of the Fish & Wildlife Commission be changed to a process which would correct potential constitutional conflicts?

B. May the Fish & Wildlife Resources Commission appoint a commissioner of the department for an "indefinite term" of office, and may the Commission, rather than the governor, appoint the commissioner of the department without violating the Kentucky Constitution?

C. Should the Department of Fish & Wildlife Resources be allowed to continue to use the power of eminent domain?

D. Currently the General Assembly appropriates to the Department 100% of the agency's receipts. Should this money be placed in the General Fund and the Department placed on the same expenditure basis as other state agencies, or should the Department be allowed to continue to spend the entire proceeds of its own revenue without restrictions? Should surplus funds be allowed to accumulate? Should the Department be allowed to carry forward surplus funds indefinitely, or should these surplus funds revert to the General Fund?

Discussion

A. The present method of selecting members of the Fish & Wildlife Resources Commission, which provides for a selection process by sportsmen to determine the names to be submitted to the governor for appointment, is vulnerable to constitutional attack because:

1. It is not clear whether it is an election, a referendum, or a nomination and appointment.

   a. If it is considered to be an election, it would be unconstitutional because it is not held at the polls on a primary or regular election date, in violation of §147 and §148 of the Kentucky Constitution. In addition, restricting those who are qualified to vote violates §145 and §147 of the Kentucky Constitution. Further, because Kentucky sportsmen must pay a license fee to qualify for participation in the selection process, the courts could interpret this procedure as a poll tax, which would be in violation of the federal Voting Rights Act.

   b. If it is considered to be a referendum, it would not match constitutional requirements which limit the types of referenda which can be held (Kentucky Constitution §60 and §171).

   c. If it is considered to be a nomination and appointment procedure, in view of LRC v. Brown, restriction on the appointment of members to the Commission may violate the separation of powers doctrine contained in Kentucky Constitution §27 and §28.

2. Further, §93 of the Kentucky Constitution authorizes either an election or appointment. It does not authorize a bifurcated procedure in which there is both an election and an appointment.

B. There is also an apparent constitutional deficiency in the present method of selection of the Commissioner of the Department of Fish & Wildlife Resources. Under the present system the Commissioner of the Department is appointed for an "indefinite term" of office. This provision violates §23 of the Kentucky Constitution, which forbids the General Assembly from creating any office "the appointment of which shall be for a longer term than a term of years." Further, since his appointment could run--and in the past has run--in excess of four years, such appointment contravenes §93 of the Kentucky Constitution, which limits appointment of inferior state officers to four years. There could also be a constitutional problem in the statutory provision for appointment of the Commissioner of the Department by the Fish & Wildlife Commission rather than by the governor.

C. Another issue discussed by the Subcommittee was whether the Department of Fish & Wildlife Resources should be allowed to continue to use the power of eminent domain. Responding to testimony by some citizens, the Subcommittee expressed concern about the intimidating effect of the mere possession of the power of eminent domain. The Subcommittee also discussed restricting or denying the use of the power of eminent domain by the Department, in keeping with the present policies established by the General Assembly with regard to other state agencies with similar functions, and in consideration of the fact that the power of eminent domain has rarely had to be utilized by the Department in its land acquisition program.

D. Throughout the subcommittee meetings many legislators as well as private citizens expressed concern about the high degree of autonomy which the statutes grant the Department. They were especially concerned about the statute which allows the Department to spend the entire proceeds of its own revenue without restrictions. Further, the Department and the League of Kentucky Sportsmen objected to the 1984 General Assembly's transfer of $2.3 million from the agency's fund to the General Fund. They felt that the money was legally intended only for fish and wildlife purposes.

Receipts from the sale of licenses may not be directed to other uses without jeopardizing the federal funds received by the Department, which constitutes 21% of its budget in 1984-85. For this reason, the Department has been allowed historically to retain and carry forward the total unexpended agency receipts. However, the General Assembly's concern is that the agency has carried forward total agency and federal funds in the millions of dollars each year, This carry-forward amount has grown from $3.7 million in FY 1978-79 to $13.1 million in FY 1983-84. The $13.1 million is an amount equal to 93% of the expected total annual receipts for that year. One concept under discussion is that, if the agency is not using these funds, there could be a limit on the carry forward, with any excess lapsing to the General Fund surplus at the end of the fiscal year.

While receipts from license fees must be restricted, due to federal funding requirements, the agency does receive income from other sources (i.e., fines, penalties, sale of confiscated material, lease of tobacco allotment and farmland, lease of mineral rights, income tax check-off, donations) which are not restricted by federal fund requirements. Proposals such as budgeting the agency's maximum level of expenditures, prohibiting the agency from exceeding the level as established in the executive budget, and describing what shall be done with the unexpended receipts would place the Department of Fish & Wildlife Resources under budget controls similar to those of other state agencies.

The Subcommittee on General Government has discussed possible legislation addressing the issues presented here and may have proposals to present to the 1986 General Assembly.

WHISTLEBLOWER PROTECTION

Prepared by Joyce Honaker

Issue

Should employers be prohibited from penalizing employees who "blow the whistle" on alleged illegal activities, mismanagement, or activities that endanger public health or safety, by enactment of a whistleblower protection law?

Background

The Federal Government and at least twelve states have adopted "whistleblower" protection laws intended to protect public employees from retaliation for disclosure of improper or illegal activities, such as violations of law, mismanagement, waste, fraud or endangerment of public health and safety. In several jurisdictions, private sector employees are also granted whistleblower protection by statute. Kentucky gives express statutory protection to whistleblowers in only a limited number of areas. For example, an employee may not be discharged or otherwise discriminated against for filing with the Labor Cabinet a complaint about violation of an occupational safety and health standard (KRS 338.121). More general laws, such as constitutional guarantees of freedom of speech and KRS 18A.095, granting the state Personnel Board authority to reverse the penalization of certain state employees if the action was taken "without just cause," may be applied on a case-by-case basis to instances of "whistleblowing."

Among the issues that might be addressed in considering a whistleblower protection law are the types of disclosures and activities warranting protection; whether public disclosures should be protected or only disclosures to particular officials or bodies; how to deal with false reports; whether information defined by law as confidential should be protected from disclosure; and the remedial actions to be applied in the event of retaliation against a whistleblower.

INTERIM LEGISLATIVE REVIEW OF REORGANIZATION PLANS

Prepared by Joyce Honaker

Issue

Should the law governing the executive branch's interim reorganization authority be changed to shorten the time period for interim legislative review of reorganization plans?

