

LEGAL SERVICES

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MEMORANDUM

February 24, 2014

SUBJECT: Reporting mental health commitments to NICS and compliance with the NICS Improvement Amendments Act of 2007 (NIAA) (Work Order No. 28-LS1172\C)

TO: Representative Lance Pruitt
Attn: Morgan Hopson

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed another draft of the above bill. I have eliminated a section that made special mention of the handling of cases where a person seeking relief from a legal disability under the bill has been convicted of a crime against the person, because it was arguably duplicative. I have also attempted to address a concern that the bill does not contain a "de novo" review. I think the concern is unfounded, but I have included the language requiring a de novo review in the Alaska Supreme Court.

As I discussed with Ms. Hopson, there has been some concern about whether the current draft, version "N" is in compliance with the federal NICS¹ Improvement Amendments of 2007 (NIAA), which, among other things, offers incentives to the states to improve the provision of records to NCIS, as well as to provide to persons prohibited from obtaining firearms on account of mental health adjudications an opportunity to remove the prohibition. I understand that there is some question about whether the bill adequately addresses the due process requirements that the law sets out. In my opinion it does.

As I understand it, the primary concern is whether there is a de novo review process. Section 105(a) of the NIAA provides:

PARTICIPATION IN GRANT PROGRAMS. (a) Program Described.
-- A relief from disabilities program is implemented by a State in accordance with this section if the program --
(1) permits a person who, pursuant to State law, has been adjudicated as described in subsection (g)(4) of section 922 of title 18, United States Code, or has been committed to a mental institution, to apply to the State for relief from the disabilities imposed by subsections (d)(4) and (g)(4) of such section by reason of the adjudication or commitment;

¹ NICS is the acronym for National Instant Criminal Background Check System.

- (2) provides that a State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest; and
- (3) permits a person whose application for the relief is denied to file a petition with the State court of appropriate jurisdiction for a de novo judicial review of the denial.

The proposed procedure in the draft bill is a court proceeding in a court of record, like the commitment procedure and all of the other procedures that result in legal disabilities with respect to the possession of firearms. Some states provide that a person petitioning for relief from such legal disabilities must first apply to an administrative agency. *See, e.g.*, Md. Code Ann. Public Safety sec. 5.133.3. In such cases, the federal law suggests that the person seeking relief should be able to obtain a de novo proceeding before the court. Similarly, as used in the Alaska Statutes, a de novo proceeding is generally prescribed when the legislature has determined that a party who has had a proceeding before an administrative agency should have a second chance to present evidence.²

In my opinion, the federal statute does not require a de novo hearing where there is a full court proceeding,³ nor does it mandate a "de novo review" by the appellate courts. Only the federal agency administering the grant program can answer the question with certainty. But the Bureau of Alcohol, Tobacco, Firearms, and Explosives in the United States Department of Justice (ATF) checklist outlining the considerations the Bureau undertakes supports the conclusion that the law does not require a new hearing when a court has already conducted a hearing.⁴

4. **Due Process:** The petition for relief is considered by the lawful authority in accordance with principles of due process, as follows:

² *See, e.g.*, AS 10.06.633 (corporation dissolved after certain determinations by the commissioner of the Department of Commerce and Community and Economic Development entitled to de novo proceeding in superior court); AS 25.27.220 (court may hold de novo hearing in whole or in part in child support case -- child support initially set by the child support services agency); AS 36.30.685 (certain contract claims decided by the commissioner of the Department of Transportation and Public Facilities subject to trial de novo). *See also*, AS 44.62.570.

³ Adding a hearing process to appellate court procedure would involve a radical restructuring of the judiciary and the amendment of court rules.

⁴ A copy of the complete form is attached.

a. The applicant has the opportunity to submit his or her own evidence to the lawful authority considering the relief application.

b. An independent decision maker someone other than the individual who gathered the evidence for the lawful authority acting on the application reviews the evidence.

c. A record of the matter is created and maintained for review.

5. **Proper Record**: In determining whether to grant relief, the lawful authority receives evidence concerning and considers the:

a. Circumstances regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);

b. Applicant's record, which must include, at a minimum, the applicant's mental health and criminal history records; and

c. Applicant's reputation, developed, at a minimum, through character witness statements, testimony, or other character evidence.

