**ALASKA STATE LEGISLATURE**
**SENATE JUDICIARY STANDING COMMITTEE**
February 6, 2004
8:00 a.m.

TAPE(S) 04-2&3

**MEMBERS PRESENT**

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

SENATE BILL NO. 217
"An Act relating to genetic privacy; and amending Rule 82, Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure."
HEARD AND HELD

SENATE BILL NO. 203
"An Act relating to certain administrative hearings; and establishing the office of administrative hearings and relating to that office."
MOVED CSSB 203(JUD) OUT OF COMMITTEE

**PREVIOUS COMMITTEE ACTION**

BILL: SB 217
SHORT TITLE: GENETIC PRIVACY
SENATOR(s): OLSON

| | | |
|---|---|---|
| 05/09/03 | (S) | READ THE FIRST TIME - REFERRALS |
| 05/09/03 | (S) | HES, JUD |
| 01/28/04 | (S) | HES AT 1:30 PM BUTROVICH 205 |
| 01/28/04 | (S) | Moved CSSB 217 (HES) Out of Committee |
| 01/28/04 | (S) | MINUTE(HES) |
| 01/30/04 | (S) | HES RPT CS 1DP 1NR 2AM NEW TITLE |
| 01/30/04 | (S) | DP: DYSON; NR: GUESS; |
| 01/30/04 | (S) | AM: GREEN, WILKEN |

BILL: SB 203
SHORT TITLE: OFFICE OF ADMINISTRATIVE HEARINGS
SENATOR(s):

| | | |
|---|---|---|
| 04/29/03 | (S) | READ THE FIRST TIME - REFERRALS |
| 04/29/03 | (S) | STA, JUD, FIN |
| 05/06/03 | (S) | STA AT 3:30 PM BELTZ 211 |
| 05/06/03 | (S) | Moved CSSB 203(STA) Out of Committee |
| 05/06/03 | (S) | MINUTE(STA) |
| 05/07/03 | (S) | STA RPT CS 1DP 3NR SAME TITLE |
| 05/07/03 | (S) | DP: STEVENS G; |
| 05/07/03 | (S) | NR: COWDERY, GUESS, DYSON |
| 05/09/03 | (S) | JUD AT 1:00 PM BELTZ 211 |
| 01/30/04 | (S) | JUD AT 8:00 AM BUTROVICH 205 |
| 01/30/04 | (S) | Heard & Held |
| 01/30/04 | (S) | MINUTE(JUD) |

**WITNESS REGISTER**

Senator Donny Olson
Alaska State Capitol
Juneau, AK 99801-1182
**POSITION STATEMENT:** Sponsor of SB 217

Ms. Jennifer Rudinger
Executive Director
Alaska Civil Liberties Union
Anchorage, AK
**POSITION STATEMENT:** Discussed concerns with SB 217

Mr. John George
American Council of Life Insurers
Juneau, AK
**POSITION STATEMENT:** Discussed concerns with SB 217

Mr. Dave Stancliff
Staff to Senator Therriault
Alaska State Capitol
Juneau, AK 99801-1182
**POSITION STATEMENT:** Answered questions about the committee substitute to SB 203

Mr. Andy Hemenway
Department of Administration
PO Box 110200
Juneau, AK 99811-0200

**POSITION STATEMENT:** Answered questions about the committee substitute to SB 203

Mr. Dave Ingram
Juneau, AK
**POSITION STATEMENT:** Supports SB 203 and presented suggestions

**ACTION NARRATIVE**

**TAPE 04-2, SIDE A**

**CHAIR RALPH SEEKINS** called the Senate Judiciary Standing Committee meeting to order at 8:17 a.m. Senators Therriault, French and Seekins were present. The first bill to come before the committee was SB 217.

^#SB217

**SB 217-GENETIC PRIVACY**

SENATOR DONNY OLSON, sponsor of SB 217, gave the following sponsor statement:

> SB 217 has to do with the genetic privacy laws here in Alaska. I introduced this bill because I think the reason for introducing such legislation is to get a handle on this very complicated issue that is related to genetic privacy. Genetic privacy goes back to the make-up of every one of us as individuals that goes back farther than we can remember historically.
>
> We're all familiar with the useful DNA identification that's been used for law enforcement and paternity disputes. But there's another side to this new technology that I feel has a special need for some type of privacy here in the state of Alaska.
>
> Up until the year 2000, much of this information had been essentially hidden within our genetic code. However, with a public consortium and a private company, they announced that they had cracked the code and were able to spell out the 3 billion letters of each genetic genome, the biochemical messages that's encoded within everyone's DNA.
>
> This is the stepping-stone in deciphering the blueprint that makes us human. In fact, every human cell, including hair, blood, fingernails, body

tissues, with the exception of gametocytes [ph], the sperm and the ovaries in particular, are made up of the same complete set of our genetic make-up. Consequently these genetic profiles yield information that could be used against us.

