

KANSAS JUDICIAL REVIEW ACT

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History

- Chapter 338, 1984 Session Laws of Kansas
- Originally known as “Kansas Act for Judicial Review and Civil Enforcement of Agency Actions”
- Modeled after Article 5, Model State Administrative Procedures Act (1981)
- KJRA actually 2 different sections
 - K.S.A. 77-601 – 77-623 is judicial review
 - K.S.A. 77-624 – 631 is civil enforcement
 - *State ex rel. Bremby v. Thorson*, 42 Kan.App.2d 188, 191-192, 210 P.2d 132 (2009)

State Agencies

- Westlaw lists over 800 hits to basic KJRA query in Kansas Cases (search using 77-621 as search term)
- Most Hits
 - Workers' Compensation – 161
 - Board of Tax Appeals – 111
 - Kansas Dep't. of Revenue – 109
 - University – 56
 - Social and Rehabilitation Services – 40
 - Kansas Corp. Commission – 34
 - Kansas Dep't. of Labor - 27

Scope and Application – K.S.A. §§ 77-602, 77-603, 77-606

- KJRA is “... exclusive means of judicial review of agency action.” – K.S.A. 77-606; *Friedman v. Kansas State Bd. Of Healing Arts*, 287 Kan. 749, 199 P.3d 781 (2009).
- Per K.S.A. 77-603 (a), KJRA “...applies to all agencies and all proceedings for judicial review and civil enforcement of agency actions not specifically exempted by statute for the provisions of this act.”
- § 77-603 (b) – KJRA only provides procedural rights and imposes only procedural duties.

Scope and Application – K.S.A. §§ 77-602, 77-603, 77-606

“Agency action” is defined by K.S.A. 77-602 (b) as:

- “[t]he whole or a part of a rule and regulation or an order;
- the failure to issue a rule and regulation or an order; or
- an agency's performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise.”

Scope and Application – K.S.A. §§ 77-602, 77-603, 77-606

K.S.A. 77- 603 (c) - 8 types of cases are not covered:

- (1) prisoner review board decisions
- (2) management, discipline or release - Corrections
- (3) management, discipline or release - Juvenile Justice;
- (4) decisions made under the election laws
- (5) pardon, commutation of sentence, clemency or extradition
- (6) military or naval affairs other than actions relating to armories
- (7) decisions under KORA
- (8) decisions under KOMA

What Types of Cases are Covered?

- Workers' Compensation
- Taxation determinations
- License suspensions, revocations
- Welfare benefits determinations
- Status determinations
- Contracts, bid protests
- State Employment matters
- Academic Tenure
- Civil penalties (such as fines for environmental violations)

What Types of Cases are not Covered?

Kansas Tort Claims Act - *Lindeman v. Umscheid*, 255 Kan. 610, 619-620, 875 P.2d 964 (1994)

“We conclude that the KJRA applies to all proceedings for judicial review of agency proceedings and civil enforcement of agency actions. Here, the Lindenmans are not seeking a review by the courts of KDHE's findings of fact, conclusions of law, or decision. They filed a combined tort and civil rights claim against KDHE and other defendants. When K.S.A. 77-603 and the definition of judicial review are considered, it is clear that the district court erred in finding the KJRA was the exclusive remedy for the Lindenmans' tort claim against the agency.”

What Types of Cases are not Covered?

When the applicable statute does not allow KJRA review -
Cincinnati Ins. Co. v. Karns, 52 Kan. App. 2d 846, 851, 379 P.3d 399 (2016)

“Because the (Kansas Workers Compensation Act) is comprehensive and has its own provisions governing what orders may be appealed and when, the KJRA does not provide for the right to appeal the decision by the Director to deny reimbursement for overpayment of an award.”

Final & Nonfinal Agency Action – K.S.A. 77-607 & 77-608

- Petitioner can challenge a final agency action or a nonfinal agency action – K.S.A. 77-607 (a)
- Definitions – K.S.A. 77-607 (b)
 - Final Agency Action – definition by exception – “the whole or a part of any agency action other than nonfinal agency action”
 - Nonfinal Agency Action – “the whole or a part of an agency determination, investigation, proceeding, hearing, conference, or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural or intermediate with regard to subsequent agency action of that agency or another agency.”

Test for Nonfinal Agency Action – K.S.A. 77-608

“A person is entitled to interlocutory review of nonfinal agency action only if:

(a) It appears likely that the person will qualify under K.S.A. 77-607 for judicial review of the related final agency action; and

(b) postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.”

