

LEGAL SERVICES

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MEMORANDUM

March 5, 2014

SUBJECT: HB 127 House State Affairs Proposed Committee Substitute
(CSHB 127(STA) (Work Order No. 28-LS0088\T))

TO: Representative Bob Lynn
Attn: Nancy Manly

FROM: Doug Gardner
Director

You requested a House State Affairs Committee Substitute for HB 127, based on Work Order No. 28-LS0088\H. In order to expedite the draft committee substitute you requested, in the short time available to get this draft to you for the 8:00 a.m. meeting of the committee tomorrow, I am sending you the substitute as you requested, with this memorandum identifying issues for the committee's consideration.

The draft provides the chair of the Administrative Regulations Review Committee: (1) the authority to request an ombudsman investigation on behalf of the legislature; (2) some level of oversight over the ombudsman by way of requiring the ombudsman to provide the chair with the name of a complainant in cases where the ombudsman declines to investigate if the complainant agrees; and (3) requires the ombudsman to provide the chair, in writing, the ombudsman's reasons for not investigating a complaint submitted by the chair on behalf of the legislature.

First, I reviewed the powers and duties of the Administrative Regulations Review Committee provided in AS 2.20.460:

Sec. 24.20.460. Powers.

The Administrative Regulation Review Committee has the following powers:

- (1) to organize and adopt rules for the conduct of its business;
- (2) to hold public hearings;
- (3) to require all state officials and agencies of state government to give full cooperation to the committee or its staff in assembling and furnishing requested information;
- (4) to examine all administrative regulations, including proposed regulations, amendments, and orders of repeal, to determine if they properly implement legislative intent and to provide comments on them to the governor and state agencies;

(5) to prepare and distribute reports, memoranda, or other materials;

(6) to promote needed revision or repeal of regulations that have been adopted by state departments and agencies and, when the committee determines a regulation should be repealed or amended, to introduce a bill that would enact a statute that would supersede or nullify the regulation;

(7) to investigate findings that are transmitted to the committee by a standing committee in accordance with AS 24.05.182 and, as appropriate, to either introduce a bill annulling the regulation or exercise the committee's power to suspend the effectiveness of the regulation in accordance with AS 24.20.445.

I could not find any legislative authorization for the chair of the Administrative Regulations Review Committee to act on behalf of the legislature in deciding when an ombudsman complaint on behalf of the legislature should be filed. In addition, you may want to consider that the legislature may not delegate its powers to a committee. *Mason's Manual of Legislative Procedure*, Sec. 615 (2010 ed.). Committees make reports regarding matters within the committee's jurisdiction, and the legislature as a whole, passes bills or resolutions addressing the matters referred by a committee.

The language you proposed could reasonably be read to suggest that the chair of the Administrative Regulations Review Committee can act, by the chair's own decision, regarding filing a complaint with the ombudsman on behalf of the legislature. I note that committees only act when they are properly assembled in a publicly noticed meeting with a quorum to do business. *Mason's Manual*, Sec. 625. So, to the extent that the language you proposed amending AS 24.55.120, and AS 24.55.130 provides the chair with *carte blanche* authority to act on behalf of the legislature, such authority in my view would be unprecedented and would be inconsistent with the most basic tenets of parliamentary law and legislative procedure.

The amendment you propose to AS 24.55.130(a), which provides that the ombudsman, with approval from the complainant, may provide the name of the complainant to the chair raises questions regarding confidentiality. Does the name of the complainant become a committee record, subject to archiving and legislative records requests? *See* Legislative Council Records Policy, I(2). Does the chair have an obligation to provide the name of the complainant to the other members of the committee and to other members of the legislature? In addition, does the amendment proposed to AS 24.55.130(a), conflict with AS 24.55.160(b) which provides:

(b) The ombudsman ***shall maintain confidentiality with respect to all matters and the identities of the complainants*** or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. However, the ombudsman may not disclose a confidential record obtained from an agency. [Italics and bold added for emphasis.]

The United States Ombudsman's Association, emphasizes that the essential characteristics of a classical ombudsman are: (A) independence; (B) impartiality and fairness; (C) credibility of the review process; and (D) confidentiality. *See*, <http://www.usombudsman.org/essential-characteristics-of-a-classical-ombudsman/>. The United States Ombudsman Association notes:

The Ombudsman is made a part of the legislative body to achieve functional and political independence from the organizations or agencies the Ombudsman reviews. Complaints officers who are not independent of an agency they receive complaints about may not act impartially but rather act to protect the organization.

Ombudsmen are independent so they may be impartial. Their findings and decisions are based on examination and analysis of the facts and law. They must be independent and avoid even the appearance of serving the interests of the organizations they investigate if complainants are to trust the results of their investigations.

The Ombudsman is also free of functional control by the legislative body. Legislative control is exercised instead through appointment, re-appointment and removal. Rigorous selection and other restraints imposed by law ensure that the Ombudsman requires no further control. The office must not appear to serve the agenda of legislative or government leaders. That independence creates credibility for the office among the people, particularly those who complain. [Italics and bold added for emphasis.]

In the short time available to prepare this memorandum and spot issues, I am not able to research the ombudsman offices of other states to see if they have the features that you are interested in adding to the Alaska Office of the Ombudsman. However, by adding the provision allowing the legislature to initiate an investigation to the draft committee substitute, there may be a perception, however unfounded, that the ombudsman's actions in deciding which cases to accept for investigation, and which cases to decline, may be motivated by a desire on the part of the ombudsman to please the legislature. Again, that perception, may undermine the credibility of the ombudsman.

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Enclosure