We certainly have state laws to restrict access to medical records, however the State of Alaska has yet to specify any protection of our genetic information. Medical information is presumed confidential, but with the increasing capability to store and rapidly transfer data, this escalates the challenge for protecting privacy.

At the present time there are no national statutes regarding the genetic privacy laws, however 15 states have required informed consent for a third party to perform or acquire genetic tests to obtain genetic information. Twenty-three other states require informed consent to disclose genetic information.

Let me just re-emphasize that this bill is not to interfere with law enforcement, paternity determination, or any kind of medical necessity. Therefore, I've introduced SB 217 to give special consideration to the advancing biotechnology and to protect our privacy rights before it gets so complicated that we can't handle it. Thank you very much, Mr. Chairman.

CHAIR SEEKINS noted that Senator Ogan had joined the committee and took questions from committee members.

SENATOR SCOTT OGAN asked who is opposed to SB 217 and whether any insurance companies want access to genetic information to determine eligibility for insurance coverage.

SENATOR OLSON said he was not sure that insurance companies are necessarily opposed to SB 217; however, they would like to amend it. He said insurance companies realize that technological advances will require some action and their concerns are valid and need to be addressed.

SENATOR OGAN told members he believes SB 217 is a good idea because insurance is based on a pooled risk. He is concerned that without such legislation, if genetic information became more readily available, it could be used to discriminate against

people based on predetermined genetic conditions. He pointed out everyone's family has some predisposition to disease.

SENATOR OLSON said the bottom line of SB 217 is that a person, and only that person, should have the right to his or her genetic information, and that person should have to provide informed consent before that information is disseminated.

CHAIR SEEKINS asked about using genetic information for the purpose of criminal identification.

SENATOR OLSON said this bill contains exemptions for law enforcement, paternity determination, and medical necessity. Therefore, it should have no effect on law enforcement.

CHAIR SEEKINS asked Senator Olson if law enforcement were to keep a database of genetic information, whether that information would be shared only within the State of Alaska or whether it would be shared on a nationwide basis for criminal identification purposes.

SENATOR OLSON said, as in the case of fingerprint identification, which is shared nationwide, he anticipates that genetic information will also eventually be shared.

CHAIR SEEKINS asked Senator Olson if he is suggesting that genetic information used for law enforcement purposes should be sequestered within the State of Alaska and not shared on a national basis.

SENATOR OLSON said the intent of the bill is not to interfere with law enforcement at all, therefore that issue is beyond the scope of this legislation.

SENATOR HOLLIS FRENCH said he reviewed the bill with a careful eye on the law enforcement aspects. He pointed out that the FBI maintains a nationwide genetic database named CODIS [Combined DNA Index System] that states have access to when seeking out crime suspects. He explained:

> If a rape is committed in Alaska and we gather evidence of who the rapist is here and enter that information into the database and ... if he's arrested in New York, we can link him up to that through use of the database but it's carefully maintained for just that purpose. And somewhere in the materials I noted the penalties for disclosing that information outside

that database are felony penalties. They're much more severe than the penalties proposed by this bill. And I, like Senator Ogan, have concerns about how the insurance industry can use genetic information about you in setting rates and so forth.

But I think the one aspect that I was looking at most closely was whether this would interfere with the collection of information for sex offenders.... It does not interfere with it and so I think it's carefully crafted to allow for the collection for information in the law enforcement arena but mainly it just sort of recognizes that Alaska has a constitutional right to privacy and that before you disclose someone's genetic information that you get in a routine medical test to some insurance company or another health agency or somebody else, that you get that patient's point blank disclosure. It may be that the patient wants to disclose it and is interested in disclosing and he can do that.... But I just think it's one of those intensely personal pieces of information that you should have an opportunity to disclose knowingly, instead of just disclosing at someone else's desire. I think this bill goes a long way to getting us on the right track as far as this information goes.

CHAIR SEEKINS noted his point was to put the fact that the committee is concerned about the law enforcement aspect on the record. He then indicated an applicant for an insurance policy must provide information about his or her family medical history so that the insurance company can determine the risk factor. He asked if SB 217 is enacted, whether his insurance company could ask him to undergo a genetic screening if the company made it available and, if he signed a waiver, the insurance company could use that information to determine his insurability.

SENATOR OLSON said it could.

