MEMORANDUM

TO: Members of the General Assembly

FROM: Don Cetrulo

SUBJECT: Supplement to Issues Confronting the 1998 General Assembly

DATE: December 10, 1997

Enclosed is a supplement to the publication, *Issues Confronting the 1998 General Assembly*, that presents a few additional issues and updates some issues presented earlier. The staff writer of a particular entry may be contacted for further information on the subject of that entry. I hope you find this material helpful.

TABLE OF CONTENTS

CONCENTRATED LIVESTOCK OPERATIONS

Prepared by Christine Baker
Updated by Biff Baker

Issue

Should the General Assembly consider stricter laws and administrative regulations to address the increasingly industrialized nature of animal production farms?

Background

Farming has undergone sweeping changes in the past two-hundred years. In the early years of our country, farming was a way of life for most people and families raised livestock and crops for their own consumption. Later, industrialization resulted in fewer, more specialized farms, in which a smaller number of independent farmers produced food for larger segments of society. This trend has dominated most of the 20th century.

Gradually, the average *size* of farms has increased while the *number* of farms has decreased. According to the 1992 Census of Agriculture, the total farm count dwindled from 2.7 million in 1969 to 1.9 million in 1992, while the number of large farms -- those with $100,000 in sales or more -- has jumped from 51,995 in 1969 to 333,865 in 1992.

In the livestock industry, the system of marketing that has prevailed during most of this period is known as open production. In this type of system, a food product firm purchases commodities (chickens, hogs) from farmers at market prices, determined at the time of purchase.

However, as a result of changing demographics and lifestyles, more discrimination among consumers, and new technological developments, a revolution has been taking place within the poultry, pork, and beef industries. The open market system is being replaced.

The trend in these industries today is toward large-scale farms that are closely connected to or controlled by food product firms. The two systems dominating this trend are known as contract production and vertical integration.

Contract production occurs when a firm commits to purchasing hogs, chickens, or cattle from a producer at a price established in advance. A vertically integrated system is one in which a single firm controls the flow of a commodity across two or more stages of production (from chicks to chickens to eggs, for example). In both types of systems, firms have some kind of control over the production process. This control may be

comprehensive -- in which a firm details exactly how the animals will be housed, raised, medically cared for and fed -- or it may be in the form of a certain expectation of weight and quality, specified in a contract between the firm and the producer.

Food product firms have moved to these systems because consumers are demanding safer, more consistent, and uniform products. Because of the availability of new technology, food product firms are able to contract with or build larger, highly systematized farms. By controlling all or some of the animal production process, firms are able to ensure that their products will have a uniform appearance, taste, consistency and weight. By developing large-scale operations, the firms also benefit from economies of scale.

The size of these new hybrid farms, however, has caused concern here in Kentucky and in other states. The large concentration of animals in one place creates challenges of waste storage and disposal, which call up environmental and health concerns.

Discussion

Kentucky has laws to deal with agricultural polluters, the most basic being KRS 224.70-110 which states that "No person shall...cause or contribute to the pollution of the waters of the Commonwealth."

Farmers that are found to be polluting water sources are given a chance to take corrective measures to solve the problem, and financial and technical assistance is available to help bring them into compliance with the law. Individuals who continue to pollute or disregard the warnings may be fined or jailed.

Aside from measures taken after pollution has already occurred, there are also regulations that instruct farmers on how to deal with animal waste and carcasses.

Farmers handling liquid waste (swine and dairy operations) must apply to the Division of Water for construction and operating permits for waste lagoons. The lagoons must conform to design standards set up by the U.S. Department of Agriculture's Natural Resource Conservation Service, and the Division must approve the site and construction of the facility, and confirm that the lagoon is operating properly.

In addition, the Agriculture Water Quality Act, adopted in 1994, sets up a system in which farmers are given specific guidelines to follow with regard to pollution control. Currently farmers are simply encouraged to operate their farms according to Best Management Practices and to adopt individual water quality plans. However, the Agricultural Water Quality Authority is charged with developing a state Water Quality Plan, and farmers will be required by the year 2001 to adopt a plan in compliance with the state plan.

Despite these measures, opponents of the large-scale livestock operations say that Kentucky's livestock regulations were written with smaller farms in mind and that they aren't designed to effectively limit pollution from large-scale, commercial farms. They point to the fact that the two large hog producers that have recently announced their intentions to build large-scale facilities in Western Kentucky would roughly double the hog population in Kentucky, bringing it to 1.2 million hogs.

