ALASKA STATE LEGISLATURE
SENATE LABOR AND COMMERCE STANDING COMMITTEE
March 20, 2012
1:34 p.m.

MEMBERS PRESENT

Senator Dennis Egan, Chair
Senator Joe Paskvan, Vice Chair
Senator Linda Menard
Senator Bettye Davis
Senator Cathy Giessel

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 168(JUD)
"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

- MOVED CSHB 168(JUD) OUT OF COMMITTEE

SENATE BILL NO. 224
"An Act making privileged certain communications between employees and employee union representatives; and amending Rule 402 and Rule 501, Alaska Rules of Evidence."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 168
SHORT TITLE: INJUNCTION SECURITY: INDUSTRIAL OPERATION
SPONSOR(s): REPRESENTATIVE(s) FEIGE

02/23/11	(H)	READ THE FIRST TIME - REFERRALS
02/23/11	(H)	JUD
02/25/11	(H)	BILL REPRINTED 2/24/11
03/21/11	(H)	JUD AT 1:00 PM CAPITOL 120
03/21/11	(H)	Heard & Held

03/21/11	(H)	MINUTE(JUD)
03/23/11	(H)	JUD AT 1:00 PM CAPITOL 120
03/23/11	(H)	<Bill Hearing Canceled>
03/30/11	(H)	JUD AT 1:00 PM CAPITOL 120
03/30/11	(H)	Scheduled But Not Heard
04/04/11	(H)	JUD AT 1:00 PM CAPITOL 120
04/04/11	(H)	Moved CSHB 168(JUD) Out of Committee
04/04/11	(H)	MINUTE(JUD)
04/05/11	(H)	JUD RPT CS(JUD) 3DP 2NR
04/05/11	(H)	DP: KELLER, PRUITT, THOMPSON
04/05/11	(H)	NR: GRUENBERG, HOLMES
04/07/11	(H)	TRANSMITTED TO (S)
04/07/11	(H)	VERSION: CSHB 168(JUD)
04/08/11	(S)	READ THE FIRST TIME - REFERRALS
04/08/11	(S)	L&C, JUD
02/23/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
02/23/12	(S)	<Bill Hearing Postponed>
03/01/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
03/01/12	(S)	Heard & Held
03/01/12	(S)	MINUTE(L&C)
03/13/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
03/13/12	(S)	Heard & Held
03/13/12	(S)	MINUTE(L&C)
03/20/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 224
SHORT TITLE: EVIDENCE RULES: UNION/EMPLOYEE PRIVILEGE
SPONSOR(s): LABOR & COMMERCE

03/05/12	(S)	READ THE FIRST TIME - REFERRALS
03/05/12	(S)	L&C, JUD
03/20/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

ANDY MODEROW, Executive Director
Alaska Conservation Alliance
Anchorage, AK
POSITION STATEMENT: Opposed HB 168.

REPRESENTATIVE ERIC FEIGE
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Sponsor of HB 168.

DANA OWEN, Staff
Senate Labor and Commerce Committee

Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Presented SB 224 as staff to the committee that is the sponsor.

DOUG MERTZ, Attorney
Juneau, AK
POSITION STATEMENT: Supported SB 224.

STEVEN SORENSON, General Counsel
Public Safety Employees Association (PSEA)
Fairbanks, AK
POSITION STATEMENT: Supported SB 224.

KATE SIAN, Deputy Director
Labor Relations
Division of Personnel and Labor Relations
Department of Administration (DOA)
Juneau, AK
POSITION STATEMENT: Opposed SB 224, because it could significantly hinder management's rights.

JAKE METCALF, Executive Director
Public Safety Employees Association (PSEA), Local 803
Juneau, AK
POSITION STATEMENT: Supported SB 224.

BARBARA HUFF TUCKNESS, Director
Governmental and Legislative Affairs
Teamsters Local 959
Anchorage, AK
POSITION STATEMENT: Supported SB 224.

ACTION NARRATIVE

1:34:17 PM
CHAIR DENNIS EGAN called the Senate Labor and Commerce Standing Committee meeting to order at 1:34 p.m. Present at the call to order were Senators Giessel, Menard, Davis, and Chair Egan. Senator Paskvan arrived soon thereafter.

HB 168-INJUNCTION SECURITY: INDUSTRIAL OPERATION

1:35:03 PM
CHAIR EGAN announced consideration of HB 168 [CSHB 168(JUD), labeled 27-LS0395\D, was before the committee].

