ALASKA STATE LEGISLATURE
SENATE STATE AFFAIRS STANDING COMMITTEE
March 17, 2005
3:39 p.m.

MEMBERS PRESENT

Senator Thomas Wagoner, Vice Chair
Senator Charlie Huggins
Senator Bettye Davis
Senator Kim Elton

MEMBERS ABSENT

Senator Gene Therriault, Chair

COMMITTEE CALENDAR

SENATE BILL NO. 134
"An Act relating to arrest; relating to investigation standards for police officers conducting criminal investigations and violations of those standards."

HEARD AND HELD

SENATE BILL NO. 132
"An Act relating to complaints filed with, investigations, hearings, and orders of, and the interest rate on awards of the State Commission for Human Rights; making conforming amendments; and providing for an effective date."

HEARD AND HELD

SENATE JOINT RESOLUTION NO. 8
Proposing amendments to the Constitution of the State of Alaska relating to and limiting appropriations from and inflation proofing the Alaska permanent fund by establishing a percent of market value spending limit.

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 134
SHORT TITLE: POLICE INVESTIGATION STANDARDS/ARRESTS
SPONSOR(s): SENATOR(s) BUNDE

03/08/05 (S) READ THE FIRST TIME - REFERRALS
03/08/05 (S) STA, JUD
03/17/05 (S) STA AT 3:30 PM BUTROVICH 205

BILL: SB 132
SHORT TITLE: HUMAN RIGHTS COMMISSION
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/04/05 (S) READ THE FIRST TIME - REFERRALS
03/04/05 (S) STA, JUD
03/17/05 (S) STA AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

Tamara Delucia,
Victims Rights Advocate
1007 West 3rd Avenue, Suite 205
Anchorage, Alaska 99501-1936
POSITION STATEMENT: Testified on SB 134

Saralyn Tabachnick, Executive Director
Aiding Women in Abuse and Rape Emergencies (AWARE)
P.O. Box 20809
Juneau, AK 99802
POSITION STATEMENT: Testified on SB 134

Darwin Peterson,
Deputy Legislative Director
Office of the Governor
Alaska State Capitol
Juneau, AK 99801
POSITION STATEMENT: Introduced SB 132

Jan DeYoung,
Chief Assistant Attorney General
Statewide Section Supervisor
Department of Law
Anchorage, AK
POSITION STATEMENT: Explained the sectional analysis for SB 132

Lisa Fitzpatrick, Commissioner
Alaska State Commission on Human Rights
800 A Street, Suite 204
Anchorage, AK 99501-3669
POSITION STATEMENT: Testified on SB 132

Paula Haley, Executive Director

Alaska State Commission on Human Rights
800 A Street, Suite 204
Anchorage, AK 99501-3669
POSITION STATEMENT: Testified on SB 132

ACTION NARRATIVE

VICE-CHAIR THOMAS WAGONER called the Senate State Affairs Standing Committee meeting to order at 3:39:55 PM. Present were Senators Davis, Elton and Vice-Chair Wagoner.

SB 134-POLICE INVESTIGATION STANDARDS/ARRESTS

3:40:30 PM

VICE-CHAIR THOMAS WAGONER announced SB 134 to be up for consideration and asked for a motion to adopt the committee substitute (CS).

SENATOR KIM ELTON moved CSSB 134, \Y version, as the working document. There being no objection, it was so ordered.

3:41:14 PM

SENATOR CON BUNDE, Sponsor, told members he is expecting more information from the Department of Public Safety (DPS) and asked that the committee take no action until that information is received.

He reported that Alaska has the unfortunate and shameful legacy of leading the nation in sexual assaults. Alaska is diverse and has many small communities. If those communities had more resources, they would be better able to address the high level of sexual assaults. SB 134 would require the Police Standards Council to set a level of standards for investigation in sexual assault cases and to enforce those standards. Small communities may not have access to the latest techniques, equipment and training and may be unaware of what the public might expect.

The legislation seeks to create a common standard so that the expectations for police enforcement would be the same in Anchorage as in a village. The Police Standards Council should decide on the professionalism of any police officer regarding discipline, reprimand and revocation of certification. With few exceptions, police officers maintain high standards and do the best job possible.

The Alaska Medical Association disciplines its own members and the Police Standards Council should discipline police officers, he asserted. The committee substitute addresses a requirement for arrest by giving police officers more latitude to make arrests based on probable cause.

