

LEGAL SERVICES

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MEMORANDUM

April 15, 2014

SUBJECT: Illicit synthetic drugs (HCS CSSB 173());
Work Order No. 28-LS1242(Y)

TO: Senator Kevin Meyer
Attn: Edra Morledge

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed the HCS CSSB 173() committee substitute that you requested. After speaking with Ms. Morledge about the issues raised in this memo, the change to a civil penalty was not made. The reasons are discussed below.

Switching to a "civil penalty" would have taken the proceeding out of the citation process and required the department to file a civil action. In the original version of the bill, SB 173 (ver. "A"), the penalty provision, AS 17.21.030(c), reads as follows: "(c) A person who violates AS 17.21.010 is guilty of a violation and, upon conviction, may be punished as provided in AS 12.55." *Id.* at page 3, lines 22 - 23.

As I understand it, the Public Defender Agency and the Office of Public Advocacy asserted that the reference to AS 12.55 raised questions about whether the penalties were criminal.¹ Apparently there was some concern that the mention of AS 12.55, the criminal sentencing statute, might suggest that a person is entitled to appointed counsel. In my opinion, the \$500 fine does not trigger the right to counsel.² The original version of the

¹ In addition, each agency provided an indeterminate fiscal note on the grounds that the bill might "inadvertently include criminalizing the sale of some herbal remedies and other innocuous substances." Department of Administration, Fiscal Notes #2 and #3, March 14, 2014 (SJUD).

² In *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970), the court defined "criminal prosecution" as that term is used in art. I of the Constitution of the State of Alaska, as including (1) offenses for which a direct penalty may be incarceration, (2) offenses which may result in the loss of a valuable license, and (3) offenses for which the fine imposed is heavy enough to indicate criminality, because such a fine could be taken as a gauge of the ethical and social judgments of the community. A \$500 fine does not meet this threshold. I am unaware of a case where a person has been provided counsel at public expense when

bill was consistent with the preferred drafting convention used in numerous places throughout the Alaska Statutes. The original version of the bill also had the benefit of changing as the penalty for violations changes without the necessity of a major effort to seek out individual statutes that are intended, as this one is, to provide the same penalty as is provided in AS 12.55.³ AS 12.55 also allows for differential sentencing for organizations.⁴

However, the wording was changed, and the Senate judiciary committee version of the bill was worded as follows: "(c) A person who violates AS 17.21.010 is guilty of a violation and, upon conviction, is punishable by a fine of not more than \$500." CSSB 173(JUD) (ver. "O"), page 3, lines 21 - 22. This language is also used in the enclosed draft.

A violation is an offense under the laws of the state. "Offense" is defined in AS 11.81.900(b)(40) as "conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation." A violation technically is not a civil penalty.⁵ A violation is defined in AS 11.81.900(b):

- (65) "violation" is a noncriminal offense punishable only by a fine, but not by imprisonment or other penalty; conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime; a person charged with a violation is not entitled
 - (A) to a trial by jury; or
 - (B) to have a public defender or other counsel appointed at public expense to represent the person;

A crime is an offense for which a sentence of imprisonment can be imposed and can be either a felony or a misdemeanor. AS 11.81.900(b)(11). While a violation is an offense and is prosecuted in the criminal justice system, it is not a crime and the Constitution of the State of Alaska does not require a jury trial. *State v. Dutch Harbor Seafoods, Ltd*,

being sentenced under AS 12.55 for a violation that did not involve or implicate in the future a loss of a valuable license.

³ AS 12.55 provides the sentencing structure for offenses committed in Alaska. Offenses, consisting of crimes and noncriminal violations are processed in the criminal justice system and governed by this chapter. A specific penalty should only be included if one intends a punishment that is different than those provided in AS 12.55.

⁴ Compare AS 12.55.035(b)(7) (fine for violation \$500) and AS 12.55.035(c) (\$25,000 for a violation, or three times the pecuniary gain to the defendant or loss caused by the defendant, whichever is greater).

⁵ An example of a civil penalty scheme can be found in AS 17.20.315.

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965 P.2d 738, 739 and 741 - 42 (Alaska 1998) (finding no right to jury trial where potential fines of \$3000 or \$6000 are not heavy enough to denote criminality) *quoting Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970). However, apparently there continues to be concern or confusion about the nature of a violation and whether it is an appropriate approach for the subject matter of the bill. To address this, the Department of Law suggested that the bill be amended to refer to a "civil penalty," and to identify the burden of proof as a "preponderance of the evidence," the civil burden of proof.

Following these suggestions would have resulted in converting the cases that result from this statute into civil actions. Law enforcement would not have been able to use the citation process under this arrangement. A full blown civil action would have been required.⁶

I was not sure what to do with the request to place the drug names in an uncoded provision. If the drug names were not codified, they could not have, in my opinion, remained an element of the offense, and would not have had the force of law. As I discussed with Ms. Morledge, the drug names have now simply been eliminated.

If I may be of further assistance, please advise.

KJS:lem

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Enclosure

⁶ This is similar to a problem that developed after an amendment to the Court's Minor Offense Rule 3(g), which had to be corrected this year by SB 116.