Background

KRS 12.028 delegates to the Governor and other elected state executive officers the power to reorganize executive branch agencies between sessions of the General Assembly. An interim reorganization plan expires after *sine die* adjournment of the regular legislative session following its issuance unless approved by the General Assembly. During the interim, a reorganization plan becomes effective after it is reviewed by the interim joint legislative committee with appropriate jurisdiction. The review must occur within 60 days after the reorganization plan is filed with the Legislative Research Commission.

In correspondence with the Interim Joint Committee on State Government, the Governor's General Counsel has suggested that the effective date of a reorganization plan be established by statute as a specific number of days after the plan is promulgated, and suggested that 30 days would be a reasonable period of time.

PUBLIC RECORDS IN STATE GOVERNMENT COMPUTER SYSTEMS

Prepared by James Monsour

Issue

Should an ongoing machine readable records program be established to manage public records and related computer data residing on computers in the three branches of government?

Background

Since electronic data processing was first employed by the Dept. of Highways in 1957, the use of computers in state government has increased dramatically. Today, the Executive Branch maintains a large mainframe computing facility that supports over six hundred major systems. The Legislative and Judicial Branches, as well as several of the Elective Officers, own computers capable of supporting numerous applications, and many individual agencies use personal computers or other small stand alone systems. With an increasing number of state offices receiving federal funds to automate specific programs, and because of the affordability and improved efficiency of computers generally, the prospect of even wider use of computers by state government in the future seems assured.

One result of the proliferation of computers is the creation of a large number of machine readable records that document the history of those state government programs and services which have been automated. These records, like their hardcopy counterparts, have value either as a management tool to decision makers in state government, or as a resource for ongoing and historical research for the public, as well as government entities. Because they can be manipulated by computer, they have the potential to provide much faster access to public information for both public and private sector computer users. Owing to several factors, however, machine readable records have not been identified and organized so that they can be widely used.

The problem of managing machine readable records and records systems came to the attention of the Special LRC Subcommittee on a Statewide Information System during the 1982-83 interim. While examining the feasibility of legislative access to data on state programs, finances and personnel residing on the Executive Branch's mainframe computer, the Subcommittee learned there was a lack of management of information resources in state government generally, and no specific program addressing the computer information created by state agencies over the past twenty-eight years. It was also learned that the absence of a systematic program to provide for the identification, description and preservation of computer data not only prevents the legislature from accessing public records in machine readable form in a timely manner at present, but also precludes LRC from incorporating data created and stored on state government computers into its research activities in the future.

To begin to address this problem, the Subcommittee sponsored legislation creating a Kentucky Information Systems Commission responsible for the coordination, on a statewide level, of the computerization of public records in state government. This legislation, subsequently passed by the 1984 General Assembly, requires that a program to provide for the documentation, maintenance, storage and accession of public records in machine readable form be developed under the aegis of the Dept. for Libraries and Archives (DLA). No appropriation for such a program, however, was provided for the current biennium.

In October, 1984, in order to fulfill its statutory responsibility, and because it lacked funding to develop a machine readable records program, DLA applied to the National Historical Publications and Records Commission for a grant to initiate a pilot project in Kentucky state government. The grant was subsequently awarded in March, 1985, and will provide funding in the amount of $148,000 for an eighteen month period to end September, 1986.

Among the goals of the pilot project are:

- Development of procedures for the identification of machine readable records;

- Surveying and describing machine readable records in three state agencies;

- Establishing methods and responsibilities in the retention of records in machine readable form;

- Creating a data directory of machine readable records in state government computers;

- Establishing methods for accessing records in machine readable form.

A major product of the project is an interim report that will be presented to the Subcommittee on a Statewide Information System in October, 1985. This report will 1) detail the costs and parameters of an ongoing machine readable records program for the three branches of government, and 2) assess the desirability of creating a data base of government generated machine readable records that could facilitate the sharing of computerized public information among different agencies and branches of government. The Subcommittee will determine if further legislation is needed to address machine readable records, and if funding for such a program can be recommended to the 1986 General Assembly, based on project findings.

Discussion

Through the mid-1970s computer technology and software concentrated on the processing of data for specific uses. Large centralized computer systems,

such as the one in the Executive Branch, were developed to process user specific programs. In this configuration, many terminals are connected to a large processor or group of large processors. Users vie for computer time, are charged for programming, and their data is stored in separate files. In recent years it has become apparent that this approach is both more expensive and less efficient than its alternative - distributed processing, whose emphasis is on the processing of information on stand alone systems which can be linked together. This arrangement permits the sharing of files, thus allowing a multitude of users to manipulate common data, or a data base of machine readable records, for a number of purposes.

At present, however, the trend away from large centralized computer systems and the resultant profusion of personal computers and other small systems has not allowed government or the public to enjoy the benefits of distributed processing, owing to the fact that machine readable data is not organized and has not been managed as a resource so that it has the potential to be shared. Even though large system development was centralized with DIS in 1981, there remains little control over the records being produced today, because progressively less information is being processed on the Executive Branch mainframe operated by DIS, while daily increasingly more information is being processed on small agency owned computers.

This trend has exacerbated the problem of managing computerized public records in state government. Not only is there a significant backlog of machine readable records developed prior to 1981 remaining to be organized, but records presently being created on small systems are not being systematically managed. Considering that many public records are now produced in machine readable form exclusively, and the fact that tapes and disks have to be rewound or copied periodically to avoid loss of data, there is no certainty that this information is being preserved at present, and further, there is no assurance, if it is being maintained, that it has been identified and described so that it can be utilized by government and the public in the future.

The Machine Readable Records pilot project is a cooperative interagency effort to develop a plan for the management and preservation of Kentucky public records in machine readable form. Proponents maintain that without a systematic plan to inventory, appraise, preserve/dispose of computer data, the problems of wasted computer storage, higher storage costs, data redundancy and data inaccuracy will continue to plague state government, and the ability to effectively manage the exponentially growing number of computerized public records will be nearly non- existent, making information less useful and less accessible.

While separate data files created on large mainframe computer systems are still widely used, the National Bureau of Standards, computer systems specialists, and public records experts are emphasizing the advantages of distributed processing and the shared data base approach to the organization and use of machine readable information.

Beside the Department for Libraries & Archives, which is authorized by KRS Chapter 171 to administer records management programs in state government, DIS, LRC, and the Administrative Office of the Courts (AOC) are proponents of

an ongoing machine readable records program, and have been working with both The Subcommittee on a Statewide Information System and The Kentucky Information Systems Commission to implement such a program within the distributive processing environment.

No organized opposition to the concept of a machine readable records program has surfaced during the Interim.

At issue, then, is whether the present value and future utility of state government computer data warrants the establishment and cost of an ongoing machine readable records program to manage the state's computerized information resources.

