

LEGAL SERVICES

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MEMORANDUM

January 28, 2011

SUBJECT: Interpretation of statutory phrases defining "good cause" in HB 6
(Work Order No. 27-LS0027A)

TO: Representative Max Gruenberg
Attn: Ted Madsen

FROM: Jean M. Mischel
Legislative Counsel

You have asked for an interpretation of the phrases used in the definition of "good cause" at proposed sec. 14.40.155(g)(3) and (4) in section 2 of the above-referenced bill. Those phrases provide as follows:

(3) conviction of a misdemeanor in any jurisdiction if the
misdemeanor involves

- (A) dishonesty;
- (B) breach of trust; or
- (C) the University of Alaska;

(4) nonfeasance in office, including

- (A) misconduct in office;
- (B) an inability to serve;
- (C) neglect of duty;
- (D) incompetence;
- (E) unjustified failure to perform the duties of the Board of

Regents;

As you know, nothing in the bill defines or otherwise modifies the plain meaning of the above phrases. A court will construe undefined terms by applying the plain meaning and, if ambiguous, will look to legislative intent to determine the meaning. The committee records may be used in some cases of ambiguity. In addition, a court may rely by analogy on interpretations by agencies, courts, or the attorney general of similar phrasing used in other state statutes. A memorandum to you in 1991 describing the statutory instances of "removal for cause" is attached.

The term "nonfeasance" is defined in dictionaries and is used in at least two other instances for removal of a state officer. See, for example, AS 23.30.007 pertaining to the Workers' Compensation Appeals Commission. The term "dishonesty" is used in several instances in state law in relation to barrier crimes for licensing. See, for example,

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AS 05.15.105 pertaining to gaming and AS 06.50.020(a), pertaining to financial institutions.

With the exception of the term, "unjustified" as used in (g)(4)(E), I find nothing ambiguous in the phrases identified. A court would therefore interpret the wording according to its plain meaning, including dictionary definitions and common usage. The hearing officer, if one is appointed, or the governor must make the initial determination of what may be considered "justified" until a court is asked to interpret the term and looks to legislative intent.

If you wish to further define the terms used in the bill, let me know.

JMM:plm
11-040.plm

Enclosure

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MEMORANDUM

February 11, 1991

SUBJECT: Statutory Criteria for Dismissal of Members of Boards and Commissions (W.O. 7LS-0703)

TO: Representative Max Gruenberg

FROM: Terri Lauterbach
Legislative Counsel

You have asked several questions in regard to dismissal of members of boards and commissions in Alaska¹:

(I) Which statutes refer to dismissal for cause?² How is that term defined in Alaska Statutes or Alaska case law?

(II) What are the statutory criteria for dismissal in statutes that do not refer to dismissal for cause? How have those criteria been defined?

(III) What procedural protections, if any, are there for dismissed members?

These questions do not admit of short answers, so I'll just plunge into a discussion that I hope will give you the information you seek.³

¹ You also asked questions about dismissal of members of boards and commissions in other states. Those questions have been forwarded to the Legislative Research Agency.

² Your memo actually only referred to "just or good cause." However, since there is only one statute (AS 08.04.030) that refers to "just cause" and none that refer to "good cause," I have treated your questions as pertaining to "cause."

³ I do not attempt in this memo to determine whether any given statutory criteria would be upheld as constitutional. As I am sure you are aware, the legislature's power to inhibit the governor's power of removal may extend only to "section 26" boards and commissions. I understand your request to be one aimed at knowing what our current statutes say with regard to this area.

I. REMOVAL FOR CAUSE

May be removed for cause

There are 22 boards and commissions listed in AS 08.01.010 that are occupational licensing boards. According to AS 08.01.020, members of these boards and commissions "serve at the pleasure of the governor." However, the last sentence of AS 08.01.020 also states that "a board may provide by regulation that three or more unexcused absences from meetings are **cause** for removal."

This combination of serving at the governor's pleasure and being removable for cause also shows up in the specific statutes relating to three of the boards listed in AS 08.01.010. Statutes relating to the Board of Chiropractic Examiners, the Board of Nursing Home Administrators, and the Board of Pharmacy each provide

A member of the board may be removed from office by the governor **for cause**. The board may by regulation provide that unexcused absences from meetings constitute **cause** for removal.⁴

Another occupational licensing board, the Board of Public Accountancy, has a specific removal statute, too, even though it is also listed in AS 08.01.010 and is covered by the general language of AS 08.01.020. Its specific statute provides

The governor **shall** remove any member of the board whose certificate, license or permit has been revoked or suspended. The governor **may, after hearing**, remove any member for **neglect of duty** or **other just cause**.⁵

The members of boards and commissions can also be removed for cause under AS 39.52 (Alaska Executive Branch Ethics Act), which provides that violation of AS 39.52 "is grounds for removal of a board or commission member **for cause**."⁶

Members of the board of directors of the Alaska Science and Technology Foundation may be removed for cause under AS 37.17.040(a). Under AS 41.37.050, members of the Citizens' Advisory Commission on Federal Areas in Alaska "may be removed by the

⁴ See, respectively, AS 08.20.025, AS 08.70.055, and AS 08.80.105.