6. **Proper Findings**: In granting relief, the lawful authority issues findings that:

a. The applicant will not be likely to act in a manner dangerous to public safety; and

b. Granting the relief will not be contrary to the public interest.

7. **De Novo Judicial Review of a Denial**: The State provides for de novo judicial review of relief application denials that includes the following principles:

a. If relief is denied, the applicant may petition the State court of appropriate jurisdiction to review the denial, *including the record of the denying court, board, commission or other lawful authority.*

b. *In cases of denial by a lawful authority other than a State court, the reviewing court has discretion to receive additional evidence necessary to conduct an adequate review.*

c. *Judicial review is de novo in that the reviewing court may, but is not required to, give deference to the decision of the lawful authority that denied the application for relief.*

ATF Form 3210.12. (*Emphasis supplied.*) Notably, the checklist also suggests that for the purpose of the grant program, a de novo review may in fact allow a reviewing court to give deference to the authority, which may included an administrative agency, that denies an application for relief. Clearly the de novo review referred to is from a decision by "a lawful authority other than a State court." Thus, it does not require "de novo" appellate review.

In Alaska, a person appealing from the superior court has a right of appeal under AS 22.05.010. In general, the appellate courts apply the following standard of review:⁵

⁵ The quotation is from a case reviewing a mental health commitment, but it is the standard generally employed in appellate proceedings.

We apply our independent judgment to the interpretation of the Alaska Constitution and statutes, adopting "the rule of law that is most persuasive in light of precedent, reason, and policy." Factual findings in involuntary commitment or medication proceedings are reviewed for clear error, and we reverse only if our review of the record leaves us with a definite and firm conviction that a mistake has been made. The question whether factual findings comport with the requirements of AS 47.30 presents a legal issue, which we review *de novo*. The superior court's decisions regarding the admissibility of evidence, including expert testimony, are generally reviewed for abuse of discretion. If admissibility of evidence turns on a question of law, we apply our independent judgment.

Wetherhorn v. Alaska Psychiatric Inst., 156 P.3d 371, 375 (Alaska 2007) (footnotes omitted.) In my opinion, this standard of review on appeal is also consistent with the federal law.

It is my understanding that some other states that have a court proceeding to provide relief from disability have added an appellate review standard to their statutes to respond to the concern conveyed to you. *See, e.g.*, La. Rev. Stat. sec. 28:57(G): "The district court order may be reviewed on appeal to the court of appeal under a *de novo* standard." The Alaska appellate courts sometimes refer to their consideration of the law as "de novo" rather than as exercising independent judgment. For example:

Whether DFYS complied with the "active efforts" requirement of the Indian Child Welfare Act (ICWA) is a mixed question of fact and law. Likewise, whether substantial evidence supports the court's conclusion that an Indian child is likely to be seriously harmed if returned to his parent is a mixed question of fact and law. Whether expert testimony satisfies ICWA requirements is a pure legal question. We review the court's factual findings under the clearly erroneous standard, and its legal conclusions *de novo*.

E.A. v. State, Division of Family and Youth Services, 46 P.3d 986, 989 (Alaska 2002). I have added an appellate review standard of "independent judgment" to the bill. I did not use the term "de novo" because it might suggest to some that there would be a new hearing in the appeals court. However, I want to alert you that telling the court how to interpret the law, in this case by directing a standard of review, can be problematic from a separation of powers point of view, as it is the court's exclusive province. *State v. Planned Parenthood of Alaska*, 28 P.3d 904, 915 (Alaska 2001). I have attempted to avoid this by indicating that the court "may" exercise independent judgment as to the law and the facts, but I believe that the provision is constitutionally troublesome. The Alaska Supreme Court as the final appellate court in Alaska and as head of the judicial branch of government may view this change as an intrusion into its sole powers under art. IV, sec. 1, Constitution of the State of Alaska.

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In summary, version "N", with the change noted at the beginning of this memo, is a version that complies with the NIAA, but this version is offered to address the concerns that have been conveyed to you.

Finally, if it is important to you that the words "de novo review" appear in the bill, or otherwise in the process that is being created, you should consider having the decision concerning whether to grant relief from these disabilities by an executive branch official, such as the commissioner of public safety, as an administrative hearing. Then the administrative Procedure Act (AS 44.62) would apply to the process and judicial review of the agency decision would be in the superior court (AS 44.62.560) and de novo review would be available (AS 44.62.570).

If I may be of further assistance, please advise.

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Enclosure