STATE GOVERNMENT PUBLICATIONS

Prepared by Jeff Kell

Issue

Should some centralized oversight be exercised over the development, production and distribution of state government publications?

Background

The subject of state publications has always been a sensitive issue. Agencies publish a variety of reports, newsletters, pamphlets and other materials. The quality of these publications varies and the purposes for which they are produced and distributed are not always clear. These circumstances have led to questions from the media, and some legislators, as to the potential waste of taxpayer money or the political motivations of agency heads whose pictures are often displayed in these publications. Organizations, individuals and legislators often receive materials from state agencies that were not requested or that seem self-serving in nature. These and other reasons led the Program Review and Investigations Committee to vote to conduct a review of state publications in December, 1984.

Discussion

Several points need to be kept in mind when trying to understand the state agency publication picture:

- There is no commonly accepted definition of a state agency.
- There is no commonly accepted definition of what constitutes a state publication.
- The federal government often requires states to publish materials, and pays for them, in whole or in part.
- There is little if any guidance in the Kentucky Revised Statutes for agencies to follow in producing and distributing publications, although in many cases the legislature requires particular agencies to "submit an annual report to the governor."
- Except in the areas of purchasing and depository requirements, there is essentially no centralized oversight of state agency printing or publishing.

- Most state agencies have no one person or office which actually controls the production and distribution of publications.

- Aside from a possible overall printing budget, most agencies do not budget for publications or keep track of their costs of development and distribution.

Estimates of the cost of producing and distributing the approximately 800 different kinds of state publications, excluding those published by state universities, are about $4.5 million a year. Should the General Assembly wish to impose some controls in this area, responsibilities need to be established and placed within one or more agencies. For instance, oversight for coordination, quality control, and technical assistance could be placed in an existing or new agency. Basic policies could be included in legislation, with more detailed requirements promulgated in regulation by the oversight agency.

DIVISION OF WATER DIRECTOR

Prepared by Jeff Kell

Issue

Should the General Assembly require bona fide qualifications for the position of Director of Division of Water in the Natural Resources and Environmental Protection Cabinet and place this position back under the merit system so as to reduce the potential for placing political appointees with insufficient training or experience in this position?

Background and Discussion

The Division of Water has had six directors in the last eight years. This frequency of turnover has meant shifts in program priorities, and has undermined efforts to gain employee acceptance of the division's consolidation with the Division of Water Resources and the Division of Sanitary Engineering, which took place in 1980. The leadership position of the Division Director has been weakened by the assumption on the part of Division employees that any director's tenure will be brief. As a result, turf problems and confusion characterize the operations of the Division, according to a study conducted by the Program Review and Investigations Committee. Even though the present Division Director is well qualified for the job, there is no assurance that he will not be dismissed tomorrow, since the position is in the non-merit classification.

PROMULGATING ADMINISTRATIVE REGULATIONS

Prepared by Joe Hood

Issue

Should KRS Chapter 13A be amended to clarify procedural requirements and substantive questions raised during the first year of its implementation?

Background

KRS Chapter 13A was enacted by the 1984 General Assembly as the statute governing the promulgation of administrative regulations by the various agencies of state government, repealing the existing statute, KRS Chapter 13. During the first year of implementation, several hundred regulations have been promulgated, amended or repealed. Agencies have responded to the requirements of KRS Chapter 13A from varying viewpoints. Time frames for affirmative consideration of comments received at public hearings on complex regulations leave little time for serious consideration of important questions raised and for revised regulatory impact statements. Occasionally, statutory requirements for approval by other groups, enacted prior to KRS Chapter 13A, cause agencies to either defer or refuse to defer regulations instead of agreeing to even minor suggested changes when questions arise at the Administrative Regulation Review Subcommittee meetings. Thus, the agencies, the Administrative Regulation Review Subcommittee, and the public work with some restrictive time requirements in KRS Chapter 13A which become more restrictive when other statutorily mandated bodies propose or review promulgated regulations within each body's jurisdiction.

Discussion

The time frame is statutory and can be changed only by amendment. For most regulations, the time allowed is adequate. An additional amount of time could be allowed for comprehensive, complex regulations. Other existing statutes regarding regulation promulgation approval need to be reviewed for possible conflicts.

Issue

Should KRS Chapter 13A be amended to define precisely the terms used therein?

Background

Material "incorporated by reference" has long been used to include lengthy technical material in a regulation by merely citing it, "incorporating" it and submitting a copy of it with the regulation and advising the public where it can be seen and obtained. Many agencies, in response to KRS Chapter 13A's definition of "regulation," have greatly increased the use of incorporating material by reference. Volumes and volumes of material have been incorporated. The public is at a loss in trying to obtain and decipher this regulatory material, especially in a timely fashion prior to a public hearing on a proposed regulation.

Discussion

The terms "regulation" and "incorporated by reference" need to be reviewed. The term "regulation" is specifically defined by statute and is broadly inclusive. Statutory amendment would be necessary to change this. Incorporation by reference has been a money and labor-saving device for state government. By this device, copyrighted material, federal guidelines, even (perhaps conflicting) administrative law rulings become "regulation" by incorporation. Perhaps a new area for "guidelines" and federal statutes and regulations should be considered. Some improvement could be handled by amendment of the LRC regulation on regulations, but General Assembly action may well be more appropriate.

Issue

Should KRS Chapter 13A be amended to require a definite in-house legislative procedure relative to objections raised and recommendations made by the Administrative Regulation Review Subcommittee?

Background

KRS Chapter 13A requires the Administrative Regulation Review Subcommittee to meet and review promulgated regulations and to conduct an ongoing study concerning needs associated with the area of regulation. This mandate affects all agencies of state government as well as the general public.

Discussion

Throughout the past year, the subcommittee has raised various questions and referred concerns to the LRC and to appropriate standing committees. There is no statutory mechanism for reporting a response of any action taken by such standing committees, other than the ongoing study of the Administrative Regulation Review Subcommittee. Previous to the LRC v. Brown suit, regulations objected to and not amended were laid upon the clerk's desk in the House and Senate. Although regulations cannot be delayed now, objectionable regulations could still be required to have some definite in-house procedure for the benefit of overall awareness.

PERSONNEL ISSUE - COMPENSATION

Prepared by Joy V. Blanton

Issue

Should state employee annual salary increases be awarded across-the-board, based on merit adjustments, tied to cost-of-living (COLAs), or based on a combination of all three; and, should such increases be calculated on base pay or gross annual salary or wages?