3:45:54 PM

VICE-CHAIR WAGONER announced a brief at-ease at 3:46:44 PM.

3:47:36 PM

TAMARA DELUCIA, Office of Victims Rights, stated support for the measure to standardize procedures and to require cases to be submitted to the district attorney (DA) for review. This would benefit victims in particular in light of the high rate of sexual assault crimes in Alaska.

SB 134 provides a very good opportunity for the Police Standards Council to level the playing field and bring rural communities in line with investigation standards that exist in urban areas such as Anchorage, Fairbanks and Juneau.

Small villages in rural communities are at a disadvantage because of the lack of proximity to troopers and the type of law enforcement system that's available. Anything that can be done to assist Village Public Safety Officers (VPSO) in pursuing a quality investigation can only be viewed as positive.

3:49:05 PM

SENATOR ELTON read new language from version Y:

> **(4) shall make an arrest at the time a peace officer determines to be appropriate and when the peace officer has reasonable cause to believe that a crime has been committed and the person to be arrested has admitted committing the crime to a peace officer or a peace officer has listened to a recording of the admission**.

Having assumed it works that way now, he asked for an example to the contrary.

MS. DELUCIA responded the Office of Victims' Rights doesn't necessarily support the mandatory arrest provision, but it does support Section 2 that allows the Council to adopt regulations

for minimum standards for the conduct of criminal investigations. She particularly favors delivering investigation results to the prosecutor, addressing victims safety concerns, writing incident reports and securing the crime scene. Every crime is different and certain evidence collection issues and arrest determinations shouldn't be standardized. However, for the most part they support the opportunity for APSC to set standards.

VICE-CHAIR WAGONER noted that Senator Bunde wanted to address the question as well.

SENATOR BUNDE referenced the new language and told Senator Elton that unfortunately that isn't the case. SB 134 is the result of a conversation with a constituent about an assault that occurred in which the offender admitted guilt, but no arrest took place. In discussing the situation with police authorities, he learned the police often do not arrest a person early in the investigation so that they can build a stronger case.

His concern relates to the need to protect the public while not tying the hands of law enforcement. He suggested placing the names of such suspects in the system to assist in investigating other unsolved cases because many offenders are actually re-offenders.

SENATOR ELTON asked if the decision to wait to arrest is based on the premise that you don't arrest the “little fish” to find the “bigger fish.”

SENATOR BUNDE said an arrest might be delayed so that the big fish is thoroughly hooked before prosecution begins.

3:53:37 PM

MS. SARALYN TABACHNICK, Executive Director, Aiding Women in Abuse and Rape Emergencies (AWARE), spoke on behalf of victims of sexual assault and domestic violence. She explained that the crime of assault or rape is one of the most difficult to report because victims often feel shame or a sense of responsibility. Judgments are made about rape survivors that aren't made about other violent crimes survivors.

Typically peace officers do a good job of investigating domestic and sexual assaults, but sexual assault survivors need messages that are clear in words and action so they know an investigation is moving forward to build the best case possible. SB 134

provides accountability, which can have a tremendous impact on holding offenders accountable and allowing survivors to heal from the victimization.

3:55:52 PM

VICE-CHAIR WAGONER announced he would set CSSB 134, version Y, aside until next week.

SB 132-HUMAN RIGHTS COMMISSION

3:56:54 PM

VICE-CHAIR WAGONER took up SB 132 and told members he did not intend to take action on it today.

3:57:25 PM

DARWIN PETERSON, Deputy Legislative Director, Office of the Governor, introduced Assistant Attorney General Jan DeYoung and thanked the Alaska State Commission on Human Rights for the hard work it does. He explained that SB 132 would allow the commission to evaluate complaints of unlawful discrimination and allocate its resources to prosecute the complaints that will best serve the commission's goal of eliminating unlawful discrimination. Included are provisions designed to improve the commission's procedures and to enhance its fairness. It also contains provisions to clarify the remedies the commission awards to remedy unlawful discrimination as well as few miscellaneous housekeeping changes.

3:58:47 PM

VICE-CHAIR WAGONER asked Ms. DeYoung for a sectional analysis.