CHAIR SEEKINS asked if anything in SB 217 protects the potential insured from being forced to provide genetic information to be considered for a policy. He said he understands Senator Ogan's concern, yet a family medical history already provides a vague picture of one's genetic predisposition. He asked Senator Olson whether he has considered how that scenario should be addressed.

SENATOR OLSON said that question has and needs to be considered. He maintained that some type of informed consent is required in Alaska and nationwide to protect one's family medical history and medical record information. SB 217 is an attempt to provide the same protection for one's genetic code so that it fits under [medical record] information. He repeated that one can voluntarily disclose the information; however his goal is to make sure the information cannot be used against a person who is unaware. He explained:

> Going on to the next step, where it's going to be a hammer that's used against you by, as you pointed out, specifically the insurance company, I think that is another level of legislation that needs – that could address it at that time. At this point, all I want to do is make sure that we have some type of protection for our genetic code, which is establishing a privacy or property right so that we have some control as to who gets that information and that's it.

CHAIR SEEKINS said his concern is that an insurance company could refuse to consider an applicant without a DNA analysis.

SENATOR FRENCH agreed with Senator Olson that the issue raised by Chair Seekins should be the subject of a separate bill.

SENATOR OLSON said his legal education told him to [limit the scope of the bill] at that point.

8:27 a.m.

SENATOR GENE THERRIAULT referred to Section 1 of SB 217, the findings and purpose section, and noted that when he was the chair of the House Finance Committee, he routinely took the findings sections out of bills to keep the statutes streamlined. He asked Senator Olson if the legal drafter suggested including a findings section and whether there is any compelling reason to include it in the bill rather than in a letter of intent.

SENATOR OLSON said because of the complexity of the genetic information available, the bill needs specific language to create parameters, "so that we don't have anything that just kind of blankets over anything because all of a sudden you get this interpretation that this means this and that means that so that's the reason I think the drafters put it in."

SENATOR THERRIAULT asked if he requested a findings section.

SENATOR OLSON deferred to his chief of staff.

MR. DAVE GRAY, Chief of Staff to Senator Olson, said he believes SB 217 is a composite of legislation from other state laws on this subject.

SENATOR THERRIAULT pointed out his own bill, SB 203, before the committee today has a shorter findings section, which he plans to review to see if it is necessary. He repeated that when a findings section is unnecessary, he believes the legislature should write a letter of intent to avoid adding pages to the statutes.

CHAIR SEEKINS noted that he does not intend to pass SB 217 from committee today so members will have an opportunity to look at that question.

SENATOR OLSON explained:

> The information that's within not just the nucleus of the cell but within the mitochondria and all those other things...when you start to go and deal with things like ribonucleic acid and deoxyribonucleic acid and all those complexities, you have to have more than just what the intent is because otherwise the bill...misses, I think, how deep this really goes because certainly there are issues – and even within the definitions, when you're starting to talk chromosomes and the protein that make up the chromosomes and the genetic code that's there, that's why...I thought that we should have the, instead of just the intent, which is far more efficient - I understand, but when you start looking deeper and more and more technology goes forward...this defines in a tighter way what we're trying to do.

SENATOR THERRIAULT noted the statute should address what is to be enforced. The findings and intent go into the uncodified section of the state law for the purpose of clarification.

SENATOR OGAN said the Alaskan Civil Liberties Union (ACLU) is calling DNA a property right and believes if human genes are property, poor people could be pressured into selling their organs or genetic material. He said that raises ethical questions about whether human material should be devalued to the point of being marketable commodities. He happens to agree with

the ACLU on that matter. He said the bill refers to genetic information as a property right and the intent language would codify it that way in statute. He asked Senator Olson his feeling on that issue.

SENATOR OLSON said he discussed that question with ACLU representatives and opted not to change the language in the bill because he feels comfortable with the property right.

SENATOR OGAN asked Senator Olson, as a medical doctor, whether he is aware of a split in opinion among the medical community about classifying genetic information as a property or privacy right.

SENATOR OLSON replied:

> That is a very good question, Senator Ogan....It is appalling to sometimes see what goes on throughout the world having, as you pointed out, studied in England, and studied law in England at Cambridge, the stuff that you saw out there has some type of negative visceral reaction to it.... On the other end of the spectrum...most students in college have had the opportunity at one time or another to go down to the local Red Cross and have your blood drawn and get 10 bucks or so, so that's for giving blood, which I don't have a problem with. So you have that on the other end of the spectrum. So between the two, ...we all fall as to what our thoughts are on this ethical issue but I would say that the intent of this bill, and in the inclusion of the property right, that it's not for certainly the sale of organs, tissues....