Background

No other area of managing relationships with state employees is more hotly debated than compensation. The compensation system currently used by the Commonwealth of Kentucky is known in personnel parlance as a "nonmerit" system. That is, employees are granted annual increases at a specified percentage of their salary. This percentage is applied across-the-board without regard to work performance.

KRS 18A.355 mandates that state employees receive salary increases of at least 5 percent each year; however, when the 1984 General Assembly passed the budget bill for the 1984-86 biennium, such increases were set at 2 percent for FY 1984 and 3 percent for FY 1985. Subsequently, the Attorney General, David Armstrong, filed suit challenging the constitutionality of the budget bill and the General Assembly's authority to suspend KRS 18A.355 and other statutes. On January 18, 1985, the Franklin Circuit Court upheld the General Assembly's authority to suspend the statute granting state employees at least a 5 percent salary increase yearly.

While KRS Chapter 18A does not require that work performance be considered when yearly percentage increases are awarded, it does mandate the establishment of programs for appraising employee work performance. In January, 1983, the Brown Administration implemented a uniform appraisal system known as Work Planning and Performance Review, or "WPPR." Prior to this time, appraisals were not conducted uniformly, if at all. "WPPR" proved to be very unpopular with state employees, even though monetary rewards were attached. The 1984 General Assembly considered, but did not enact, detailed guidelines regarding performance appraisal.

"WPPR" was repealed by the Collins Administration effective January 20, 1984. Governor Collins recently established the Commonwealth of Kentucky Employee Evaluation Committee, composed of various state employees. It is charged with the responsibility of coming up with recommended guidelines for a work performance appraisal system targeted for implementation in February, 1986.

Another method that could be used to adjust salaries is based on cost-of-living. Cost-of-living adjustments (COLAs) are determined by the movement of the Consumer Price Index in any given year. These adjustments are usually granted across-the-board but may be subject to a cap in the event that inflation exceeds funds available for salary increases. COLAs are less popular with employees during periods of low inflation and more popular during periods of high inflation.

KRS 18A.355, enacted by the 1982 General Assembly, mandates that state employee salary increases be computed on gross annual salary or wages rather than base pay. Traditionally, such increases have been calculated on base pay. The term "base pay" is generally taken to mean the salary or wages received by an employee minus any type of incentive pay. The term "gross annual salary or wages" is generally taken to mean the total salary or wages, exclusive of deductions, received by an employee.

Personnel regulations currently mandate the exclusion of incentive pay, such as Educational Achievement Increases, Employee Suggestion System Awards, Overtime Pay, and Compensatory Leave Payments, in computing salary increases. Prior to December 15, 1982, when Continuous Service Awards (CSAs) were repealed, such awards were also excluded from these computations.

In a decision rendered May 2, 1985, the Kentucky Supreme Court ruled that gross annual salary or wages, for the purpose of calculating salary increases, shall mean the total amount of compensation received by an employee, including salaries, wages, and increments for the twelve-month period preceding his anniversary date (Bullock v. Commonwealth of Kentucky). It also affirmed an 8 percent penalty imposed by the lower courts. It is estimated by the Department of Personnel that this decision alone will cost the state 6 to 9 million dollars if applied across-the-board.

This ruling resulted from a suit filed by a group of state employees who questioned whether Continuous Service Awards (CSAs), earned in the year before KRS 18A.355 was enacted, should be considered as part of their gross annual salary or wages when determining the amount of the salary increase provided by KRS 18A.355.

The issue of whether such employee benefits as insurance, educational allotments, and overtime pay should be included in determining the amount of gross annual salary or wages was not presented to the court in Bullock v. Commonwealth of Kentucky; however, the Kentucky Supreme Court said, "To the extent that the opinion of the Court of Appeals may be deemed to include such benefits within the definition of gross annual salary or wages, it is reversed."

PERSONNEL ISSUE - GENERAL

Prepared by Joy V. Blanton

Issue

Should state employee grievance and lay-off procedures, performance appraisal methods, separation and disciplinary procedures, and other personnel matters be more explicitly governed by statute; and, should the present statutory requirements for uniform personnel policies for state employees be retained, or should individual agencies be authorized to promulgate administrative regulations governing some aspects of the personnel system?

Background

The Merit System law as we know it today was largely rewritten during the 1982 Session of the Kentucky General Assembly. Because the changes were so extensive, a new chapter of the Kentucky Revised Statutes, KRS Chapter 18A, was created and the old one, KRS Chapter 18, was repealed. The new Chapter, however, still contains the language granting the Personnel Department and the Board broad authority to specify, among other things, the manner of completing appointments and promotions, leaves of absence with and without pay, procedures for changes in rates of pay, transfers, reinstatements, grievance and lay-off procedures, separation and disciplinary procedures, and performance appraisal methods. The breadth of the Executive Branch's authority became a legislative issue during the Brown Administration, when concerns began to surface regarding the design and implementation of new classification and compensation plans and a uniform performance appraisal system. An attempt was made during the 1984 Session, through the introduction of Senate Bill 404 and House Bill 941, to make the language more restrictive; however, this attempt failed.

Kentucky's first uniform Merit System law was enacted by the 1960 General Assembly. It covered approximately 12,000 positions and did not become fully binding until July, 1961. Prior to 1960, approximately 3,000 positions were covered by separate departmental merit systems. Today's Merit System law, according to the Department of Personnel, covers approximately 29,900 employees.

KRS Chapter 18A mandates that the Personnel Commissioner prepare and recommend to the Personnel Board administrative regulations governing the purposes of KRS 18A.005 to 18A.200. It also requires the Board to adopt such regulations, and in some cases, submit them to the Governor, prior to filing with the Legislative Research Commission for publication and review. Under the provisions of KRS Chapters 13A and 18A, personnel regulations must be consistent with the statute governing the subject matter of the regulation. This mandate is being ignored by the Personnel Board and other state agencies. For example, on May 15, 1985, the Board filed administrative regulations with the Legislative Research Commission which extend reemployment

rights to all status employees, a provision which failed to pass the 1984 Session of the General Assembly. Currently, KRS 18A.130 and 18A.135 grant these rights to career employees rather than status employees. "Career Employees," according to KRS Chapter 18A, are those employees with twenty or more years of state service. "Status employees" are defined as those employees who successfully complete probationary periods.

The Corrections Cabinet, the Transportation Cabinet, and the Cabinet for Human Resources filed administrative regulations which establish procedures to be followed when employees are separated, disciplined, or laid off; restate current regulatory language (Personnel Rules), which is redundant and unnecessary; prohibit unclassified (nonmerit) employee appeals; and establish grievance procedures. KRS 18A.030, 18A.075, and 18A.110 clearly mandate that regulations governing these matters must be prepared and proposed by the Personnel Commissioner and adopted by the Personnel Board. KRS 18A.095 specifically grants appeal rights to unclassified employees who are dismissed, demoted, suspended, or otherwise penalized for cause.