ANDY MODEROW, Executive Director, Alaska Conservation Alliance, opposed HB 168, and said he was concerned that this legislation is unconstitutional, punitive and would do nothing to stop frivolous litigants. Further, it would require Alaskans to pay the corporate costs of a permit delay if a judge grants temporary release after an initial review, which places a hold on a permit. Temporary release is only granted if a judge decides two things: that the case against the permit is likely to succeed and that irreparable harm will be caused in the absence of a temporary release being given.

MR. MODEROW explained that two things could cause a strong case against a permit in the eyes of the court: if a court believes a corporation isn't following the terms of the permit and if a court believes the government issued the permit in error.

1:37:00 PM
If a case is frivolous, it will be dismissed and no project delay will occur, Mr. Moderow said, and hence, this only punishes the Alaskans who bring strong cases to court and nothing punishes the frivolous litigants who have their cases quickly dismissed.

Requiring a citizen to pay for a governmental error or a corporate misdeed puts a very chilling effect on a long American tradition of protecting whistle blowers. Indeed, it only penalizes the whistle blowers who make a strong case in the eyes of the judge. He pointed out that this legislation impacts Alaskans, communities, tribal organizations and potentially even the state of Alaska.

MR. MODEROW said in reviewing cases where this bill would apply, he found one where Bella Hammond and Vic Fisher challenged the legitimacy of some Pebble water discharge permits. Alaskans like them should not have to pay for the corporate cost of delay, particularly when after a judicial review the judge finds their case likely has merit.

1:37:52 PM
This legislation has been framed as a jobs bill, but instead of charging Alaskans millions of dollars to hold their government accountable, the core of the problem could be addressed through adequately funded, strong permitting programs that make certain that when judicial review occurs, a permit is upheld and the case is dismissed. This is a better tactic than taking away the ability of an Alaskan to point out a governmental error.

1:38:44 PM
REPRESENTATIVE ERIC FEIGE, sponsor of HB 168, responded that a lot of objections that have been raised are opinions, and in SB 168 he was trying to essentially allow people to work and not have their projects stopped unless there is a good argument to the contrary.

1:39:48 PM
SENATOR PASKVAN joined the committee.

REPRESENTATIVE FEIGE said this bill does not prevent a lawsuit from being filed or a request for an injunction as part of that lawsuit. Whenever an injunction is requested, he said there generally two reasons: one is a legitimate concern that somehow the operation continuing would have an adverse effect on the plaintiff and the other is to delay because of a philosophical objection to it.

He explained that HB 168 provides the judge with a fair amount of latitude. Court Rule 65(c) already allows for bonds and security to be posted, but this measure would provide an additional emphasis on the part of the legislature to give the judge certain things to consider when it comes to that security or bond.

CHAIR EGAN closed public testimony and removed his objection.

SENATOR PASKVAN moved to report CSHB 168(JUD), version \D, from committee to the next committee of referral with individual recommendations and attached fiscal note(s). There were no objections, and it was so ordered.

1:43:07 PM
At ease from 1:43 to 1:44 p.m.

SB 224-EVIDENCE RULES: UNION/EMPLOYEE PRIVILEGE

1:44:45 PM
CHAIR EGAN announced consideration of SB 224.

1:45:12 PM
DANA OWEN, staff to the Senate Labor and Commerce Committee, sponsor, said SB 224 (and the companion measure in the other body) seeks to grant to the communications between employees and their union representatives the same kind of protection that is granted to an attorney who is representing an employee. Under current law, those communications are not privileged, and in

litigation, attorneys from one side can subpoena the union representative and request any confidential information that might have passed between the employee and the union representative. The upshot of this is a situation where union representatives cannot effectively advise or represent their members.

MR. OWEN said Mr. Mertz noted that one of the California justices says it is illogical to assume that the only advice a union representative could legally or effectively give to anyone is, "Don't talk to me." That is what happens today and that is what this bill seeks to remedy. Several provisions in SB 224 make it clear that there are conditions under which no one is compelled to withhold evidence and that in the case of conflict with federal or other state laws, this bill would not apply.

SENATOR MENARD asked how many Alaskan cases have been affected by a breach of confidentiality.

MR. OWEN replied that he didn't have a number, but one such case is before the Alaska Supreme Court now; briefs on it are in their packets. Maybe one of the attorneys could provide more enlightened testimony about it, but he explained that for many years the practice has been to not subpoena these kinds of communications. It is a trend that started a few years back.

SENATOR MENARD asked if there will be fewer labor disputes with this bill.