CHAIR SEEKINS acknowledged that the purpose of SB 217 is to protect genetic information based on an individual right, not to determine the ethics of selling body parts.

SENATOR OLSON agreed.

CHAIR SEEKINS took public testimony.

8:45 a.m.

MS. JENNIFER RUDINGER, Executive Director of the Alaska Civil Liberties Union, said that the right to privacy is among the strongest guarantees in the Alaska Constitution. The ACLU appreciates Senator Olson's and the committee's interest in this

important issue. The ACLU made several suggestions in a letter sent to Senator Olson and feels most strongly about two of those suggestions. First, the ACLU would like the bill to define "informed consent" and second, the ACLU would like to see protections from discrimination included in the bill. She noted that she respectfully disagrees with Senator French that including such protections would be outside the scope of the bill. She pointed out if the state is going to acknowledge this important privacy right, the bill should contain some "teeth" to protect that right. She said 46 states have some type of anti-discrimination measure, mainly related to health insurance policies. Alaska has two statutes that deal with that discrimination based on genetic information; however, "genetic information" is not defined in Alaska statute. Those statutes say that a health care provider cannot discriminate in terms of eligibility for health insurance based on genetic information, among other things. She suggested, "It would be important, I think, to beef that up a little bit and define genetic information and then beyond eligibility, protecting people in terms of their coverage."

MS. RUDINGER noted the other statute prohibits discrimination based on genetic information in regard to pre-existing conditions. She said it is important to protect people in both the health insurance and employment context. It is a common scenario for an employer to get consent for a genetic test from an applicant and then to misuse the information when the employee's disclosure of a genetic condition leads to employment discrimination. The ACLU wants to see SB 217 protect people in the two areas of employment and insurance.

CHAIR SEEKINS referred to page 3 of the ACLU letter, which clarifies that in Alaska statute, a person includes corporations and all different entities. He then asked Mr. George to testify.

MR. JOHN GEORGE, representing the American Council of Life Insurers (ACLI), told members the ACLI has been working with Senator Olson on its concerns with SB 217. The ACLI believes the basis of the bill is well founded. Because insurers need to require some medical tests, the ACLI feels the definition of genetic testing in the bill is overly broad because that definition would include the test results from, for example, a cholesterol test and a serum iron test. Insurance companies use tests that are widely accepted, cheap, and reliable. The type of genetic testing that Senator Olson intends to protect does not fit that description.

MR. GEORGE informed members that he provided a proposed amendment to Senator Olson that contains a new definition. He said he would prefer to work with Senator Olson to see if they can agree on a new definition. He then told members that ACLI's second concern regards adverse selection. He explained that if an insured knows he or she has a medical condition and does not disclose that to the insurance company, there is the possibility of adverse selection. If a person knows that he or she is likely to die in a year from now, that person is likely to buy more life insurance. Insurance companies believe that if the insured knows something about a medical condition beforehand, that information should be disclosed to the insurance company for underwriting purposes.

He informed members that applicants sign a disclosure form for medical information when applying for insurance. He also noted a good portion of the Division of Insurance's privacy regulations have to do with disclosure of health information and what insurance companies can do with that information. Insurance companies are also subject to the Health Insurance Portability and Accountability Act (HIPAA) regulations, which address authorization by an applicant for disclosure of medical information. SB 217 would require a separate authorization for disclosure of genetic information. He noted if an insurance company does business in 50 states and each state has a different requirement, it would have to provide a different form in each state and deal with insureds that move from state to state. The ACLI believes the authorization forms it uses now comply with HIPAA and are adequate for people who voluntarily apply for insurance.

He said once an insurance company has information, it is obligated to maintain those records. SB 217 originally allowed a person to withdraw his or her information, however the insurance company would be required to maintain the file. Insurance companies are subject to audit by the Division of Insurance and disclose client files when selling the company or applying for reinsurance.

8:56 a.m.

CHAIR SEEKINS asked if he were to voluntarily get a DNA test to learn how to live a better life, whether he would be obligated to share the information with an insurance company.

MR. GEORGE said if an insurance company asked health related questions, he would be obligated to answer them. He asked Chair

Seekins if he knew he had a disease that was diagnosed using a non-genetic type test, he would feel obligated to disclose it.

CHAIR SEEKINS said he would feel obligated to disclose a pre-existing condition but he was referring to a predisposition.

MR. GEORGE said the definition he plans to address with Senator Olson addresses a predisposition and a pre-existing condition.

CHAIR SEEKINS asked if once the insurance company has that information, it becomes the insurance company's property and can be sold and shared.