⁵ See AS 08.04.030.

⁶ See AS 39.52.410(b).

appointing authority **for cause after notice and hearing** or after missing three consecutive meetings of the commission."⁷

May be removed **only** for cause

In addition to the instances cited above where the statutes give the governor the discretion to remove a board member for cause, there are four statutes that provide specifically that the governor may remove members of certain agencies **only** for cause.

Members of the Labor Relations Agency, the personnel board, and the Alaska Public Broadcasting Commission may **only** be removed for "cause" under AS 23.05.360(c), AS 39.25.060(c), and AS 44.21.258(a).

The fourth statute providing that members may "only" be removed for cause relates to the Alaska Mental Health Board. It is a little more explanatory, providing that

Members may be removed **only** for cause, including, but not limited to, poor attendance or lack of contribution to the board's work.⁸

Definitions of "cause"

My research has not uncovered any definitions of "cause" in Alaska Statutes or in Alaska case law relating to dismissal of members of boards and commissions other than the reference to "poor attendance" and "lack of contribution" noted in the preceding quotation concerning the Alaska Mental Health Board.

However, there is a definition of "cause" in the statute that allows the State Board of Education to dismiss the commissioner of education "for cause." It provides that, for purposes of that section, "cause" means

- (1) incompetency which is the inability or the unintentional failure to perform the duties of the commissioner;
- (2) immorality which is the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude; or
- (3) malfeasance or misfeasance in office which includes, but is not limited to, the failure of the commissioner to comply with the rules or regulations adopted by the board.⁹

⁷ Although this is the only statute I found that refers to removal for cause "after notice and hearing," it is likely that all removals for cause would be construed to require notice and hearing. See discussion of procedural protections that begins on page 6.

⁸ See AS 47.30.663(c).

Other definitions of "cause," "just cause," and "good cause" may be found in general authorities like Corpus Juris Secundum and Black's Law Dictionary. (Excerpts enclosed.) For instance, Black's provides that "cause," as used with reference to the removal of an officer or employee, means

a just, not arbitrary, cause; one relating to a material matter or affecting the public interest; ...conduct indicating unworthy or illegal motives or improper administration of power; ...misfeasance or nonfeasance.¹⁰

C.J.S.'s general definition of "cause" is that which is

sufficient or necessary to authorize a removal from office..., that is, reasons which the law and sound public policy recognize as sufficient warrant for removal and not merely a cause which the appointing power in the exercise of discretion may deem sufficient.¹¹

II. REMOVAL FOR REASONS OTHER THAN "CAUSE"¹²

Misconduct, neglect of duty, etc.

Under AS 08.48.041, the governor "may" remove a member of the State Board of Registration for Architects, Engineers, and Land Surveyors for "misconduct, incompetency or neglect of duty."

Under AS 14.20.430, the governor "may" remove a member of the Professional Teaching Practices Commission for "misconduct, malfeasance or nonfeasance in office, or incapacity."

Under AS 16.05.280 and AS 41.17.045(a), respectively, the governor "may" remove a member of the Board of Fisheries or Game or the Board of Forestry for "inefficiency, neglect of duty, or misconduct in office."

⁹ See AS 14.07.145(f).

¹⁰ Black's Law Dictionary, page 279.

¹¹ 67 C.J.S. 487 (OFFICERS, sec. 120 b.)

¹² Some statutes cited in this section may be construed as referring to dismissal for cause for purposes of procedural protections; however, they do not use the term "cause" so they are discussed separately, as your memo requested.

Under AS 18.60.057(b) and AS 18.67.020, respectively, the governor "may" remove a member of the OSHA Review Board or the Violent Crimes Compensation Board for "inefficiency, neglect of duty or malfeasance in office."

I have found no statutes defining terms like "misconduct," "misfeasance," "malfeasance," or "nonfeasance," but I have enclosed an excerpt from C.J.S. that discusses them.¹³

Other non-"cause" reasons for removal

Under AS 44.21.200(d), the Older Alaskans Commission "may" request the governor to remove a member who has failed to attend three consecutive meetings of the commission.¹⁴

Under AS 42.40.230(e), the members of the board of directors of the Alaska Railroad Corporation "may" recommend to the governor that a board member be removed for intentionally violating the conflict of interests provisions of AS 42.40.230.