The announcement by the two hog producers has alarmed local citizens who fear that large or improperly managed hog waste lagoons could pollute streams, lakes, rivers, and other water sources, and spread disease. There are also concerns that property values could fall in areas located near large hog farms or that the smell would be a nuisance to homeowners and a threat to tourism.

Critics also point to the experiences of North Carolina and Missouri. Both states suffered environmental mishaps, such as spills of hog waste into rivers, resulting in fish kills. They each responded to these events by adopting new animal waste laws. These laws cover a variety of issues -- such as tougher construction and monitoring standards, distance requirements between animal waste and water sources, mandatory training for farm workers and managers, and annual inspections.

On the other hand, supporters of the large hog operations say that if the facilities are properly constructed and managed, large lagoons and carcass waste should not cause problems.

They cite the economic benefits such industries can bring to an area -- new jobs, capital investment and spin-off industries, like feed mills and slaughterhouses. Supporters also point out that a large farm can be a boon to smaller, local farmers who grow corn used as hog feed.

Subsequent to the initial drafting of this paper, several events have occurred that relate to the issue of animal waste:

Responding to concerns from certain groups about the potential environmental effect that could result from the construction of two proposed large-scale hog operations in Western Kentucky, the Governor issued an Executive order in July that placed a moratorium on accepting applications for permits to construct agricultural waste handling systems for swine. The moratorium was initiated in order to give the Cabinet for Natural Resources and Environmental Protection time to draft an administrative regulation that would address the topic of animal waste handling facilities.

In September, the Cabinet filed an emergency administrative regulation dealing with animal waste handling facilities. This regulation is more restrictive than existing regulations in terms of lagoon construction, monitoring, reporting requirements, permitting costs, set-back requirements, and a variety of other concerns. The regulation applies to operations larger than 1000 swine units.

Some critics of this regulation feel it is too restrictive, in that it will stifle economic development and discourage hog operators from expanding their facilities or beginning new operations.

Other critics maintain that the regulation does not adequately address the question of potential environmental problems. They feel the set-back requirements relating to property lines and water sources are not strict enough.

Recently, the larger of the two proposed hog operations announced its decision not to locate in Kentucky.

HEALTH INSURANCE REFORM

Prepared by Greg Freedman

Issue

Should the health insurance reforms enacted in 1994 and amended in 1996 be modified, repealed, or left unchanged?

Background

The 1994 Kentucky General Assembly adopted comprehensive legislation on health care reform with enactment of House Bill 250. The insurance reforms in that legislation took effect on July 15, 1995. Some health insurers opted to cease writing individual health insurance business in Kentucky rather than be subjected to the new reforms, which included modified community rating, guaranteed issue, and standard plans. It has been reported by the Department of Insurance that 45 companies left the Kentucky individual market and that only Anthem Blue Cross/Blue Shield and Kentucky Kare are writing business in that market. The individual market represents about 10% of total covered lives in Kentucky. About 52% of persons in the individual market are covered by policies that are not standard plans subject to the reforms. The small group market represents 19% of covered lives, the large group market represents 63%, and association plans represents 8% of covered lives. About 50% of the group markets are not covered by standard plans and 93% of association plans are not.

The significant reduction in the number of companies participating in the individual market and rate increases for those individuals who were issued standard plans subject to reforms led to the changes enacted by the 1996 General Assembly with passage of Senate Bill 343. Major changes in that legislation included the exemption from modified community rating given to associations, mandatory rate hearings for filings that contained premium increases in excess of 3% above the change in the medical Consumer Price Index, participation in rate hearings by the Attorney General, and use of additional rating factors.

After the 1996 Session, Congress passed the Health Insurance Portability and Accountability Act (HIPAA) in August, 1996. The federal reforms took effect on July 1, 1997. Those reforms addressed preexisting condition periods, portability, guaranteed issue, and guaranteed renewability. The preemption of certain state laws by the federal law further complicated the health insurance reform laws in Kentucky.

On September 26, 1997, the Governor issued a proclamation convening the General Assembly in Extraordinary Session on September 30, 1997, to consider health insurance legislation.