JAN DeYOUNG, Chief Assistant Attorney General, Department of Law, said she would describe the differences between version Y and the version that passed the Senate last year. She said:

> Section 1 of the bill would amend AS 18.80.100 to ensure that a complainant can withdraw a complaint of unlawful discrimination during the investigation and conciliation phases of the procedures. Basically what this would do to the existing statute is it makes it clear that not only can the person file the complaint, but they have the capacity to withdraw the complaint at any time if they wanted to. That is important in this bill because the bill gives the

executive director enhanced discretion to choose whether to take a bill [complaint] forward or not. And so this would give the individual an opportunity, if they didn't like the decision that was being made or to withdraw and then go to court or to other procedures that would be available to the person.

3:59:22 PM

SENATOR ELTON noted the Select Committee on Legislative Ethics could file its own complaint and move forward. He asked whether the Human Rights Commission has the same authority and that this wouldn't abridge that authority.

MS. DeYOUNG replied that's correct. The executive director and commissioners have the authority to file complaints of unlawful discrimination.

SENATOR ELTON asked whether the commission could file a new complaint involving the same circumstance if a complainant withdrew a complaint.

MS. DeYOUNG answered she thought so.

4:01:11 PM

MS. DeYOUNG continued:

Section 2 would add two subsections to the bill. One addresses the authority of the executive director to file a complaint. That's a carry over from the statute, as it exists right now. Subsection (c) - that's in Section 2 - would add a statute of limitations of 180 days after complaint. This simply takes the existing statute of limitations in commission regulations and moves it into the statute.

SENATOR ELTON referenced his initial question and said he understands some of the commission investigations take a long time. He questioned whether the 180-day statute of limitations would preclude the commission from filing its own complaint if the complainant withdrew a complaint that had gone on for two years.

MS. DeYOUNG said that's correct. The individual would more than likely be going to court and the statute of limitations for a judicial action is much longer. Presumably the commission

complaint was withdrawn because the individual wanted to take control over the action, which would provide the opportunity to go to court. "So the commission would need to be acting within their own statute of limitations also," she said.

SENATOR ELTON suggested it might be reasonable to include a provision that says a complaint may be filed not later than 180 days after the alleged discriminatory practice or 30 days after a complaint was withdrawn. Doing so wouldn't preclude the commission from pursuing a complaint that had been withdrawn.

MS. DeYOUNG replied the 180-day timeframe is the existing framework in regulation and she didn't know whether this had proven to be difficult. She wasn't aware of how many complaints the executive director files or whether this is something she has considered after a complainant withdraws a complaint.

VICE-CHAIR WAGONER commented he couldn't see any reason why the commission would want to continue with a complaint that an individual had withdrawn so they could pursue it in court.

MS. DeYOUNG said in general the commission concludes the case in those situations.

SENATOR ELTON said the point is well taken if the person is going to court, but a complainant might withdraw a complaint and not go to court.

VICE-CHAIR WAGONER suggested committee might amend the bill to say that if a person didn't elect to pursue the complaint in another venue, the commission could do so.

SENATOR HUGGINS said limiting the timeframe to 6 months to prevent allowing a complaint to be filed in perpetuity.

4:06:25 PM

MS. DeYOUNG continued:

> Section 3 addresses what would happen if there's a settlement. It basically encourages settlement and requires that settlement agreements - and this is by the commission with the concurrence of both the respondent and the complainant - those are put into writing and they have the force and effect of any commission order.

4:06:48 PM

Section 4 adds a new section giving the executive director expanded discretion to determine which cases to take forward to a hearing after the investigation concludes that there's substantial evidence of discrimination. This provision is in response to a court case that reversed a commission, which had elected - after investigation - not to pursue a case because even though it found a prima-facie case supported by substantial evidence. It had found that the evidence was weak or the defenses were strong and it wasn't a strong case meriting a hearing. And the Supreme Court reversed that and said all cases with a substantial evidence finding must go to hearing.

The purpose of Section 4, which is one of the keystones of the bill, is to expand that discretion to allow the executive director to make the kinds of choices that a prosecutor would make in determining whether to pursue to prosecution of a crime. The cooperation of the complaining witness, the strength of the evidence, the public policy to be served, and whether there are any good defenses against the prima-facie charge.

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4:08:55 PM

In Section 4 we did narrow the listing of items that the executive director could consider when deciding whether to go forward with a case to hearing as a result of testimony that came out in the House State Affairs Committee last year.