MR. GEORGE said he was not sure how to answer that question. He pointed out an insurance company would be prohibited from selling the information. However, if he bought a life insurance policy from Company A and that company decided to get out of the life insurance business and sell to Company B, Company B would want to review the underwriting files to determine the risk.

CHAIR SEEKINS indicated the information appears to be a saleable commodity.

MR. GEORGE said ownership of the policy is with the policyholder but the insurance company offering that policy can sell the book of business. In addition, if a company wants to reinsure a policy, the reinsurance company will want to look at that file. He noted the privacy regulations that the Division of Insurance is in the process of adopting contain specific guidelines about what is permissible and what is not. Medical information is not public information and is not available on the Internet.

CHAIR SEEKINS asked if that information is put into a database that is available to other members of the insurance industry, either on a membership or fee basis.

MR. GEORGE said it is not.

CHAIR SEEKINS asked, in that case, if he gave the information to Company A, it would not be put into a database that is accessible by Company B.

MR. GEORGE replied:

> Senator, my understanding is that if we're talking about a national database that someone can subscribe to and just access, the answer is absolutely not. I

gave the example of Company A and B and, in that case, it would be because there is a business relationship and a reason for doing that. Again, what are they doing with the information? Are they using it for a business purpose to decide whether or not to accept the business as opposed to selling it to your credit card company or to your bank or to a prescription drug company?

CHAIR SEEKINS said it seems that the intent of SB 217 is to establish a level of privacy on an individual relationship basis. He asked if when he shares information with Company A, whether, without his knowledge or consent, it is a shareable commodity with another entity. He thought that is what Senator Olson was trying to protect. He said he wants to know what actually happens to the data once it is shared with Company A and asked Mr. George to get back to him with a definitive answer.

MR. GEORGE said he feels absolutely safe in saying the information is not saleable or shareable other than for the specific permissive uses listed in the Division of Insurance's regulations for claims adjusting and other purposes. It is not available for any purpose not related to that insurance policy.

CHAIR SEEKINS noted with no further testimony, he would hold the bill in committee and announced a 5-minute recess.
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9:06 a.m.

^#SB 203

**SB 203-OFFICE OF ADMINISTRATIVE HEARINGS**

CHAIR SEEKINS called the meeting back to order and announced SB 203 to be before the committee.

SENATOR GENE THERRIAULT, sponsor of SB 203, told members that the committee substitute (CS) [version B] addresses the many concerns of the state agencies. The purpose of SB 203 is to implement a new system for adjudications and hearing officers to make them consistent across statutes as much as possible. He noted this bill is not a perfect fit to all areas of state government. However, knowing that people resist change, the bill has been scaled back so that it now establishes a pilot project. He said the common goal, in working with the Murkowski Administration, is to achieve a seamless transition.

**TAPE 04-2, SIDE B**

SENATOR THERRIAULT said those existing administrative hearing jurisdictions that do not fit well at this time were removed from version B. Those jurisdictions may, over time, be brought into the new system by future legislative action. He explained that the main source of tension involved whether the existing rules and regulations would apply under the central panel reform, or whether new regulations yet to be developed by the chief hearing officer will control the process. He said to address the concerns about agency expertise, version B allows agency representatives to participate at hearings under conditions set by the chief hearing officer. To address the concern about maintaining agency power over policy, version B keeps the central panel decisions as non-binding within certain timelines and conditions. In areas of conflict with federal law, version B authorizes the administration to follow federal guidelines where required. In addition, at the request of the administration, the definition of a hearing officer was removed and replaced with a more broad description of a quasi-judicial hearing function.

SENATOR THERRIAULT told members that the length of the bill has decreased from about 50 to 39 pages. He asked that Mr. Stancliff explain the details.

SENATOR THERRIAULT moved to adopt, as the working document before the committee, the proposed committee substitute to SB 203, version B, dated 2/4/04.

CHAIR SEEKINS announced that without objection, the motion carried.

MR. DAVE STANCLIFF, staff to the Administrative Regulation Review Committee (ARRC) and to Senator Therriault, said the good news is that the fundamental applications and structure in version B are unchanged. The major changes made in the CS were requested by the administration and several concerned commissioners who like the existing process or are in the process of making reforms to their hearing processes and want the opportunity to implement them. Therefore, 12 of the jurisdictions listed in the Senate State Affairs CS were removed from version B. In addition, the Department of Environmental Conservation’s (DEC) emergency authority and emergency statutes that are time sensitive and deal with environmental hazards were exempted and the general DEC hearing functions will not fall

under the central panel for a grace period of two years. After two years, if DEC's in-house reforms are working well, it could make a case to the legislature for a permanent exemption.