Discussion

During the 1997 Second Extraordinary Session several bills pertaining to health insurance reform were introduced, but the Session ended without enactment of legislation. The two bills that received the most attention were Senate Bill 1 and House Bill 3. In general, out-of-state insurers seemed to support Senate Bill 1, while in-state insurers and health maintenance organizations appeared to favor House Bill 3. Although the two bills were similar in many respects, there were differences that prevented a consensus within the insurance industry and within the General Assembly.

A major difference between the two bills was their treatment of **high risk individuals**. Senate Bill 1 created a high risk pool, called the Kentucky Comprehensive Health Insurance Plan. House Bill 3 established a "pay or play" arrangement, called the Kentucky Guaranteed Issue Funding Program. The **Kentucky Comprehensive Health Insurance Plan** was to have become operational no later than six months after the effective date of Senate Bill 1. An "eligible individual" under federal law would have been eligible for Plan coverage. Other individuals who had been residents of Kentucky for twelve months would have been eligible if they had been rejected by two insurers, or had received higher premium quotes from two insurers, or had a high cost condition. Rates would have been 135% of standard risk for persons with previous coverage and 150% for others. The Plan would have offered three health benefit plans. The Plan would have been funded by premiums, revenue from premium tax, assessments and appropriation. There would have been a limit of $1 million in benefits per individual. The **Kentucky Guaranteed Issue Funding Program** was to have been operational on January 1, 1998. Individuals with a high cost policy would have been eligible if they were not covered and not eligible for other coverage and either (a) within the previous five years had been diagnosed with a high cost condition for which benefits were payable or (b) had had benefits paid under the policy for a high cost condition. The rates initially for previously insured persons would have been 125% of the maximum premium that could be charged for the same policy to someone without high risk condition, 150% for persons without insurance, but the Commissioner could have allowed up to 200%. The **Safety Net** portion of the program was to have been operational until April 14, 2000. The Safety Net would have offered three plans on a guaranteed issue basis to persons with high cost conditions not covered by an employer or government plan if (a) there were no private carrier providing coverage in their area or (b) there were only one participating carrier offering coverage in their area. Rates in the Safety Net would have been restricted initially to 150% of average statewide rate. The Program would have been funded by premiums and assessments. Insurers with high cost policy losses would have received refunds and tax credits for losses in excess of refunds. There would have been a limit of $1 million in lifetime benefits to an individual.

Senate Bill 1 and House Bill 3 provided **guaranteed renewal**, as required by HIPAA. House Bill 3 provided exceptions if the Commissioner of Insurance finds renewal would not be in the best interests of policyholders, would impair the financial ability of an insurer, or that the coverage is obsolete and being replaced by comparable coverage.

House Bill 3 also provided that guaranteed renewal does not apply to individuals qualified to participate in the Kentucky Guaranteed Issue Funding Program.

Senate Bill 1 required **guarantee issue** to all small employer groups (2 to 50), as required by HIPAA. The Kentucky Comprehensive Health Insurance Plan would provide coverage to qualified individuals on a guaranteed issue basis. House Bill 3 provided that for groups of 2 to 50 plans are guarantee issued, as required by federal HIPAA. Plans issued to "eligible individuals" are guarantee issued. Other individuals would have been provided guarantee issued plans if they had been a Kentucky resident for 12 months and the previous plan had not been terminated due to fraud, misrepresentation, or noncompliance. Exceptions were allowed if the Commissioner found issuance would not be in the best interests of policyholders or would impair the financial ability of the insurer.

Senate Bill 1 provided that all group plans must comply with HIPAA provisions on **pre-existing conditions**. "Eligible individuals" could not have a pre-existing condition exclusion imposed. Other individuals could have had a pre-existing condition exclusion imposed to the extent permitted groups under HIPAA. House Bill 3 provided that "eligible individuals" could not have a pre-existing condition exclusion imposed. Other individuals could have had a pre-existing condition exclusion imposed to the extent permitted groups under HIPAA; however, insurers could have imposed a pre-existing condition exclusion relating to pregnancy. Federal HIPAA applies to group plans. Under Senate Bill 1 and House Bill 3, all group plans and individuals who were not "eligible individuals" would be subject to the 63 day **portability** provision in HIPAA for groups, as well as the creditable coverage provision in HIPAA.