MR. OWEN replied that is not the aim of the bill, although it would be nice. The aim of the bill is to make sure that one side in this dispute doesn't have effective representation eroded. It only applies in disciplinary proceedings when an employee has a dispute with the employer.

SENATOR PASKVAN said it could be important to indicate that the other side has an attorney representing it and there is a privilege if that person is an attorney. He understood that the bill attempts to create parity between parties where one is represented in connection with the advocacy services.

MR. OWEN agreed that was the case precisely.

1:50:11 PM
DOUG MERTZ, Attorney, said this issue came to his attention when he represented a client who was unjustly terminated by the state. Under existing law, when that happens, you are required

to go through an administrative process before bringing a suit. The administrative process involves a union advocate, basically dealing with people from the state Division of Personnel, in an attempt to resolve the matter. The feature that is unusual is that the state prohibits the union member from using an attorney. It requires using the union advocate and those are always non-attorneys. This sets up the kind of trap that happened with his client, where the employee went through the whole process dealing with his union folks, assuming as everyone has, that his communications were confidential. He related:

> The state said, oh no, no confidentiality here. We have the right to all your records, to all your notes, to all your emails and letters, anything having to do with this member, including tactical discussions, evaluations of the strength of the case, discussions of settlement positions - the sort of thing that if there were an attorney representing the person there is no question it could not be obtained.

MR. MERTZ said it would indeed be unethical to even try to do it, and yet that is what has happened here. The reason it matters is because for centuries, confidentiality has been recognized as an absolute essential to a fair legal system. As in the California Supreme Court opinion that Mr. Owen mentioned, it would be ridiculous to think that the only advice the union advocate could give to his member is, "Don't talk to me." If there is no right to confidentiality between the union advocate and the union member, then the state could even call the union advocate as a witness against his own client. The state could use this tactic to obtain confidential notes and discussions of minutes of the other side's collective bargaining team while the collective bargaining is going on! An employer could obtain all the records having to do with confidential reports of wrong doing to law enforcement agencies in order retaliate against the person making the reports.

If there was no right to confidentiality, no union member would ever talk to his union advocate, and the entire system of pre-court litigation, the administrative remedy, would simply fall apart, Mr. Mertz said. The process would become meaningless, because nobody would talk to the union advocate.

MR. MERTZ said in his case he decided to make a discovery request for their internal communications and their response was that they couldn't do that because of attorney/client privilege.

Why is this coming up now? He explained that when he was an assistant attorney general decades ago, they would never have thought of doing this; it would have been dismissed as ineffective and maybe unethical. But in the last two years, as a result initially of overenthusiastic attempts by an assistant attorney general to gain an advantage over the other side, it became Department of Law policy.

MR. MERTZ said he took his case to the State Supreme Court and it is considering what to do with it now. That raises the final question: why should the legislature deal with this problem when it's in the Supreme Court's lap? The answer is that the Supreme Court is examining whether this tactic violates the constitutional duty of affording due process to litigants. That is a very high level to achieve. The legislature, on the other hand, has the luxury of deciding whether this tactic is fair and whether it is good policy to let it happen. He urged them to conclude that there are so many down sides to allowing one side to invade the confidentiality of the other side that it would essentially destroy the current system of employer relations with union members.

1:56:46 PM
SENATOR MENARD asked why unions don't hire attorneys as union advocates.

MR. MERTZ answered because attorneys are really expensive and it would require a revolution in the way they fund their representation. It would mean displacing all the current corps or advocates, many of whom are quite experienced and good at their jobs, with new attorneys. Even if that was possible, it wouldn't happen real soon.

SENATOR MENARD asked if his concern was with the tactic.

MR. MERTZ answered yes; it is being used as an unfair tactic.

SENATOR PASKVAN said the administrative process is required and as part of it, the retention by the employee of counsel is prohibited.

MR. MERTZ replied, "Right on both counts." The Supreme Court has said you have to exhaust this administrative remedy before you can go to court. And the collective bargaining agreement, which is approved by the legislature, says you have to use a union advocate, essentially barring private attorneys. In his case,

one of the things that the state attorney subpoenaed was his confidential correspondence with the union advocate.

2:00:10 PM
STEVEN SORENSON, attorney and general counsel, Public Safety Employees Association (PSEA), said he supported SB 224, because PSEA had this happen in Fairbanks: union records were subpoenaed along with the deposition of an executive director, a non-attorney. The two members involved in this lawsuit were represented by business agents of the union (non-attorneys) all the way through the administrative procedures (required under the collective bargaining agreement). They went all the way through to arbitration and have now sued the city for wrongful termination.