MR. STANCLIFF said the Department of Natural Resources' (DNR) concerns were addressed by removing DNR from the bill. Version B is a highly polished model; one that will not be too costly to implement. It has a very liberal transition period, requested by the administration. The tension that Senator Therriault referred to, between the Administrative Procedures Act (APA) and the model, is not new. That tension exists simply because not every agency conducts its hearings in the same way and not every agency conducts its hearings under the APA. Those tensions are inherent in any process that is not consistent from top to bottom. He said the premise of this legislation was to build a model that over time would provide top to bottom consistency, but not to force the consistency in a way that would be too costly or would "train wreck" legitimate, ongoing hearing functions.

MR. STANCLIFF pointed out that a panel of five experts from different states that assembled on February 3 was impressed with the provision in the bill that will make the hearing officer an administrative employee who will be appointed by the administration. That hearing officer will write regulations and expedite the necessary hearing process transformations. The five experts were a bit reluctant to give high accolades for the fact that final decision-making authority was not given to the central panel. The experts did note that even though the panel will not have final decision-making authority, the legislation requires the commissioner to meet a fairly high bar to reverse a decision. The reversal must be in writing so that if the case advances to court, a written record will be available. He pointed out the experts from the five states were very impressed with the fact that the model in version B is a culmination of all the best features of about 25 models adopted by other states.

MR. STANCLIFF introduced Mr. Andy Hemenway, a hearing officer with the Department of Administration (DOA) and said the two would address the specific changes made in the CS.

9:20 a.m.

MR. STANCLIFF described the following changes to version B:

- page 5, line 31 and page 6, line 1 - language states that this act does not create a right to a hearing that otherwise does not exist in law
- page 6, lines 7-9 – language states that full-time hearing officers will be subject to AS 39.25.150 personnel rules - these positions will be partially exempt with the same protections under the personnel rules listed in paragraphs (7), (15) and (16)
- page 6, lines 29-30, language says a person who enters into a contract to work as a hearing officer with the central panel will be subject to the same rules of ethics as a state hearing officer

SENATOR FRENCH asked how hearing officers are currently classified in state service.

MR. STANCLIFF said it varies but for the most part, they are fully protected employees if they are not under contract. He noted there might be some exceptions in which an appointed person, such as a director, would hold hearings. He deferred to Mr. Hemenway for further information.

MR. HEMENWAY told members that most hearing officers are partially exempt. He and a few others are classified.

SENATOR FRENCH asked if version B will maintain the status quo.

MR. HEMENWAY said that is correct.

CHAIR SEEKINS asked why a hearing officer would be under contract.

MR. HEMENWAY referred to the list of agencies on page 4 and explained that those agencies are statutorily required to hold hearings if a decision is appealed, but they have no hearing officers. When a hearing has to be conducted, a division employee conducts the hearing or the department might contract with an attorney for professional services to act as the hearing officer.

CHAIR SEEKINS asked if this bill would reduce the requirement for contract hearing officers.

MR. HEMENWAY said that is the intent but the bill creates one additional position, the chief hearing officer. The expectation is that the consolidation should create some efficiency and free

up time for the existing hearing officers to do some of the currently contracted functions.

SENATOR THERRIAULT said that even with a centralized panel pool, there may be times when outside contractors will have to perform that function.

CHAIR SEEKINS agreed that the number of contracts will be reduced, not eliminated.

MR. STANCLIFF continued:

- Page 7, lines 24-27 - Sec. 44.21.555 contains a reimbursement agreement
- Page 7, beginning on line 8 - Sec. 44.21.560 was rewritten to clarify how a resolution would occur when there is a conflict between regulations and existing statute and regulations adopted by the chief hearing officer

MR. STANCLIFF pointed out that the administration will appoint a high quality person to work with the agencies and develop and carry out regulations in a compatible manner. However, no matter how well the system works, there will occasionally be a "rub" between the jurisdictions as the transition goes forward. That section is designed to address such a problem. He continued:

- Page 8, lines 13-14, address the confidentiality rule when case information and materials are shifted to the central panel
- Page 8, lines 16-21, allow, if an agency makes a case for expertise, the chief hearing officer to determine what level of participation is necessary
- Page 9, lines 22-23, subsection (f) provides a 30 day time period for the commissioner to overturn a decision, and says if no action is taken, the decision becomes final
- Page 10, lines 14-15, addresses any legitimate ongoing action within an agency and prevents the central panel from arbitrarily holding in abeyance what otherwise would be good public policy
- Page 10, lines 24-25, say when federal requirements exist, they prevail
- Page 10, line 28, contains a shorter definition of administrative hearing officer at the suggestion of the attorney general
- Page 29, lines 7-12, reinstates the requirement that the attorney general approve contract services

- Page 34 contains the provision that puts DEC back in after its two-year grace period - line 18 contains an exception for the DEC functions that are extremely time sensitive and are rarely used
- Page 39, line 29, Section 71, contains the DEC 2-year exemption

MR. STANCLIFF told members that the transition period was designed so that the administration can appoint a hearing officer and start "getting the house" in order within a liberal time period.