Both Senate Bill 1 and House Bill 3 required the Commissioner to define one **standard plan** for the individual and small group markets by Dec. 31, 1997. All insurers would have to offer the standard plan in the individual and small group markets. Both Senate Bill 1 and House Bill 3 required the **Health Insurance Advisory Council** to give advice on the standard plan and review high cost conditions. In addition, House Bill 3 required the Council to review provider reimbursement rates for the Safety Net.

Both Senate Bill 1 and House Bill 3 repealed **modified community rating**. Senate Bill 1 listed six factors to be considered in reviewing rates, whereas House Bill 3 provided rates must be reasonable, six factors were listed for consideration, and premiums could be based on any factor deemed necessary by the insurer. Both bills adopted the rating methodology from BR 1, as proposed by the Commissioner of Insurance. Senate Bill 1 required rates to be filed with and approved by the Commissioner, who could hold a hearing within 30 days. A hearing would have to be held if requested by the Attorney General, if the Attorney General gave a reason, cited a factor in the statutes, and included documentation from the filing. House Bill 3 required insurers to file rates with the Commissioner, who would have 45 days to approve or disapprove. The Commissioner could hold a hearing, but the Commissioner would have to hold a hearing if the Attorney General made a written request for a hearing. Senate Bill 1 provided that rates must be guaranteed for 12 months, while House Bill 3 provided rates must be guaranteed for 12

months or the length of the contract. Senate Bill 1 provided that the rates could be used upon filing, if the filing contained a guaranteed loss ratio, but House Bill 3 had no provision allowing for a guaranteed loss ratio.

Both bills required a **financial impact statement for mandated benefits** and both provided for the same patient protections. Patient protection provisions included disclosures by insurers and standards for emergency care, waiting times, choice of providers, termination of provider, gag rules, coverage of experimental services, drug utilization review, quality assurance, and the patient's right of privacy.

Senate Bill 1 provided that the **Kentucky Health Purchasing Alliance** could not issue or renew any business after January 1, 1998 and would have to cease operations no later than Dec. 31, 1998. House Bill 3 provided that the Kentucky Health Purchasing Alliance could not accept any new business after January 1, 1998 and would have to cease operations no later than one year after the effective date of the Act.

Both bills deleted the exemption from modified community rating given to **associations** under 1996 Senate Bill 343. Senate Bill 1 provided that an employer-organized association would have to obtain certificate of filing to self-insure and established a rating methodology for employer-organized associations. House Bill 3 allowed associations to self-insure and established a rating methodology for employer-organized associations.

Senate Bill 1 proposed changing the **State Buy-In Program** to allow individuals who are not state employees to renew (but not small groups) and permit rates to increase over a 5-year period. House Bill 3 provided that on and after January 1, 1998, there could be no new issuance or renewal of plans and allowed current coverage to continue until the end of the policy period. As for participation by non-state employees in the **Kentucky Kare Program**, Senate Bill 1 provided that small groups could not renew current coverage, individuals currently covered could renew until 6 months after the Commissioner declared the individual market to be competitive, the Department of Personnel would have to establish a separate fund for non-state employees covered by Kentucky Kare and that the Commissioner could cause any deficit in the fund to be paid for by funds from the Kentucky Comprehensive Health Insurance Plan. House Bill 3 provided that on and after January 1, 1998, there could be no new issuance or renewal of plans and that current coverage might continue until the end of the policy period.

The issue of health insurance reform will face members of the General Assembly when they convene in Regular Session on January 6, 1998. The question of how best to address the issue of providing adequate coverage to high risk individuals, while at the same time attracting insurers to the individual market, will remain a formidable one. If a consensus is not reached on that critical question, another option for consideration proposed in the 1997 Special Session repeals the health insurance reforms adopted with enactment of 1994 House Bill 250 and 1996 Senate Bill 343 and incorporates the provisions of the federal Health Insurance Portability and Accountability Act of 1996.

JUVENILE COURT RECORDS

Prepared by Norman W. Lawson, Jr.

Issue

Should juvenile court records remain confidential?

Background

Traditionally, juvenile court records have been confidential, as has the juvenile court process. During the 1996 session of the General Assembly several significant amendments were made to the Juvenile Code relating to juvenile records. Records of juveniles committing serious felony offenses or offenses with firearms were made public records under the open records law. Records of juveniles committing various felony offenses, firearms, and drug offenses were made available to the school which the child attended, but with the availability of records limited to administrators, counselors, and the teachers of classes in which the student was enrolled. These persons were prohibited from further disclosure of the information and the schools were limited in the action which could be taken against the student based upon that record. Juvenile records relating to the victim's specific case are released to the victim of the juvenile's crime but are limited to the disposition of the case.