The city sought the union's records and served a "subpoena duces tecum" on PSEA to get them and deposed the former executive director, John Cyr. In the deposition they asked Mr. Cyr what advice he, as the executive director of the union, gave the members; he declined to give that information absent a court order requiring him to do so. In his response to the subpoena duces tecum for those records, he would have to give over the emails, the written correspondence, the advocacy aspect of that part of communication to the attorneys representing the city.

MR. SORENSON said this case was ongoing and in its initial stages of discovery; it's very likely, now that there is some notoriety with Mr. Mertz's case, that the attorneys for the City of Fairbanks could press the Superior Court to issue an order for these records and require the former executive director to testify. This legislation is desperately needed now to protect these private and confidential communications that exist between a business agent and its members.

CHAIR EGAN asked him to explain a "subpoena duces tecum."

MR. SORENSON replied that it is a type of subpoena that is used to get just the documents that a litigant may have.

2:04:24 PM
KATE SIAN, Deputy Director, Labor Relations, Division of Personnel and Labor Relations, Department of Administration (DOA), commented specifically about section 2 rather than section 1 that amends AS 23.40. She said that employee union representatives are recognized through collective bargaining agreements and this legislation could significantly hinder management's rights, which are also found in collective

bargaining agreements. Further, she said unions are free to bargain language with regards to the roles their employee representatives play and, in fact, unions have done just that.

MS. SIAN used the Alaska Correctional Officers Association as an example, because they are in current negotiations with them. Their language states:

> The confidentiality of officer representative discussions with members regarding contractual or disciplinary issues shall be respected except when an officer representative has information of a criminal nature. Officer representatives shall not be asked or compelled to disclose information gained while acting in their capacity as an officer representative unless it involves knowledge of criminal misconduct.

MS. SIAN said this matter is more appropriate for collective bargaining than statute. In addition, this legislation could present several problems for agencies, particularly those that provide security related services. For instance, the Department of Corrections' policy is that you need to report incidences and security breaches through the chain of command and sometimes employee union representatives are in the line of command, for instance, a supervisor. They have had examples where an employee has reported something to their employee union representative and that report has not been brought forward. It was done under the guise of talking to an employee union representative, but then at the same time saying they reported it up the chain of command, because they happen to be one and the same person.

2:06:51 PM
She said Mr. Mertz mentioned that union advocates are always non-attorneys, but that is not accurate for every union. Many attorneys are union representatives; PSEA actually has an attorney in addition to Mr. Sorenson.

MS. SIAN said that Mr. Mertz raised the issue of speaking to a representative during collective bargaining and pointed out that there are specific ground rules in play during collective bargaining that must be followed by both parties.

SENATOR PASKVAN said she referenced a contract provision and asked if that was based on fairness.

MS. SIAN replied that language was probably proposed by the union and may have been the result of interest arbitration, but

it was related to fairness. It's understood that employee union representatives play a vital role in the world of labor's organizations and how business is conducted in the state. But, for instance, the Department of Corrections has major security concerns that have to be brought forward to management's attention, and there is some concern that this legislation could hinder that process.

SENATOR PASKVAN asked if the employer is represented by counsel as part of the administrative hearing process.

MS. SIAN replied in the grievance process that the employer is represented by labor relations and all but one of the labor relations analysts are attorneys and she can go to the Attorney General's Office for advice.

2:09:33 PM
JAKE METCALF, Executive Director, Public Safety Employees Association (PSEA), Local 803, said he was also a lawyer. Prior to this job, he worked as associate general counsel and general counsel for IBEW 1547. He said unions have many representatives; some unions call them shop stewards. They are the initial representative for members, especially in disciplinary proceedings. They usually represent the member throughout the grievance process up unto the time it has settled or gone to arbitration.

These representatives tend to not be attorneys, he explained. However, sometimes attorneys that have gone to law school but have not passed the bar work as business representatives, but they are still not considered attorneys. For this process to work, clients need the confidence that their representatives can talk to them and get all the information, much like a lawyer would do representing a client, because all the information they can gather early on is used to hopefully settle the case before it has to go to arbitration, which is a very expensive process.

2:12:03 PM
MR. METCALF also pointed out that in the middle of representing an employee under the collective bargaining agreement, if the employer were to come and say they want all their records, they could say no. The Alaska Labor Relations Act specifically prohibits an employer from interfering with administration of a union and the reason is because it would mess up the process and interfere with the union's ability to represent the member. This proposal is a limited privilege that would allow the communications between a union rep and a member to stay

confidential. If they don't have that, the union can't do its job and is limited in its ability to resolve disputes quickly costing both sides more money and time. This bill is very necessary he concluded.