Test for Nonfinal Agency Action – K.S.A. 77-608

Williams Gas Pipelines Central, Inc. v. Kansas Corporation Commission, 27 Kan.App.2d 573, 7 P.3d 311 (2000)

“We agree with the district court. We hold institution of an investigation docket does not as a matter of law represent "final agency action" that would afford judicial review under K.S.A. 77-607. KCC has taken no evidence and has not entered any definitive holding that will be binding upon Williams...Here, Williams has not shown it will suffer an immediate detrimental result which is disproportionate to the public benefit derived from postponement which is required for K.S.A. 77-608(b). Expense and inconvenience of an administrative hearing, without more, does not constitute irreparable harm. *Cf. Niagara Mohawk Power Corp. v. F. P. C.*, 538 F.2d 966, 970 (2d Cir. 1976).”

Jurisdiction & Venue – K.S.A. 77-609

- §77-609 (a) - “The district court shall conduct judicial review except when”:
 - Statute allows for direct appeal to Court of Appeals; or
 - “otherwise provided by law.”
- § 77-609 (b) – “Venue” is in county:
 - where agency action is entered,
 - where agency action is effective, or
 - where rule or regulation is promulgated.
- Venue Exceptions for K.S.A. §§ 8-259, 31-144, 44-556, 72-5430a & 74-2426 - See K.S.A. 77-618 dealing with review of disputed facts.

Persons Entitled to Review of Final Agency Action – K.S.A. 77-607

Three factors stated by K.S.A. 77-607:

- Standing - K.S.A. 77-611
- Exhaustion of Administrative Remedies – K.S.A. 77-612
- Timely Filing of Petition for Judicial Review – K.S.A. 77-613

Standing – K.S.A. 77-611

- Person to whom the agency action is directed;
- Person who was a party to agency proceeding that led to agency action;
- Person subject to an agency rule / regulation; or
- Person who has standing under some other provision of law
- See *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 750-761, 189 P.3d 494 (2008) for participation and for common law associational standing

Standing – K.S.A. 77-611

Do you need statutory KJRA factors plus common law standing?

“Thus, before determining whether the appellants have standing under traditional standards governing standing in this state, we must consider whether the appellants meet the standing requirements of the KJRA, See FACT, 268 Kan. At 807. If we determine that the appellants do have standing to challenge the agency action in this case under the KJRA, we must also consider whether they meet the traditional tests for individual and associational standing under Kansas law.” *Bd. Of Sumner County*, 286 Kan. at 750.

Exhaustion of Administrative Remedies – K.S.A. 77-612

- “A person may file a petition for judicial review under his act only after exhausting all administrative remedies...”
- 4 Exceptions:
 - If the KJRA action is on a rule or regulation, the petitioner does not have to have participated in the rulemaking process
 - No exhaustion of administrative remedies is necessary if KJRA or other act does not require exhaustion
 - A petitioner does not need to file for reconsideration of the agency decision unless reconsideration is required by agency as a prerequisite for exhaustion
 - when administrative remedy is inadequate

No Adequate Remedy – Constitutional Issue

- State administrative tribunal or process cannot determine Constitutional issues, but a court can – see *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, Syl. ¶ 5, 176 P.3d 938 (2008)
- Nuanced - See *Zarda v. State*, 250 Kan. 364, 826 P.2d 1365 (1992) – taxpayer’s challenge of regulation’s Constitutionality required no exhaustion since administrative remedy inadequate, but taxpayer could not seek tax relief without exhausting administrative remedies.

Timely Filing of Petition – K.S.A. 77-613

- §77-613 (b) – Basic - 30 days after service of order with 3 days added to response period if order is mailed
- §77-613 (c) – Subject to K.S.A. 77-631 – Deals with Reconsideration of Final Agency decision - 3 variations:
 - Within 30 days of response to KAPA reconsideration request
 - Within 30 days of denial of KAPA reconsideration request
 - For KCC, within 30 days of date that request for reconsideration is considered denied

K.S.A. 77-631 – “Failure of agency to act in timely manner, interlocutory review of agency’s failure to act”

- §77-631 (a) - If agency does not comply with K.S.A. 77-526 (concerning time period for issuing initial / final order) or K.S.A. 77-549 (concerning determinations / orders from division of taxation), an “aggrieved” person can seek interlocutory review of agency’s failure to act.
- §77-631(b) – if agency (does not include KCC) does not act within the time period specified by K.S.A. 77-529 on a KAPA reconsideration request, a party can file a petition for judicial review within 90 days of service of the final order.

Requirements for Petition for Judicial Review – K.S.A. 77-614

- name and mailing address of petitioner
- name and mailing address of the agency whose actions are being challenged
- identify agency action being challenged and include a copy, summary, or brief description of the agency action
- identify all parties to any adjudicative proceedings that led to the agency action
- state facts demonstrating petitioner is entitled to judicial review
- state reasons petitioner believes relief should be granted
- specify the type and extent of relief requested

Service – K.S.A. 77-613, 77-615

- Service on Agency Head or designee primary means – K.S.A. 77-615
- Comply with subsection (e) of K.S.A. 77-613
- K.S.A. 77-613 (e) –
 - (1) Delivering a copy of it to them;
 - (2) mailing a copy of it to them at their last known addresses; or
 - (3) transmitting a copy of it to them by electronic means when authorized by supreme court rule or a local rule.