Recent assaults of school bus drivers and school administrative personnel who did not have access to the juveniles' criminal records have brought about new demands for better sharing of information about juveniles who have criminal records.

Discussion

Proposed changes in the law are being suggested to provide that juvenile records made available to schools should be made more widely available and that schools should be able to take actions necessary to protect faculty, staff, and other students from the harmful actions of students. There are variations of the proposals regarding who might have the records, what should be done as a protective action, and penalties for unauthorized disclosure of information, but most proposals would make information available about students with a criminal history more widely accessible.

Proponents of making records freely available to all school personnel and students cite the fact that certain felony records are public records in the first place and that teachers and school administrators should not be penalized for disclosing the same information which is publishable in the newspaper and from taking whatever protective action is necessary to eliminate the threat these students may pose. Proponents say that

recent attacks on school personnel by violent students show that record sharing has been too restricted, since some of the school administrators and school bus drivers who were assaulted by violent students were, by law, not entitled to view their records and were thus prevented from taking protective action.

Proponents also want more types of juvenile records to be available; some want all public offense records to be made available to the schools and for the schools to distribute those records (not otherwise available to the public under the felony and weapons exemptions) to all school personnel, and for schools to be permitted to take whatever action is necessary to protect staff and students.

Opponents allege that access to records will not necessarily prevent attacks on school personnel. They further allege that schools, given the opportunity, will attempt to eliminate all "bad" students from the school system through expulsion or through alternative schools or some other form of discipline or restriction. These persons feel that a student's offenses committed outside of school do not necessarily indicate that the student will be a threat in class, particularly if they are nonviolent offenses. Opponents cite testimony from the 1996 debates on the Juvenile Code, wherein Jefferson County juvenile authorities who had placed nonviolent juveniles under a house arrest and electronic monitoring program had trouble when the students arrived at school with the monitoring devices attached to their legs. It was alleged that the schools wanted to expel the students or place them in alternative schools when no crime had been committed at school and the students did not misbehave at school and were, in the mind of the juvenile authorities, no threat at school. Opponents feel that the schools have overreacted and that the vast majority of children found delinquent do not merit "reprisals" by the school system under the guise of protecting students and staff.

Others feel that a "middle ground" might be achieved by permitting the schools to take action against the students only after hearings, due process protections, and the right of the student and the student's parents to be represented by counsel have been considered, by an appellate process within the school system and in the courts in cases where the student or parents object to singling the student out for special treatment or in terms of the type of restrictions placed against the student. They cite high rates of disciplinary action against minorities and certain other groups of students as evidence of bias on the part of teachers or the school authorities. These groups frequently want criminal sanctions or civil damages against offending school systems, administrators or teachers, to protect against "misuse" of the school's powers.

Proponents of "safer schools" cite the fact that many of the students convicted of offenses outside the school later pose discipline problems and threats at school, either personally, or as a part of gang activity in the schools and the community. Proponents feel that action should be taken to promote safety and order in the schools and that the constant fear of lawsuits or criminal action which could be taken against teachers and administrators has a "chilling effect" and undermines the discipline and safety of the school. This group would limit more severely the sanctions, if any, which could be

imposed and would broaden the authority of schools to deal with violence without the necessity of expensive and unnecessary hearings.

LICENSING INTERPRETERS FOR THE DEAF AND HARD OF HEARING

Prepared by Allison Weber

Issue

Should there be mandatory licensing of interpreters for the deaf and hard of hearing?

Background

Pursuant to the federal Americans with Disabilities Act of 1990 (ADA) and KRS 12.290 and 344.500, all deaf persons are entitled to qualified interpreters, both as a public accommodation and because they are consumers of governmental services. The result, according to the Kentucky Commission on the Deaf and Hard of Hearing, has been a "crisis shortage" of qualified interpreters in the Commonwealth.

In the 1994 regular session of the Kentucky General Assembly, HB 468 was introduced to establish minimum qualifications for interpreters employed by state government. (Educational agencies account for about 90% of interpreter employment.) The bill did not pass.