Section 5 on the hearing there's a couple of things. One of the things it does that's different this year is that it coordinates with the central panel hearing officer system that was adopted by the Legislature last year. That bill did bring the Human Rights Commission into the central hearing office so that the chief administrative law judge would be appointing hearing officers to hear human rights commission cases beginning July 1, 2005.

This bill makes a minor change to that by expanding the number of provisions in the hearing officer bill that will apply to the commission. In other words, rather than just it be appointment authority, the ability to disqualify a hearing officer for bias the provisions about public records - some of the others are mechanics of how the central panel system will also be applied to the human rights commission under this bill.

It also brings the bill into the Administrative Procedures Act to bring the human rights commission into closer conformity with the standard for most administrative agencies in the state. ... Any specific provisions in the human rights law would control over the general provisions in the Administrative Procedures Act.

4:10:51 PM

Subsection (c) addresses amendments to a complaint after it's referred for a hearing and it does allow reasonable and fair amendments to the accusation that is issued against a respondent. But it does require that any new charges be supported by the same kind of substantial evidence finding that was required initially of the basic charges. And it also requires an opportunity for the respondent and the complainant to go through the conciliation process so that there's no circumventing the settlement opportunity through the amendment process.

4:11:33 PM

Subsection (d) would add a burden of proof to set the standard at a preponderance of the evidence, which is the general standard that is used both in court and in most administrative hearings.

Subsection (e) there is a provision adding a summary judgment type process similar to a judicial summary judgment, which would allow the commission to decide a case without a formal hearing with live witnesses if there are no disputes over facts and only disputes on the law.

4:12:05 PM

Section 6 addresses an important component of the bill, which is the remedial provisions. The goal here - and they're addressed principally the employment area because that is the area where most of the commission's work is done - is to make the process more predictable and certain for both the complainant and for the respondent. It incorporates into statute the case law, which says that remedies are economic remedies that the commission can award. They don't award punitive damages; they don't award non-economic financial remedies such as pain and suffering. And so that would incorporate that into the statute so that would be clear for all to know that that's what the commission's authority is.

The remedial provision also makes reinstatement the principle remedy for employment discrimination - if that's possible - and a restoration of any back pay that's lost. If it's impossible for circumstances that are laid out in the bill to return a person to work ... there is the possibility to award front pay. But since that is a speculative and forward looking remedy a cap at one year is placed on that remedy.

There are also a number of conforming amendments that are made.

4:13:45 PM

Section 12 differs from last year’s bill.

The word “pay” is defined and the reason for that is to ensure that when back pay or front pay are awarded that that is a full remedy to the victim and it's not simply salary. In other words if there's benefits or some other remuneration associated with the employment that is included in a front pay or a back pay award. It's intended to be included.

[Section 17 has] another minor difference between this bill and laws year's bill is that there is a July 2 effective date. And the reason for that is for an orderly adoption that knits together nicely with the effective date of the central panel office's authority to appoint the hearing officer. So these provisions would take effect a day after those provisions take effect.

4:14:46 PM

SENATOR ELTON asked if Section 6 restates current practice and that the commission doesn't award non-economic or punitive damages.

MS. DeYOUNG said that is her understanding. However, Johnson versus the Alaska Department of Fish and Game makes it clear that the court does not consider that the commission has that authority.

SENATOR ELTON questioned why front pay is limited to not more than one year.

MS. DeYOUNG said when a decision is issued the complainant would be made whole up to the decision point. Front pay is speculative and very uncommon. The strong preference of the law and the commission is to restore the complainant to the position. However, if that is not feasible one year is considered sufficient time in which to find another position.

SENATOR BETTYE DAVIS asked whether a commission member wanted to comment on the bill.

4:18:15 PM

LISA FITZPATRICK, Chair, Alaska Human Rights Commission, informed members that the commission has been in contact with the Governor’s office. In general the commission supports SB 134, but it does have a few concerns.

Last year the bill had a two-year limit on front pay. At that time the commission felt no limit would be better because it is a very unique remedy and the commission wanted that remedy to be invoked in fact-specific instances. During a committee hearing the bill was amended to one year so instead of getting more they got less. The provision is of concern, but it's important to have at least some form of front pay.