MR. HEMENWAY noted the start-up date is July of 2005, when the chief hearing officer could be hired.

MR. STANCLIFF pointed out that version B addresses 85 to 90 percent of the administration's concerns. Addressing any of the remaining concerns would have diluted the reform to the point where it would not work as efficiently as needed. He said he hopes the committee supports this balanced approach.

9:32 a.m.

SENATOR THERRIAULT said resistance is a natural reaction to any system change. He noted that DEC resisted fee changes several years ago but favored the changes after they were in effect for a year. He said he will continue to be sensitive to agency concerns but, hopefully, they will find that most of their concerns have been dealt with. He asked members to consider passing the CS from committee today so that the Finance Committee can address the fiscal aspects of the bill.

MR. STANCLIFF told members that the five-state expert panel said if the state wants to build a new model that garners respect, and participant qualifications are raised, it is important to change the title of hearing officer to administrative law judge. He suggested that would be an easy conceptual amendment to make.

CHAIR SEEKINS asked the sponsor for his opinion of the suggestion.

SENATOR THERRIAULT said he believes it has merit because it would highlight that this panel will have uniform standards and a heightened level of professionalism.

CHAIR SEEKINS asked Mr. Ingram to testify.

9:37 a.m.

MR. DAVID INGRAM told members he recently retired as a hearing officer for 24 years with the State of Alaska. He also taught administrative law and other legal courses at the University of Alaska Southeast for the last 20 years and has been on the executive committee of the administrative law section of the Alaska Bar Association for 19 years. He thanked Senator Therriault, Mr. Stancliff and Mr. Hemenway and all those involved in SB 203; he is fully supportive of its general thrust. He said anything that will help improve the level of professionalism in administrative adjudications in Alaska is a great idea. He has advocated for the creation of a central panel for many years and looks forward to the day when all hearing officers are removed from agency supervision and control. He believes the idea of a pilot project is a good idea.

MR. INGRAM supported changing the title of hearing officer to administrative law judge. He attended the meeting of the five experts from other states and said that several of them noted a discernible change in the level of professionalism when the titles were changed in their states. He said that although it may seem like window dressing, it would mean a lot to the hearing officers to be referred to as administrative law judges. In addition, many titles are now used throughout the state agencies.

MR. INGRAM offered the following suggestions, which he believes are very important. First, make all full-time hearing officers employed by the state subject to the Alaska Code of Judicial Conduct. The Supreme Court did a lot of work drafting and adopting that code for the “black robed” judges in the state. He said it does not contain anything unique to judges and would apply in equal force to administrative law judges. Adopting that code would eliminate the need to draft a new code, provide a code of conduct at the inception of the panel, and provide an instantaneous body of interpretive decisions to guide the hearing officers in interpreting the code.

His second suggestion is to prohibit the practice of law by all full-time hearing officers employed by the state. He believes that as long as hearing officers are allowed to “moonlight,” the state will not have a professional corps of administrative adjudicators. That activity has serious potential to conflict with one’s performance of duties. He repeated that is already prohibited in the Alaska Code of Judicial Conduct.

9:42 a.m.

SENATOR OGAN asked if any conflicts surrounding private practice work are regulated so that an attorney would recuse himself. He said that the Alaska Bar Association holds attorneys to high standards regarding conflicts.

MR. INGRAM said that is true but does not mean attorneys always declare conflicts. The other difficulty is that the extra work distracts them from their state duties.

CHAIR SEEKINS asked Mr. Ingram if he is suggesting that full-time hearing officers be prohibited from moonlighting as a lawyer but the prohibition would not apply to contract hearing officers.

MR. INGRAM said that is correct.

SENATOR OGAN expressed concern that only the attorneys who can't make a living on their own would apply.

MR. INGRAM said there are many applicants for any vacant hearing officer position. His third suggestion was that all full-time hearing officers be prohibited from acting as an advisor or judge to another sovereign, such as another state, federal government or Native group. He pointed out the Commercial Fisheries Entry Commission (CFEC) allows one of its hearing officers to be both a judge and an advisor to another sovereign. Alaskans should be sure in the knowledge that their hearing officers are not in a position to advise or sit on the court of a sovereign with an interest potentially at odds with the State of Alaska. He said, in his opinion, the CFEC situation is a serious conflict of interest in light of potential disputes over natural resources, fish and game, jurisdictional matters and the Indian Child Welfare Act. He believes it is a terrible idea to let a hearing officer engage in outside interests that may affect the quality or integrity of his or her work for the state.