Recently, a state inter-agency Quality and Standards for Interpreters Team has recommended the licensure of all interpreters, to ensure the quality and integrity of the profession, as well as provide consumer protection. Under its proposal, by 2003 all people interpreting for pay in the Commonwealth would require licensure. The license would be granted upon earning a skill-based certification from one of two national associations--the Registry of Interpreters for the Deaf (RID) or the National Association of the Deaf (NAD).

Although the exact number of interpreters in Kentucky is unknown, the Commission's best estimate is around 300. Of those, approximately 80 are certified by either RID or NAD.

While many states register deaf interpreters and some require certification, two states — Rhode Island and Missouri — mandate licensure.

Discussion

About 80 of the estimated 300 interpreters in Kentucky would qualify for licensure under the proposal for mandatory licensing. The inter-agency team contends that

mandatory licensing will attract more students to a career of interpreting and that the five-year phase-in period will encourage currently uncertified interpreters to earn certification. The converse argument is that mandatory licensing will aggravate the existing shortage by eliminating those "amateur" or part-time interpreters who may lack the incentive or funding to study and test for certification.

The proposed mandatory licensure would apply to all interpreting done for pay for non-religious purposes. It would govern private arrangements between deaf consumers and interpreters. A deaf consumer would thus be prohibited from hiring an unlicensed interpreter. Proponents of licensure feel strongly that all deaf consumers are entitled to nothing less than a nationally certified interpreter. Opponents point out that the ADA mandates only a "qualified" interpreter--one who is able to interpret effectively, accurately, and impartially, using any necessary specialized vocabulary. The Department of Justice has noted in its publication, "ADA, Title III, Technical Assistance Manual," that certification by an official licensing body does not ensure that this standard is met. Opponents also question whether a certified interpreter is necessary in all instances, regardless of the competence, convenience, or cost of a "qualified" interpreter.

ELECTION RECOUNTS AND CONTESTS

Prepared by Rob Williams

Issue

Should the General Assembly clarify the statutory procedures for conducting election recounts and contests?

Background

Kentucky's election recount and contest laws have remained largely unchanged for more than fifty years. They were written at a time when most counties still conducted elections with paper ballots, while others were beginning to use the mechanical lever-type voting machine approved for use in 1941. Today, electronic voting machines are widely used, and generally produce error-free vote tabulations. However, the recount and contest laws primarily address the use of paper ballots, not voting machines. Further, as election recounts and contests have been conducted over the years, various other inconsistencies, ambiguities, and gaps in the recount and contest laws have made it plain that legislative action was necessary to provide candidates, the public, and the courts with more specific procedural instructions.

The 1978 General Assembly directed that the LRC study the election recount and contest laws to identify problem areas and to develop clear and consistent procedures for conducting election recounts and contests. LRC Research Report No. 158, published in 1979, noted specific policy alternatives the General Assembly should consider in determining what type of recount and contest system should be implemented for Kentucky. The study report also identified twenty-six substantive problem areas in the current recount and contest statutes. Except for three problem areas relating to recounts or contests of city elections, no legislative action has been taken to address the other study recommendations.

Perhaps the most notable recent example of the inadequacies of the election recount and contest laws occurred when an election recount was requested after the 1994 general election for U. S. Representative in the Third Congressional District. While the appropriate house of Congress has the ultimate constitutional authority to determine the validity of a congressional election, the U. S. Supreme Court has ruled that states may conduct recounts of congressional elections. The recount of the 1994 election was requested because it was felt that a power outage at some voting locations may have affected the ballot reading and vote tabulating functions of the electronic voting machines being used. However, unlike recounts of state and local elections, a recount of a congressional election is not specifically authorized in Kentucky statutes. Despite the statutes' silence as to whether a congressional recount may be conducted, the circuit court

overseeing the recount permitted the recount action to proceed, on the basis of a candidate's right to request a recanvass of election returns and a state's powers to prescribe the time, place, and manner of electing its congressional representatives and to ensure the integrity of an election. That initial jurisdictional hurdle and other significant gaps and inconsistencies concerning policy and procedure in the laws presented the court and the parties with an unusually difficult challenge in applying statutes written for a different time in a manner consistent with modern election practices.