KRS 18A.030 and 18A.110 currently mandate uniform standards and methods of appraising the work performance of all employees of the Executive Branch. The regulation establishing a performance appraisal system was repealed January 20, 1984, and has not been replaced. The issue is discussed in this publication under the title, "Personnel Issue - Compensation."

PERSONNEL ISSUE - TIME LIMIT FOR APPEALS

Prepared by Joy V. Blanton

Issue

Should the statutory time limits placed on Personnel Board hearings and the issuance of final determinations be extended?

Background

KRS 18A.095 permits employees to appeal dismissals, demotions, suspensions, or other penalizations within 30 days of their occurrence. In the case of the unclassified (nonmerit) employee, the action taken must be for cause. KRS 18A.095 also mandates that such appeals be heard within 60 days and that a final determination be issued within 90 days. Although the 30 days appeal period is adhered to, the Personnel Board frequently ignores the 60- and 90-day limitations, as it did in the appeal filed by twelve black employees of the Kentucky Commission on Human Rights alleging racial discrimination.
815N

A VIETNAM VETERANS' BONUS

Prepared by Kent Downey

Issue

Should the Commonwealth enact a Viet Nam Veterans' Bonus?

Background

The Kentucky General Assembly in 1958 enacted a proposed constitutional amendment which was ratified by the public in 1959 (KRS 40.005). A bonus was paid to "veterans, their widows or heirs, or next of kin of the Spanish-American War, World War I, World War II, and the Korean conflict." The amount paid to each veteran in 1960 was $300.00 for service in the continental limits of the United States, and $500.00 for service outside the continental limits of the United States. The bonus was paid out of the issuance of bonds and the levying of a retail sales tax. Veterans groups and other military advocates have long felt the Viet Nam veteran should receive the same compensation as those veterans of past wars and conflicts.

Discussion

The amount of money needed to equal the buying power of the 1960 payment has almost tripled, due to inflation. The cost to the Commonwealth in 1985 dollars to enact a bonus for Viet Nam veterans is estimated to be approximately $60 million. The funding of this bonus could be financed by issuing general obligation bonds, appropriation of revenues, single- or multi-year, as tax increment appropriation, or through temporary revenue increases, such as a surtax.

FEDERAL MILITARY RETIREMENT ANNUITIES

Prepared by Kent Downey

Issue

Should the Commonwealth increase the exemption on federal military retirement annuities?

Background

The state of Kentucky currently exempts up to $4,000.00 of the federal retirement, Civil Service and Military retirement annuities, of persons fifty years of age and older (KRS 141.021). Military retirement groups (e.g., the Retired Officers Association) want the exemption to be increased to cover all gross income.

Discussion

Kentucky's revenue loss from the exemption of all federal military personnel retirement pay is estimated to be $4.6 million. This loss of revenue for the state might be somewhat offset by attracting more retirees to Kentucky.

ISSUANCE DATE FOR D.A.V. LICENSE PLATES

Prepared by Kent Downey

Issue

Should the Commonwealth change the date of issuing disabled American veterans license plates?

Background

As mandated by KRS 186.041, the Department of Transportation issues a free certificate of registration and two license plates to each disabled veteran. The expiration on such plates is December 31.

Discussion

The proposed change in the law would make the renewal date July 31, the date for renewing other handicapped licenses.

TRANSPORTATION

Automatic seat belts - Work in the same way as conventional belts, by restraining the occupants' forward motion. These belts automatically move into place as the occupant enters the car and closes the door. In use they are similar to manual belts and are designed with a provision for emergency exit.

Passive Interiors - Involves engineering improvements to the interior and front of the vehicle to better absorb crash forces on the vehicle's occupants. This concept is currently in the design phase and while some features have been included on some vehicle models, there has been no test for these safety components' ability to meet crash test standard.

The effect of the current amendment to FMVSS 208 is that these automatic safety features will be replaced with a safety feature which bases its protection on the citizen's compliance with state laws.

Discussion

Opponents of the state's mandating the use of seat belts for its citizens point to the checkered history of FMVSS 208. They believe a conscientious effort on the part of the United States Department of Transportation would have secured a safety standard and negated the need for state action. A common outcry is that the current seat belt system coupled with air bags would create greater safety than state mandated seat belt use. Others fear that once laws are enacted, passenger safety research by manufacturers will become minimal.

Proponents of the Dole decision state that FMVSS 208 never supported air bags over seat belts. According to FMVSS 208, only one system is required and said system is the choice of the manufacturer.

In addition, state required use is the quickest alternative for saving lives. Any manufacturer's requirement will delay full implementation. Vehicles already in use not in compliance with the safety standard will not be off the roads for about fifteen years.

As mentioned, there is also the personal freedom factor. Opponents of the seat belt law argue that mandating use is a totalitarian act. It is not the life-saving effect of seat belts that is usually debated, but rather the method that will achieve that effect. Opponents of mandatory use believe that the option of education, public awareness and incentives could achieve the same goal of increased seat belt use.

The personal freedom argument is counteracted by dramatic figures on lives saved by seat belt use. Proponents argue the automobile crashes are the fourth largest national health problem in this country and, through increased seat belt use, perhaps the easiest to solve.

In addition, the proponents point out that laws have been enacted in several areas in which personal freedom could be construed to have suffered. Employee safety, highway safety and recreational safety are just a few such areas.

Proponents believe mandatory use to be the quickest method to cure the highway death and injury epidemic. Foreign countries have provided evidence that usage will increase with mandatory laws and deaths decrease. Examples include England, Australia, Germany, Israel and four providences of Canada. In these countries, compliance increases from 50% after enactment of mandatory seat belt use and fatalities dropped by 20%.

Currently, thirteen states have enacted seat belt legislation and nine states have such legislation pending. The states which have enacted such a law include New York, New Jersey, Illinois, Missouri, Michigan, New Mexico, Indiana, North Carolina, Oklahoma, Nebraska, Hawaii, Texas and Connecticut. Based on the experiences of these other states, a lively debate will undoubtably occur on this issue in the 1986 General Assembly session.

PROPERTY TAX ASSESSMENT ON MOTOR VEHICLES

Prepared by James R. Roberts

Issue

Should the General Assembly establish the method of property tax assessment on motor vehicles?

Background

The 1982 General Assembly passed House Bill 807 which required that the collection of property tax on a motor vehicle be prior to registration. The MOTAX system, as it is now known, began implementation on January 1, 1984.