Two other statutes do not refer to a specific reason for removal but do require that a statement of reasons be given. These statutes are AS 37.13.070(a) (Alaska Permanent Fund) and AS 44.33.705(c)(2) (members of the Alaska Tourism Marketing Council that are appointed by the trade association).

Removal not specifically addressed

My research indicates that there are at least 28 advisory boards and commissions. None of their statutes carries a reference to removal powers or reasons for removal. A few state that the members serve at the pleasure of the governor, but none speaks to removal, per se.¹⁵

III. PROCEDURAL PROTECTIONS.

Statutory protections

¹³ See 67 C.J.S. 490 - 495 (OFFICERS, sec. 121 - 124).

¹⁴ This is similar to the situation for occupational licensing boards covered by AS 08.01.010 and 08.01.020, but the Older Alaskans' statute does not use the term "cause." (Members of the Older Alaskans Commission serve "at the pleasure of the governor" under AS 44.21.200(c) just as the members of licensing boards do under AS 08.01.020.)

¹⁵ See AS 03.17.020; AS 14.40.087; AS 14.42.030; AS 18.07.011; AS 18.08.020; AS 18.60.030; AS 23.20.025; AS 37.14.120; AS 38.06.020; AS 41.15.310; AS 41.21.510 and 41.21.625; AS 41.23.430; AS 41.37.010; AS 44.19.101, 44.19.110, 44.19.120, 44.19.155, 44.19.165, 44.19.181, 44.19.255, and 44.19.561; AS 44.29.100; AS 44.46.030; AS 44.88.174; AS 46.30.020; and AS 47.07.110.

Only two Alaska statutes relating to removal for "cause" specify any procedures that must be followed. One says the removal must be "after hearing"¹⁶ and the other says "after notice and hearing."¹⁷

Three statutes that should probably be considered to be "cause" statutes, even though that term is not used,¹⁸ also specify some procedures to follow. One requires "due notice and hearing";¹⁹ two require "a written copy of charges," "an opportunity to be heard in person or through counsel at a public hearing...upon 10 days' notice," and allows the removed member to "confront and cross-examine witnesses."²⁰

Constitutional protections

Members of boards and commissions who serve "at the pleasure of the governor" probably are not entitled to any procedural protections attendant to their removal unless the governor removes them for cause. If they are removed for cause, they are probably entitled to reasonable notice of the charges and an opportunity to be heard, even if the statute governing their agency does not so provide.

The Alaska Supreme Court, in Breeden v. City of Nome, 628 P.2d 924, held that

A person who is employed "at the pleasure" of his employer has no "property" interest in continued employment that is protected by due process.

However, removal of persons serving "at the pleasure of the governor" is probably still governed by the same types of exceptions the courts have found applicable to the "at will" doctrine, e.g., discrimination, unfair labor practice, "whistleblower," and other violations of public policy.

Persons who are removed for cause, whether or not they had been serving at the pleasure of the appointing authority may be entitled to notice and an opportunity to be heard. This

¹⁶ AS 08.04.030 (Board of Public Accountancy).

¹⁷ See AS 41.37.050(a) (Citizens' Advisory Commission on Federal Areas in Alaska).

¹⁸ Although not using the term "cause," the statutes relating to the Boards of Fisheries and Game, the Violent Crimes Compensation Board, and the Board of Forestry all refer to removal for something akin to "cause," such as neglect of duty, misconduct in office, and malfeasance.

¹⁹ See AS 18.67.020 (Violent Crimes Compensation Board).

²⁰ See AS 16.05.280 (Boards of Fisheries and Game) and AS 41.17.045 (Board of Forestry).

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is so because removal for cause may tend to stigmatize them or injure their reputations; hence, they are entitled to defend themselves.²¹

IV. CONCLUSION.

Removal "for cause" is used in a number of Alaska Statutes relating to members of boards and commissions, but not uniformly and with no definition of the term. Only three statutes that use the term purport to restrict removal **only** to situations involving cause. Some members who are removable for cause serve at the pleasure of the governor; some do not.

Procedural protections afforded by statute are minimal, spelled out in less than a handful of statutes. Procedural protections arising from the constitution will vary, depending on the type of board or commission involved and whether or not dismissal was for cause.

I hope you find this memo and the enclosed information helpful. Please let me know if I can be of further assistance.

TML:gc
91-068.glc

Enclosure(s)

²¹ See 67 C.J.S. 538 (OFFICERS, sec. 148), copy enclosed.