During the 1996-97 interim, the Task Force on Elections and Constitutional Amendments heard testimony regarding the need for updating the election recount and contest laws from the State Board of Elections, the Kentucky County Clerks' Association, and the Jefferson County Clerk's Office. All parties urged the adoption of the 1979 study recommendations and made several policy recommendations concerning the conduct of recounts and contests. The Task Force directed staff to begin preparing a bill draft to clarify the election recount and contest statutes for consideration during the 1998 Regular Session.

Discussion

Achieving greater consistency and clarity in the election recount and contest statutes requires that the General Assembly first determine an appropriate combination of assumptions and policies concerning the purposes, beneficiaries, forum, function, scope, and costs of a recount or contest. In general, the purposes of a recount are to check for errors in vote counting and tabulation, to correct clerical and arithmetic errors in returns and tabulations, and to correct mistakes resulting from errors in vote counters' judgments in interpreting marks on paper ballots. On the other hand, the general purpose of a contest is to ascertain whether incidents of vote fraud, corrupt practices, or other election improprieties affected individual votes cast and, hence, the legitimate outcome of the election.

The State Board of Elections and others presenting testimony to the Task Force on Elections and Constitutional Amendments noted that what is called a "recanvass" in Kentucky is considered a recount in other states. The recanvass is a government-paid re-check of the voting machine and paper ballot totals, vote tabulations, and returns, and is conducted at a candidate's request. The State Board recommended that Kentucky's current recanvass process become the recount process, conducted administratively by the state or county boards of elections, and the current contest process, initiated by filing suit in circuit court, would then be reserved for allegations of voting irregularities and improprieties concerning specific votes cast. Additional policy decisions would remain, however, to determine whether any eligibility requirements for requesting a recount or contest are desirable, whether and under what conditions costs should be assessed to the government or the parties to the recount or contest, what specific grounds for a contest may be alleged and adjudicated, and whether different procedural standards should apply for recounts or contests of elections on public questions than for candidates.

Once necessary policy decisions regarding recounts and contests are made, the problems with the election recount and contest statutes identified in Research Report No. 158, which are summarized below, may be addressed to provide clarity and consistency:

- The recanvassing law does not clearly indicate the scope of a county board of elections' authority when vote counters and return sheets match, but other errors affecting the election outcome are discovered. Further, there is no express authority for a county board of elections to check returns from paper ballots for clerical or mathematical error, short of a full recount of individual ballots, analogous to the recanvass of voting machines and correction of returns permitted by KRS 117.305;

- Since the recanvassing law applies only to primary and general elections of officers, it does not permit a rechecking of voting machines and returns from them in elections on public questions;

- Standing to demand a recount or contest of a local option election is accorded any qualified voter. In elections on other public questions, standing is limited to qualified voters who voted on the question;

- It is unclear why recounts and contests of local option elections are governed by statutes relating to elections of officers rather than those relating to elections on other local public questions;

- Costs of the recanvass in primary or general elections affecting state officers are borne by the county, with no additional state reimbursement required for this extra cost of an election;

- In general, the recount and contest statutes do not allow adequately for the special characteristics of the voting machine, as opposed to paper ballots, yet KRS Chapter 117 makes the electronic voting machine the principal voting device in Kentucky;

- No specific provision is made for a recount of election results in congressional races;

- The election recount and contest statutes do not clearly state whether they apply to presidential elections and thus to Kentucky's selection of its presidential electors;

- Rights to appeal recount or contest results are inconsistently afforded candidates and supporters or opponents of public questions;

- The statutes prescribe inconsistent time limits for filing recount or contest actions and preserving ballots and other election data;

- The statutes governing contests of elections for Governor, Lieutenant Governor, and members of the General Assembly do not say who may initiate a contest;

- The grounds for contesting elections are usually stated at some point in most of the current elections contest statutes, but not in a comprehensive or consistent manner;

- The current election contest statutes are inconsistent in requiring bonds or other advance security for costs to be posted in some instances but not in others;

- In most cases, the current statutes do not provide clear direction as to who pays the costs of a recount or contest and under what conditions reimbursement of costs may be ordered; and

- The statutes are inconsistent in affording a circuit judge discretion in rejecting ballots found to be procured by fraud, duress, bribery, intimidation, or for valuable consideration.

As noted earlier, a bill to rewrite the election recount and contest laws will be considered during the 1998 Regular Session.