A public outcry against the equity of the assessment values began almost immediately. The displeasure was aimed primarily at the assessed value of those vehicles which no longer are in the National Automobile Dealers Association (NADA) price guide, the main source for determining vehicle value. These omitted vehicles are models seven years old or older.

Two reasons for objecting to the new assessment plan were that:

(1) Motor vehicles which had been dropped from the property valuation administrator's tax rolls reappear under the new proposal, with minimum values of $400, and

(2) The change in assessment plan also called for a higher value in 1984 than the 1983 assessed value.

In both these instances, owners had the value of the vehicles increased; thus the taxes were increased. In some instances owners would receive their 1983 and 1984 tax bills within a short period because of early birthdates. In almost all cases relating to older vehicles the value assessed for 1984 was higher than that for 1983.

Critics of the Revenue Cabinet's assessment policy argued that House Bill 807 was passed to ensure tax payment, not to increase the tax roles. The Revenue Cabinet's schedule called for a seventeen - year depreciation schedule in some instances, while a statutory schedule for usage tax purposes for automobiles shows a twelve - year depreciation schedule.

In the 1984 Regular Session, legislation was introduced which would limit the rate of motor vehicle property tax to the amount levied in 1983. This legislation was not reported from the Appropriations and Revenue Committee.

The Interim Joint Committee on Transportation has prefiled BR 44 for the 1986 Regular Session. The legislation seeks to incorporate the usage tax formula in determining motor vehicle value, rather than continue use of the existing formula.

The Revenue Cabinet, in hearings before the Transportation Committee, opposed the legislation. Its view was that such a schedule would not reflect fair market value and as such would be unconstitutional. Officials also noted a statutory method for taxpayers to appeal property valuation. If a mistake is made, this process is open for the aggrieved taxpayer.

Undoubtedly, if BR 84 passes, a revenue loss will result. Whether-the amount lost appears to be outweighed by a public and legislative perception of a fairer taxation method is the decision of the 1986 General Assembly.

FUNDING FOR THE STATE ROAD FUND

Prepared by Robert C. Fallon

Issue

Should the General Assembly increase funding for the state Road Fund?

Background

The state Road Fund is the primary mechanism for financing highway construction and maintenance in Kentucky. In FY 1985-86 the Road Fund consists of $480,875,000, generated from a variety of sources, including the 10¢ motor fuel tax, $189 million; the 5% usage tax on motor vehicles, $151,850,000; the 2.85¢ per mile weight distance tax on trucks 60,000 lbs. and over, $30 million; and toll road revenue, $21,500,000. Road Fund expenditures for FY 1985-86 are as follows:

Debt Service	$151,927,000
Revenue Sharing with Local Governments	88,805,000
Maintenance	99,763,200
General Administration & Support	37,263,800
State Construction	10,000,000
Resurfacing	11,756,600
Other Road Fund Expenditures Including Federal Aid Matching	81,359,400
TOTAL	$480,875,000

Since the early 1970's two changes have occurred in the Road Fund which are presently hampering the current maintenance and construction on the state highway system. First, increased inflation was accompanied by stagnant growth in the state Road Fund. From 1973 to 1984 the Federal Highway Maintenance and Operation Index, an index compiled by the Federal Highway Administration, increased by 155%, while Road Fund revenues grew only 3%. Secondly, bond issues have increased debt service in the Road Fund by $46.9 million each year for Resource Recovery Road bond debt service and $35.8 million annually for Economic Development Road Bond debt service. In FY 1974-75, $72,567,400 was appropriated for debt service. That figure has grown to $151,927,000 in FY 1985-86 and debt service now comprises 31% of Road Fund revenues.

The debt service for resource recovery roads was to be funded with coal severance tax revenues transferred from the General Fund to the Road Fund. However, in the 1984 General Assembly, due to a shortage of funds in the General Fund, these receipts were not budgeted to be transferred in FY 1984-85 and FY 1985-86. Resource Recovery Road Bond debt service in these

fiscal years will be the responsibility of the Road Fund. At the same time, the Legislature approved the issuance of $300 million in Economic Development Road Bonds, which increased debt service as mentioned above, to $35.8 million in FY 1985-86. The end result of this withdrawal of the coal severance tax from the Road Fund and the increased debt for Economic Development Road Bonds is that the present maintenance of the state highway system is suffering in the current biennium. Funding for resurfacing totaled $17,110,500 in FY 1984-85 and $11,756,600 in FY 1985-86. That level of funding will mean that the state highway system will be resurfaced every thirty-three years, rather than every fifteen, as recommended by state highway engineers. In the maintenance program, requested funds for FY 1985-86 were reduced $6,954,200 from the level requested of $106,717,500, resulting in cutbacks in material purchases, snow and ice removal, and mowing.

Finally, the Transportation Cabinet estimates that just to maintain the state system in its present form, the Cabinet needs $165 million annually above projected levels.

Discussion

Numerous proposals have been offered to raise Road Fund revenues, including:

(1) Increasing the motor fuels tax.

Each penny raised would generate $20 million per year, with $11.1million going to the regular Road Fund and $9.9 million forcounty, municipal, and rural secondary roads. Proponents of the motor fuels tax claim that our tax is the lowest of the surrounding states, except Missouri, and that the tax is easy to collect and administer and more closely reflects the concept that highway users should pay for the maintenance of the roads in accordance with the number of miles driven. Opponents of increasing the motor fuels tax do not disagree with this concept, but argue that increasing the tax causes individuals to purchase fuels in bordering states, thereby decreasing the revenue that would be generated. They also argue that it would hurt businesses, such as truck stops, which depend on sales of diesel fuel to interstate truck operators, since a tax increase would make the pump price of diesel fuel in Kentucky higher than in other states such as Tennessee. Many of these arguments were made during the 1985 Special Session of the General Assembly during discussions on House Bill 4, which would have increased the percentage rate on motor fuels from nine percent to thirteen and a half percent of the average wholesale price. This would have effectively resulted in a five cents per gallon increase, since the current wholesale price of approximately ninety-seven cents is well below the minimum level of $1.11. This proposal was defeated in the House of Representatives by a vote of 36 to 60.

(2) Doubling passenger car registration fees to $25.
This proposal would generate approximately $20 million annually. Proponents charge that Kentucky's license fee is lower than those of many states and therefore should be raised. Opponents contend that increasing the registration fee, given new requirements for paying property tax and showing proof of insurance at time of registration, would mean an additional burden to people at the time of registering their cars.