2:13:43 PM
SENATOR PASKVAN said he understood the limited privilege, but he could also see the benefit in a reciprocal action of removing the administrative privilege even if one is an attorney. In other words, if it's fair for one side it should be fair for the other side. And just because they can afford the attorney, if it's appropriate to gain access to that information, then maybe they should remove the privilege on the other side as well.

MR. METCALF said that was logical thinking.

2:14:41 PM
BARBARA HUFF TUCKNESS, Director, Governmental and Legislative Affairs, Teamsters Local 959, supported SB 224. She read a last minute letter about privileged communications into the record in support of SB 224 as follows:

> Dear Senator Egan:
>
> On behalf of our Teamster Local 959 business reps and the members that we represent around the state, we wish to thank the committee for introducing this legislation in regards to the impact of privileged communications.
>
> SB 224 would allow free candid and confidential conversations between employees and their business representative. In addition, this bill allows business representatives to fully investigate workplace disputes. SB 224 establishes privilege similar to the attorney client privilege between a business representative and a member. This correlates to conversations that occur during the administration of any of our collective bargaining agreements.
>
> Additionally, previous legislatures have recognized other privileges for persons other than doctors, lawyers, and spouses such as (a long list included in their packets). Considering the above examples of SB 224, we believe the merit of privilege is to ensure that members, clients and patients can confide freely in their representatives or provide support in order

to help them reduce problems, resolve litigation and/or get appropriate service.

Rick Boyles, Secretary Treasurer

MS. HUFF TUCKNESS said one of the earlier testifiers talked about collective bargaining and actually used an excellent example of where the issue is. First of all, she clarified that Teamsters Local 959 represents private sector and public sector employees. The private sector, under federal law, does recognize this privilege. The private sector in the state does not. As a business agent, she actually does day-to-day administration of one public sector contract and two private sector contracts, collective bargaining and arbitrations. She wears two different hats under two different sets of laws. She actually agreed with the earlier testifier that this should be an issue in collective bargaining, but unfortunately, the success of some individuals in being able to collectively bargain these particular issues in a contract is good while other unions are not successful.

She said this was one of the arguments used that Senator Davis, in particular, might remember in the attempt for about seven years to pass the nurses' overtime bill. In fact, Ms. Huff Tuckness said she had testified on it, because she had negotiated the 10-hour in-between protection in their hospital agreements; they had minimum hours, and it was all in the contract. Unfortunately, the employer with the other groups out there was not willing to negotiate the same or similar provisions. That law was finally passed, and it has been pretty successful for everybody around the state, but the point is that some individuals or organizations have those tools and maybe a relationship with a particular employer to successfully negotiate those provisions while others don't. It would set up an unlevel playing field throughout the state for those that are unable to accomplish that.

2:19:08 PM
MS. HUFF TUCKNESS said the other issue with respect to attorneys is that while Local 959 has a general counsel, everyone else on staff has been hired from within the different bargaining units - to continue the relationship.

SENATOR MENARD noted that her letter of March 20 about privileged communication was indeed in their packets.

2:20:18 PM

SENATOR PASKVAN invited Ms. Sian back and asked her thoughts on removing any attorney/client privilege of any sort from the administrative proceeding.

MS. SIAN responded that both sides have emails and deliberative conversations that they wouldn't want the other side to be able to discover and use. She could only speak for the state and the 11 unions it works with, but they don't try to subpoena records and don't seem to be having any issues like that. She understood this issue was based on a very limited incident.

SENATOR PASKVAN remarked that she would find it a problem of fundamental fairness if the other side could ask her lawyers what they were told on their side of the equation.

MS. SIAN answered at times, yes; there are things you don't want to disclose to the other side. As an employer, the state has to provide information on which they base their disciplinary decisions; the state is more of an open book, because when they go to arbitration, they have all the information and have to provide it to the unions and their representatives. So, there are some differences in who holds what information.

SENATOR PASKVAN asked if there is a difference between having to turn over the facts of the case and information regarding tactics or strategies that she might want to establish while the proceeding is still active.

MS. SIAN replied that the unions have requested information that the state has withheld based on confidentialities such as deliberative privilege.

CHAIR EGAN found no further questions and closed public testimony. He removed his objection, thanked everyone for attending.

[SB 224 was held in committee.]

2:24:41 PM
CHAIR EGAN adjourned the Senate Labor and Commerce Committee meeting at 2:24 p.m.