EXPANDING OR CONTINUING PERSONNEL PILOT PROGRAM INNOVATIONS

Prepared by Joyce S. Honaker

Issues

Should the General Assembly revise state personnel laws to permit, or require, wider application of changes in personnel policies and procedures tested in the Personnel Pilot Program authorized in 1994? Should the General Assembly authorize continuation of selected pilot projects? To what extent should the personnel policy innovations be established by statute and to what extent should they be developed in administrative regulations?

Background

In March, 1993, the Governor established a 55-member Commission on Quality and Efficiency to develop recommendations to improve state government's efficiency and the quality of its services. The Commission's final report, *Wake-up Call for Kentucky: Out of Crisis, Into Action*, was delivered to the Governor and members of the General Assembly in late 1993. Among over two hundred recommendations for change, the Commission proposed that Kentucky "reinvent" its merit system, employee evaluation process, and classification and compensation systems.

In response to the Commission's recommendations, the 1994 General Assembly enacted KRS 18A.400 to 18A.450, authorizing pilot personnel programs in state government. The purpose of the law was "to determine and define new methods of quality management which should be adopted by the Commonwealth." Subject to approval by a majority of affected employees and approval and supervision by a Personnel Steering Committee, state agencies could institute changes in personnel policies and procedures on a trial basis. While preserving statutory rights to appeal dismissals and other penalizations and statutes relating to lay-off rules and reemployment of career employees, the General Assembly authorized the temporary suspension of merit system laws in order to implement and assess innovative pilot programs.

The pilot personnel programs expire July 1, 1998, unless extended by statute. KRS Chapter 18A directs the Personnel Steering Committee to issue a report and recommendations relating to the pilot programs, and their continuation or expansion, to the Governor and the 1998 Regular Session of the General Assembly.

Discussion

As of March, 1997, ten pilot personnel programs were operating in seven program cabinets. They range widely in the scope of policies and procedures covered, the extent to which they suspend existing merit system laws, and the number of employees affected. The most comprehensive pilots, in the Workforce Development Cabinet's Department of Vocational Rehabilitation and Department for the Blind and Visually Impaired, deal with time and attendance, grievance procedures, performance review and career development, classification and compensation system revisions, and political activities of merit employees. Other cabinets operating pilot programs are the Cabinets for Families and Children, Finance and Administration, Health Services, Natural Resources and Environmental Protection, Personnel, and Revenue.

The Personnel Steering Committee issued a report and recommendations to the Governor November 1, 1997. The Interim Joint Committee on State Government will meet December 15 to review the recommendations prior to the 1998 Regular Session.

The Personnel Steering Committee's recommendations include the following:

(1) Develop new employee performance review methods that more accurately measure performance, encourage improvement, and emphasize internal and external customer service. The committee proposes repealing the current statutory system and authorizing the Personnel Cabinet to propose a new performance review process by administrative regulation. The regulatory process would include peer review of disagreements regarding final performance ratings.

(2) Provide regulatory authority to allow weekend and holiday premium pay.

(3) Continue, and continue to gather data on, broad-banded compensation pilot programs in the Department of Vocational Rehabilitation and the Department for the Blind. The programs, which reward employees for skills development and performance, permit career advancement without necessarily moving into management ranks. The Committee recommends additional testing before statewide implementation of this innovation.

(4) Revise and extend regulatory authority under KRS 18A.445 for cost savings incentives and revenue generating productivity incentives.

(5) Amend KRS Chapter 18A to authorize monetary incentives for merit employees to transfer to jobs they would not otherwise voluntarily accept.

(6) Revise KRS Chapter 18A to allow the Personnel Cabinet to promulgate administrative regulations allowing agencies to develop alternative employee selection methodologies to meet their needs.

(7) Support ongoing employee development, beginning with the first day on the job.

(8) Provide a permanent mechanism for piloting new and alternative personnel procedures. The permanent mechanism would require the Personnel Cabinet to work with a board of public and private sector representatives to allow state agencies to pilot new personnel practices.

(9) Offer a sick leave buy-out program similar to a Department of Social Services pilot which decreased sick leave use. Under that pilot, an employee may request a lump-sum payment for unused sick leave accrued over a fiscal year at 75% of face value, while being required to retain a minimum sick leave balance of 150 hours.

(10) Conduct exit surveys to monitor employee separations and transfers.