(3) Increasing the Weight Distance Tax.
The present weight distance tax is 2.85 cents per mile for trucks 60,000 lbs. or over. The tax is expected to generate $30 million in FY 1985-86 and each one cent increase would generate approximately $10 million. Proponents of the weight distance tax state that it is the most equitable of the taxes in the state Road Fund since trucks with higher weights cause more damage to the roads and therefore should pay more for road repairs. Opponents charge that the weight distance tax is difficult to administer, encourages tax cheating, since taxes are reported quarterly by the carriers based on the mileage driven in Kentucky, and that imposition of the weight-distance tax has caused states such as Georgia and Florida to retaliate against Kentucky-based motor carriers operating in those states. A floor amendment, adopted as part of the proposed increase in the motor fuels tax during the 1985 Special Session of the General Assembly but subsequently defeated, would have required the Governor to report on ways to improve the enforcement of the weight distance tax and estimate the possible revenues to be generated from increased enforcement efforts.

(4) Doubling present toll rates.
Doubling toll rates would generate approximately $21.5 million annually. Proponents argue that the annual deficit on the toll roads between revenues generated and costs to collect tolls, maintain the road and pay debt service is approximately $45 million. They argue that an increase in toll rates, which have never been increased, would help offset this deficit. Opponents contend that the system of collecting toll road revenues is not cost effective. They contend that raising tolls would burden individuals who are required to use these roads for everyday transportation and force them off of the toll roads onto less maintained secondary roads.

Other methods of increasing the Road Fund include raising the 5% usage tax on motor vehicles (a 1% increase in the usage tax would generate $30.4 million annually) and transferring from the General Fund to the Road Fund the sales tax collected on automobile parts and accessories. The latter would generate approximately $42 million annually. Both ideas have been discussed previously and appear to have little legislative support.

THE COUNTY ROAD AID AND MUNICIPAL AID PROGRAMS

Prepared by Robert C. Fallon

Issue

Should the General Assembly change the method of funding or administration of the County Road Aid and Municipal Aid Program?

Background

Since 1948 the General Assembly has provided funding for a rural and secondary road system in Kentucky. At that time, the fund consisted of 2/7ths of the motor fuels tax. In 1972 the allocation was changed to 2/9ths of the motor fuels tax, or 22.2%. At that time a new fund was created, entitled the Municipal Aid Program, funded by 1/18th, or 5.6 percent, of the motor fuel tax, to repair city roads and streets. In the following legislative session in 1974, the County Road Aid Program was separated from the Rural and Secondary Road Program and funded by 9/10th of one cent, or 10%, of the motor fuels tax. Funding for the County Road Aid Program in FY 1983-84, which totaled $31,263,300, and the Rural Secondary Road Fund, which totaled $44,489,500 in FY 1983-84, is divided according to a formula based on such factors as rural population, rural mileage and square mileage of rural area in each county. The Municipal Aid Program which totaled $13,427,000 in FY 1983-84, is divided according to population.

The administration of the Rural Secondary Road Fund has always been within the Transportation Cabinet and the County Road Aid Program and the Muncipal Aid Program were administered by that Cabinet until 1980. In 1980, substantial changes were made in the County Road Aid and Municipal Aid Programs. Administration of these two programs was transferred to the Finance and Administration Cabinet, with counties and cities receiving monthly checks based on the previous month's collections of the motor fuels tax. At the same time, the percentage of County Road Aid allocations was increased from 10% to 15.6% and Municipal Aid Programs from 5.6% to 6.7% of motor fuel tax receipts.

Despite the additional funds and the greater freedom in expending monies allocated, local governments, especially counties, also had greater responsibilities. Prior to the change, the Transportation Cabinet provided counties with technical expertise, equipment and funds when emergencies occurred. Some counties adjusted to the changes without difficulties, but in other counties road maintenance suffered as funds were expended to begin road programs, counties lacked technical expertise in road maintenance and additional funds in a county budget were not available when emergencies occurred.

In an attempt to alleviate some of the problems which resulted from the changes in the County Road Aid and Municipal Aid Program, while maintaining the increased level of funding and allowing counties to have greater flexibility in expenditure of funds, the legislature passed Senate Bill 238 in the 1984 General Assembly. That bill created the Department of Rural and Municipal Aid within the Department of Highways to develop the Rural Secondary Program. Section 8 of that bill amended KRS 179.400 to provide that the fiscal court of any county receiving state aid could enter into cooperative agreement with the Department of Rural and Municipal Aid for the construction, reconstruction and maintenance of county roads and bridges. To date, over sixty counties have entered this agreement. Under the co-op system, 3% is deducted from each particular county's projected allotment for a statewide emergency fund to be used in only those counties that participate in the co-op program. Of the funds remaining, 80% is made available to the participating counties on July 1st for the purchase of materials on price contract and cost already incurred by county road departments for personnel and equipment rental. The Cabinet is not performing work on a day-to-day basis, but is providing assistance in emergency situations. In addition, the Transportation Cabinet is providing technical assistance on a request by request basis and, for both FY 1984-85 and FY 1985-86, utilized approximately $7 million annually of Rural Secondary Road Funds on county roads.

Discussion

Despite these recent administrative changes and infusion of money, the 44,000 miles of local roads and streets, which includes county roads, continues to be in need of repair and resurfacing, according to the Transportation Cabinet. Many legislators state that the number one constituent complaint is the condition of local roads. There are two local road problem areas which are most often discussed as continuing sources of difficulty. One is improving the effectiveness of current expenditures of County and Municipal Aid Funds. One idea calls for greater Transportation Cabinet involvement in the programming and expenditure of funds, as was the case prior to the 1980 changes. Opponents of this idea believe that since local governments are closer to the problem, they should determine road needs; the Transportation Cabinet contends that not enough men and equipment are available to perform road work on a daily basis. Another suggestion made is to increase the use of materials which meet Transportation Cabinet specifications and increase training for county road employes and highway maintenance techniques by the Transportation Cabinet and the Kentucky Transportation Center at the University of Kentucky.

The second proposal to improve the condition of local roads is an increased funding, either through an increase in the gas tax or the greater utilization of the state Road Fund, through either the regular state Road Fund or the Rural Secondary Road Fund. Every penny increase in the gas tax would generate $3,120,000 in the County Road Aid Program and $1,340,000 in the Municipal Aid Program . As mentioned above, the Transportation Cabinet in the past two years has utilized approximately $7 million annually in Rural Secondary Road Funds on county roads. Proponents call for continuation of this policy on an annual basis, but opponents believe that

such a step is only taking needed funds from the state system. Another idea is to tie funding for the County Road Aid Program and Municipal Aid Program to a source other than the motor fuels tax. As mentioned above, in FY 1983-84 the County Road Aid Program received $31,263,300 from 15.6% of the motor fuels tax and the Municipal Aid Program received $13,427,000 from 6.7% of the motor fuels tax. However, growth in the motor fuels tax has been relatively stagnant in recent years, due to the enactment of the gasohol tax exemption in 1982, declining fuel prices and reduced consumption. One suggestion is to set the County Road Aid and Municipal Aid funding levels for FY 1986-87 and FY 1987-88 at that projected from the motor fuels tax but tie funding to the motor vehicle usage and weight distance tax, as well as the motor fuels tax, since these other two taxes have grown considerably in recent years and have the potential for greater future growth in the motor fuels tax. This proposal would not result in an immediate increase in County Road Aid and Municipal Aid funding. However, in future years, according to projected levels, these two funds would receive more of the regular Road Fund than they would through the present funding source of the motor fuels tax.