A provision in Section 4 is of particular concern and it wasn't addressed in the sectional analysis. That provision is at the bottom of page 2. It provides that when the executive director issues an order dismissing a complaint due to lack of substantial evidence, the commission may review the order of dismissal and affirm the order, remand the complaint for further investigation or refer the complaint for conference conciliation

and persuasion if it concludes that substantial evidence supports the complaint.

To explain why the commission opposes that language she relayed the following historical information.

In the early 1980s, the commission had a provision in regulation that provided the power of reconsideration of an executive director's order to dismiss a case for lack of substantial evidence. In recent years the commission has undergone a 20 percent funding decline and after reviewing resources and workload, it consulted with the Department of Law and decided to repeal the regulation providing for reconsideration.

The commission conducted a cost benefit analysis reviewing cases in which reconsideration had been sought and determined that about 10 percent of the complainants whose cases that were dismissed sought reconsideration. Of those, about 1 percent were referred back to the agency for further action. Of the 1 percent, about .14 percent resulted in a change in decision. The benefit to complainants didn't justify the cost.

Another problem associated with reconsideration cases is that according to case law, the commission must make a complainant's entire file available to the complainant. Those files often contain confidential documents from businesses submitted during the investigation that were not meant for release to the complainant or the general public. A commissioner would have to review the file, which is a time consuming process and intellectually challenging process from a legal standpoint. Invariably commissioners have solicited help from the Department of Law on cases in which the state was not the defendant. In state cases, the commission would hire an independent attorney to assist in the review.

Although one more layer of review sounds good, it is time consuming and costly in practice. The commission is looking for ways to reduce time and costs and it wouldn't support creating more work at this time.

4:26:17 PM

SENATOR ELTON asked if the commission would prepare a fiscal note if that provision remains.

MS. FITZPATRICK answered the commission submitted a fiscal note to Governor Murkowski's Office but that office determined that it wasn't necessary.

SENATOR ELTON expressed surprise at the decision and how large the fiscal note was.

MS. FITZPATRICK said the cost would be from $5,000 to $6,000 annually.

SENATOR BETTYE DAVIS asked if the commission was satisfied with the bill with the exception of Section 4. She also asked for the number of the bill in the previous session.

MS. FITZPATRICK said the commission does support the remainder of the bill.

MS. PAULA HALEY, Executive Director of the Alaska Human Rights Commission, said the bill number was SB 354 and that it passed the Senate but not the House.

SENATOR HUGGINS asked the total number of commissioners and the geographic distribution.

MS. FITZPATRICK said the commission is composed of two commissioners from Fairbanks, one from Soldotna, one from Whittier, two from Anchorage and one position is vacant. All commissions have five year staggered terms.

SENATOR HUGGINS asked Ms. Fitzpatrick if she is satisfied with the recruitment process.

MS. FITZPATRICK said she wasn't familiar with the recruitment procedures for commission members.

VICE-CHAIR WAGONER said recruitment is taken care of by the Boards and Commissions office.

SENATOR ELTON asked Ms. Haley if he should be concerned with the language on page 2, lines 7-9, which limits the commission from re-filing a dismissed case to 180 days after a complaint is filed.

MS. HALEY said she didn't believe that to be a problem because when complainants withdraw, they have sought redress elsewhere or have lost interest and aren't the best witnesses if the commission were to pursue the complaint. The commission has re-

filed when there was a broad public policy impact in its allegations of discrimination. She emphasized the commission is not in the role of playing advocate for the complainants; it acts as the advocate for the public policy of the Legislature to prevent and eliminate discrimination. She said the commission might re-file a complaint in a situation of a claim of rampant sexual harassment with multiple witnesses where the original complainant dropped the case. She acknowledged the 180-day limit might bar the commission from re-filing such a complaint.

SENATOR ELTON asked Ms. Haley if the committee should consider amending that provision.

MS. HALEY said the commissioners determine the policy so she would ask them. She repeated this would be a rare occurrence, but using the sexual assault example she acknowledged that although a victim might be embarrassed and not want to participate in a hearing there may be other potential witnesses that are also victims of the workplace harassment who would come forward. She said she would discuss the issue with the commissioners.

4:32:40 PM

SENATOR ELTON asked Ms. Haley to let the committee staff know the commission's preference.

4:33:08 PM

VICE-CHAIR WAGONER announced he would hold SB 132 in committee and that it would address Section 4 at a subsequent hearing.

There being no further business to come before the committee, Chair Wagoner adjourned the hearing at 4:33:18 PM.