MR. INGRAM informed members that he attached to his written comments 4 pages of an extract from a decision he issued on January 30, 2004 involving an application from a Ketchikan resident. He suggested members read it to get some idea of what is going on in the "real world" regarding professionalism and integrity of the process.

SENATOR OGAN thanked Mr. Ingram for bringing his experience to the committee.

MR. INGRAM said that he believes that all hearing officers would love to be more independent and be part of a central panel.

SENATOR OGAN said when he introduced similar legislation 6 years ago, a number of hearing officers privately gave him the “thumbs up” for a central panel. He then said the term “administrative law judge” is interesting because most people believe the legislature writes law. However, the administration writes regulations, which have the same force of law, and then enforce them and deal with adjudications. Therefore, what is supposed to be balanced by three branches is under one. He expressed concern that hearing officers are pressured to rule with a little bit of a bias toward the commissioner they work for.

MR. INGRAM said was never told how to decide a case. He suspects he was given certain cases because he was likely to lean in a particular way. He believes the main danger is that hearing officers become friends with their co-workers and it is difficult to criticize the performance of people one works with and respects. He acknowledged that a good hearing officer can step back.

SENATOR THERRIAULT said he clearly understands the reasons for Mr. Ingram’s first suggestion, to change the titles of the hearing officers to administrative law judges. He asked if the central panel adopted the Alaska Code of Judicial Conduct, Mr. Ingram’s other two suggestions, regarding outside employment, would be addressed.

MR. INGRAM said it would take care of his suggestion to prohibit moonlighting. However, he believes the committee should consider amending the bill to specifically state that administrative law judges should not act as an advisor or judge to another sovereign because some people would argue that is not the practice of law.

SENATOR THERRIAULT said if the legislature wants the efficiency of a central pool, it would not want administrative law judges with conflicts within the pool, other than life experiences, such as being related to someone involved in a case.

CHAIR SEEKINS announced that he was closing public testimony and asked for further comments from members.

SENATOR FRENCH thanked Mr. Ingram for his comments and said he supports his first and fourth suggestions. He said his concern about the second suggestion is based on a personal experience. He noted that law clerks must be admitted to the Alaska Bar Association to practice law and pay dues, but they cannot practice law outside of being a law clerk. He said his problem is with the ABA and believes it should establish a separate dues rate for public interest lawyers.

**TAPE 04-3, SIDE A**

SENATOR FRENCH said he is still mulling over how Mr. Ingram's second and third suggestions should be structured, but he believes the bill is in good shape and appreciates the work that has been done on it.

SENATOR THERRIAULT moved a conceptual amendment [Amendment 1] to change the term "hearing officer" to "administrative law judge" throughout the bill.

CHAIR SEEKINS announced that without objection, the motion carried.

SENATOR THERRIAULT said he would prefer to get more information on adopting the Alaska Code of Judicial Conduct before taking action on that suggestion. He noted the next committee of referral is the Finance Committee and, if adopting that code will avoid having to write an entirely new code, he would consider that as a way of handling the fiscal impact.

SENATOR THERRIAULT made a second conceptual amendment [Amendment 2] to preclude the administrative law judges from acting as an advisor or a judge to any other sovereign.

SENATOR OGAN objected and asked what is meant by an advisor to another sovereign. He questioned whether that would include consulting.

SENATOR THERRIAULT said the amendment is conceptual so the drafters will have to define that term.

CHAIR SEEKINS said he believes the intent is to address situations in which the work is done for remuneration because the law could not prohibit someone from giving free advice to another.

SENATOR FRENCH read an excerpt from Mr. Ingram's letter that cited the Alaska Code of Judicial Conduct, "A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family."

CHAIR SEEKINS said that is how he interprets Amendment 2.

MR. STANCLIFF noted that a member of the administration felt the term, "for remuneration or official purposes" should be used.

SENATOR FRENCH said that "official purposes" should probably be parsed out a bit more.

SENATOR OGAN said he wanted to provide the drafter with some discussion. He removed his objection; therefore Amendment 2 was adopted.

SENATOR OGAN moved CSSB 203(JUD), Version B as amended, with its attached fiscal notes from committee and asked for unanimous consent.

CHAIR SEEKINS announced that without objection, the motion carried. He then adjourned the meeting at 10:01 a.m.
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