HIGHWAY SAFETY ISSUES

Prepared by Robert C. Fallon

Issue

Should the General Assembly enact legislation on issues relating to the current child restraint law, motorcycle helmets or radar detection devices?

Background

(1) Child Restraints. Kentucky passed a child passenger restraint law in the 1982 Session, requiring a child 40 inches tall or under to be properly secured in a child restraint system. However, Kentucky is one of three states that do not prescribe a penalty for a violation of this law. In the 1984 Session, House Bill 739 was introduced to set a penalty of $25 for violation unless proof could be shown of purchase of an approved child restraint device. Similar legislation will more than likely be introduced in the 1986 General Assembly. Advocates of such legislation say that a penalty is the only way to make the legislation effective, while opponents contend that the volunteer program, with an emphasis on public information, is working.

(2) Motorcycle Helmets. KRS 189.285(2)(c) requires that persons operating a motorcycle on a public highway wear protective headgear. In 1982 and previous legislative sessions, bills have been introduced to delete that requirement, citing a person's right to individual freedom over the state's interest in the health and welfare of its citizens. In the 1984 session, legislation was introduced to change the law and require that a helmet be worn only by persons under eighteen years of age, persons operating a motorcycle under an instruction permit, or those who have had a valid operator's license for one year or less, and passengers who are under eighteen years of age or who are driving with an individual under eighteen years of age. This 1984 legislation passed the House but failed in the Senate and will more than likely be reintroduced in the 1986 session.

(3) Radar Detection Devices. In May, a Lexington man was convicted for possession of a radar detection device. That conviction was subsequently overturned on appeal. The statute cited as the basis for the original conviction was KRS 432.570, which states in part:

> It shall be unlawful for any person except a member of a police department or police force or an official with written authorization from the head of a department which regularly maintains a police

> radio system authorized or licensed by the Federal Communications Commission to have in his or her possession or in an automobile or other vehicle, or to equip or install in or on any automobile or other vehicle any mobile radio set or apparatus capable or either receiving or transmitting radio or other messages or signals within the wave length or channel now or which may hereafter be allocated by the Federal Communications Commission or its successor for the purpose of police radios or which may in any way intercept or interfere with transmission of messages devices by any police or police officer.

That statute, first passed in 1942, was used in the 1960's by the state police to seize such devices. However, many of the convictions were, as in the Lexington case, overturned on appeal and in 1978 when the Attorney General ruled that the statue was too vague to base a conviction for possession of a radar detection device, the state police discontinued enforcement. At a recent meeting of the Subcommittee on Highways and Vehicle Regulation of the Interim Joint Committee on Transportation, the state police stated that they supported a more clearly defined law banning such devices, which they said were a threat to the enforcement of speed laws. Opponents of such a law contend that such devices actually reduce speed, since, when the device notifies a driver of radar in the area, he does in fact reduce his speed. In addition, opponents of such a law contend that it would be difficult to enforce, since manufacturers of such devices would devise ways to hide the device within the motor vehicle. The 1986 legislature will more than likely address legislation either banning such devices or more clearly defining by statute that such radar detection devices are not illegal under Kentucky state law.

PHOTOGRAMMETRY

Prepared by Sam Sears

Issue

Should the Division of Photogrammetry be reestablished in the Transportation Cabinet?

Background

As a cost savings measure, the Division of Photogrammetry in the Transportation Cabinet was abolished May 31, 1980 (Executive Order 80-412), and its equipment sold to the highest bidder. At the time, Transportation Secretary Metts claimed that the cost of contracting for photogrammetry services would only be $150,000 per year and that the cost for continuing operation of the Division would be $935,560 annually. A study by the Program Review and Investigations Committee, completed in July, 1983, refuted both of the above figures. The study found that subsequent annual costs for photogrammetry contracts far exceeded Secretary Metts' estimates and that operating expenses for the Division were considerably less than stated.

The Personal Service Contract Review Subcommittee, noting that the amount let for photogrammetry service contracts for the Cabinet for Transportation had averaged $1,013,683 annually since the Division was abolished, requested, on September 7, 1984, that the Program Review and Investigations Committee determine if it would be more cost efficient to reestablish the Division rather than continue contracting for such services. The Committee approved the study request at its October 8, 1984, meeting.

Discussion

The study was begun in December, 1984, and completed in April, 1985. It concluded that two reestablishment options offer some savings over the present means being utilized: partial reestablishment option and full reestablishment option. The costs of the two options listed below are to be contrasted with the Transportation Cabinet's and other state agencies' estimated annual cost of photogrammetry services to be secured from 1985 to 1990 by contracting with private agencies - $1,317,500 to $1,747,500.

The partial reestablishment option would include an initial equipment cost of $536,725 ($462,725 if a used aircraft were purchased), and a yearly operating cost of roughly $382,200. Total outlays in the first year would be approximately $918,925 ($844,925 if a used aircraft were purchased). This option would provide approximately one-third of the photogrammetry work

presently being contracted for at a cost of $572,000. The savings in operating costs would be $189,800 annually. This partial unit could be expanded in future years as more equipment and trained staff become available.

The savings offered by the full reestablishment option have a greater variance in magnitude, but are likely to be quite substantial. Even with this option, about $100,000 worth of services would, for a variety of reasons, have to be obtained contractually. Initial outlays for equipment would be roughly $706,375 ($632,375 if a used aircraft were purchased), and subsequent annual operating costs would be $848,500. Total outlays in the first year would be approximately $1,554,875 ($1,480,875 if a used aircraft were purchased). This option would provide approximately 90% of the photogrammetry work needed in the future. After the first year, the estimated savings in operating costs of the full reestablishment option, as opposed to contracting for services, would range from approximately $369,000 to $799,000 annually. The establishment of this option is dependent upon the availability of necessary equipment and trained personnel.

The operating costs of photogrammetry units in states similar to Kentucky support the reliability of the cost estimates derived for the full reestablishment option.