K.S.A. 77-613 (e) - Service

“Delivery of a copy of an order, pleading or other matter means handing it to the person being served or leaving it at that person's principal place of business or residence with a person of suitable age and discretion who works or resides therein. Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service. Service by mail is complete upon mailing. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of an order, pleading or other matter and it is served by mail or electronic means, three days shall be added to the prescribed period. Unless reconsideration is a prerequisite for seeking judicial review, a final order shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.”

Is Service on Attorney General Required?

- K.S.A. 77-613 intro states: “Subject to other requirements of this act or of another statute...”
- K.S.A. 60-304 (d)(5): “Service of process, on whom made... Except for service by publication under K.S.A. 60-307, and amendments thereto, service of process under this article must be made as follows:...(d) Governmental bodies. On... (5) the state or any governmental agency of the state, when subject to suit, by serving the attorney general or an assistant attorney general.”

Stays, Injunctions and Other Pre-Adjudication Actions – K.S.A. 77-616

- §77-616 (a) - Agency may grant a stay or other temporary remedy
- §77-616 (b) – A party, upon motion, may seek interlocutory review of agency’s action on request for stay
- §77-616 (c & d) – review standards to be used by court on interlocutory review for (b) above - use of (c) or (d) depends on whether public health, safety or welfare involved
- §77-616 (d) – Remedies – remand with direction to administrative tribunal, issue stay or other remedies. Agency can ask for “appropriate terms” for temporary remedy like “bonds”.

K.S.A. 77-616 (c) – Review Standards for Stay

- §77-616 (c) – if public health, safety or welfare involved, court can't grant relief unless:
 - “(1) The applicant is likely to prevail when the court finally disposes of the matter;
 - (2) without relief the applicant will suffer irreparable injury;
 - (3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and
 - (4) the threat to the public health, safety or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.”
- §77-616 (d) – all other matters than (c) – did agency act unreasonably in denying stay request ?

Agency Record – K.S.A. 77-620

- §77-620 (a) – Record to be prepared and forwarded to reviewing court within 30 days of filing of petition for judicial review
- §77-620 (b) – Transcript to be prepared – Appellant to pay cost
- §77-620 (c) – Parties can jointly stipulate to shorten, summarize or organize record
- §77-620 (d) – Court can assess cost for record and transcript to party who unreasonably refuses to stipulate to shortening, summarizing or organizing record
- §77-620 (e) – Additions to records per K.S.A. 77-619

K.S.A. 77-617 – Limitation on New Issues

§ 77-617 (a) – agency lacked jurisdiction to grant an adequate remedy

§ 77-617 (b) – agency action being reviewed was a rule and regulation and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue;

§77-617 (c) – agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding; or

§ 77-617 (d) – interests of justice – issue arose from:

“(1) A change in controlling law occurring after the agency action; or

(2) agency action occurring or first reasonably knowable to the person after the person exhausted the last feasible opportunity for seeking relief from the agency.”

K.S.A. 77-618 – Review of disputed facts

- Read carefully since there are some agency specific exceptions
- “Judicial review of disputed facts shall be confined to the agency record of judicial review as supplemented by additional evidence taken pursuant to this act”

Exceptions to Review of Disputed Facts

- Orders of the director of workers' compensation follow K.S.A. 44-556
- Orders of Kansas Human Rights Commission follow K.S.A. 44-1011, 1021
- Orders of Division of Motor Vehicles under K.S.A. 8-254 re driver's licenses follow K.S.A. 8-259
- Orders of Dept of Labor under K.S.A. 72-5413 to 5431 follow K.S.A. 72-5430a
- Orders of State Fire Marshal under K.S.A. 31-114 follow statute
- Orders of Bd of Tax Appeals under K.S.A. 74-2426 follow statute

K.S.A. 77-619 – Limitation on Additional Evidence

“(a) The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(1) Improper constitution as a decision-making body; or improper motive or grounds for disqualification, of those taking the agency action; or

(2) unlawfulness of procedure or of decision-making process.”

K.S.A. 77-619 (b) – Curative Provisions

“(b) The court may remand a matter to the agency, before final disposition of a petition for judicial review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:”

(1) The agency was required to base its action exclusively on a record, but the agency failed to prepare or preserve an adequate record;

(2) the court finds that:

(A) there is new evidence concerning validity of agency action and Petitioner was under no duty to discover the change until after agency action; and

(B) the interests of justice would be served by remand to the agency;

(3) the agency improperly excluded or omitted evidence from the record; or

(4) a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

Scope of Review – K.S.A. 77-621 – Heart of KJRA

- §77-621 (a)(1) -Burden on proving invalidity of agency action on Petitioner
- §77-621 (a)(2) - Review of validity of agency action limited to time when taken
- §77-621 (b) - Court will make separate and distinct decision on each material issue
- §77-621 (e) - Harmless error analysis to be applied to agency action – see *State v. Shadden*, 290 Kan. 803, Syl. ¶¶ 18 & 19, 235 P.3d 436 (2010); see, also, K.S.A. 60-261

Scope of Review – K.S.A. 77-621 – Heart of KJRA

- Court's review is limited. Reviewing court may not substitute its judgment for that of an administrative agency. *Lacy v. Kansas Dental Board*, 274 Kan. 1031, 1040, 58 P.3d 668 (2002).
- Judicial review and relief is limited to one (or more) of eight statutorily enumerated agency "errors" identified by K.S.A. 77-621 (c). *Frick Farm Properties, L.P. v. State, Dept. of Agriculture, Div. of Water Resources*, 289 Kan. 690, 697, 216 P.3d 170 (2009).

K.S.A. 77-621 (c) – 8 Reviewable Agency Errors

- §77-621 (c)(1) – agency action “is unconstitutional on its face or as applied”
- §77-621 (c)(2) – agency acted beyond its jurisdiction
- §77-621 (c)(3) – agency has not decided an issue requiring resolution
- §77-621 (c)(4) – the agency has erroneously interpreted or applied the law
- §77-621 (c)(5) – the agency used unlawful procedure or failed to follow prescribed procedure
- §77-621 (c)(6) – “the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification”
- §77-621 (c)(7) – agency action not supported by substantial evidence in light of record as a whole
- §77-621 (c)(8) – agency action was unreasonable, arbitrary or capricious

“In Light of the Record as a Whole” – K.S.A. 77-621 (d)

Clawson v. Kansas Dept. of Agriculture, 49 Kan.App.2d 789, Syl ¶ 5, 795, 315 P.3d 896 (2013)

“K.S.A. 2012 Supp. 77-621(c)(7) has always provided that appellate courts review an agency's factual findings to ensure substantial evidence supports them "in light of the record as a whole." However, as amended, K.S.A. 2012 Supp. 77-621(d) now defines "in light of the record as a whole" to include evidence that both supports and detracts from an agency's finding. Thus, appellate courts must determine whether the evidence supporting the agency's factual findings is substantial when considered in light of all the evidence. Substantial evidence is such evidence as a reasonable person might accept as being sufficient to support a conclusion.”

Relief that can be granted – K.S.A. 77-622

- Order the administrative agency to take action or exercise discretion as required by law;
- Set aside or modify an action taken by the agency;
- Enjoin or stay an action of the agency;
- Remand a matter for further proceedings;
- Render a declaratory judgment; or
- Take any other action that is both authorized and appropriate.
- Attorney Fees and Costs – K.S.A. 77-622 (c) – only if allowed by another law – ex: Americans with Disabilities Act

Some Unique Situations

- Operative Construction - *Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 559, 293 P. 3d 723 (2013) – Unlimited review on questions of interpretation without deference to the agency’s interpretation. See *Yeasin v. University of Kansas*, 51 Kan. App. 2d 939, 360 P.3d 423 (2015) involving the University’s Student Code and sexual harassment policy.
- Admitting agency deficiency as a KJRA defense – *Williams v. DesLauriers*, 38 K.App.2d 629, 172 P.3d 42 (2007) – kudos on legal jiu-jitsu
- Debt Setoff – if you receive a “Final Order” from Dept. of Administration on a debt setoff matter, original debt-listing agency has responsibility for KJRA response and action since Dept. of Administration is not to be named as party – see K.S.A. 75-6207 (d)

Some Unique Situations

- Death of Appellant / Petitioner in mid-stream deprives the court of personal jurisdiction since a decedent alone has no legal identity. See *Bigler v. State ex rel. Kansas Health Policy Authority*, No. 106,534, 2012 WL 1920802, (Kan. App. 2012) (unpublished decision)
- Basis – decedent alone has no legal identity - *Voorhees v. Baltazar*, 283 Kan. 389, 409, 153 P.3d 1227 (2007) ("Simply put, the only defendant of consequence has been the estate of Francisco J. Baltazar, which is sued through its administrator as representative simply because Baltazar himself is dead.")
- Remedy is to seek substitution of party via K.S.A. 60-225 if claim survives per K.S.A. 60-1801 the death of Appellant / Petitioner. Failure to complete the substitution in a reasonable time is grounds for dismissal.

Resources

- Obermeier, “The Kansas Judicial Review Act: A Road Map”, JKBA, Vol. (May 2017)
- See “Judicial Review of Agency Decisions” at: <http://www.kscourts.org/pdf/Chapter6.pdf>
- Good KJRA checklist at the KS Courts article