

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 14, 2014

1:58 p.m.

MEMBERS PRESENT

Senator John Coghill, Chair
Senator Lesil McGuire, Vice Chair
Senator Bill Wielechowski

MEMBERS ABSENT

Senator Fred Dyson
Senator Donald Olson

COMMITTEE CALENDAR

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 366(JUD)

"An Act relating to reporting an involuntary mental health commitment to the National Instant Criminal Background Check System; relating to the sealing of records of mental health proceedings; and relating to relief from a disability resulting from an involuntary commitment or an adjudication of mental illness or mental incompetence."

- MOVED CSHB 366(JUD) OUT OF COMMITTEE

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 140(FIN) AM

"An Act relating to the proposed adoption, amendment, or repeal of a regulation; and relating to contact with agencies about regulations."

- HEARD & HELD

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 127(JUD)

"An Act relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; and amending Rules 501 and 503, Alaska Rules of Evidence."

- HEARD & HELD

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 250(HSS) AM

"An Act making an expression of apology, sympathy, commiseration, compassion, or benevolence by a health care provider inadmissible in a medical malpractice case; requiring a health care provider to advise a patient or the patient's legal representative to seek legal advice before making an agreement with the patient to correct an unanticipated outcome of medical treatment or care; and amending Rules 402, 407, 408, 409, and 801, Alaska Rules of Evidence."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 366

SHORT TITLE: INVOLUNTARY COMMITMENT; FIREARMS

SPONSOR(S): REPRESENTATIVE(S) PRUITT

02/26/14	(H)	READ THE FIRST TIME - REFERRALS
02/26/14	(H)	STA, JUD
03/11/14	(H)	STA AT 8:00 AM CAPITOL 106
03/11/14	(H)	Moved CSHB 366(STA) Out of Committee
03/11/14	(H)	MINUTE(STA)
03/12/14	(H)	STA RPT CS(STA) NT 2DP 3NR 1AM
03/12/14	(H)	DP: KELLER, KREISS-TOMKINS
03/12/14	(H)	NR: GATTIS, HUGHES, LYNN
03/12/14	(H)	AM: ISAACSON
03/17/14	(H)	JUD AT 1:00 PM CAPITOL 120
03/17/14	(H)	Moved CSHB 366(STA) Out of Committee
03/17/14	(H)	MINUTE(JUD)
03/19/14	(H)	JUD AT 1:00 PM CAPITOL 120
03/19/14	(H)	Heard & Held
03/19/14	(H)	MINUTE(JUD)
03/21/14	(H)	JUD AT 1:00 PM CAPITOL 120
03/21/14	(H)	Moved CSHB 366(JUD) Out of Committee
03/21/14	(H)	MINUTE(JUD)
03/24/14	(H)	JUD RPT CS(JUD) NT 5DP 1NR
03/24/14	(H)	DP: LEDOUX, PRUITT, FOSTER, GRUENBERG, LYNN
03/24/14	(H)	NR: MILLETT
03/26/14	(H)	TRANSMITTED TO (S)
03/26/14	(H)	VERSION: CSHB 366(JUD)
03/28/14	(S)	READ THE FIRST TIME - REFERRALS
03/28/14	(S)	JUD
04/02/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/02/14	(S)	-- MEETING CANCELED --

04/03/14 (S) STA AT 9:00 AM BUTROVICH 205
 04/03/14 (S) <Pending Referral>
 04/04/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
 04/04/14 (S) <Bill Hearing Canceled>
 04/07/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
 04/07/14 (S) -- MEETING CANCELED --
 04/09/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
 04/09/14 (S) Heard & Held
 04/09/14 (S) MINUTE(JUD)
 04/11/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
 04/11/14 (S) -- MEETING CANCELED --
 04/14/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: HB 140

SHORT TITLE: REGULATIONS: NOTICE, REVIEW, COMMENT

SPONSOR(S): REPRESENTATIVE(S) REINBOLD

02/22/13 (H) READ THE FIRST TIME - REFERRALS
 02/22/13 (H) JUD
 03/18/13 (H) JUD AT 1:00 PM CAPITOL 120
 03/18/13 (H) Heard & Held
 03/18/13 (H) MINUTE(JUD)
 03/25/13 (H) JUD AT 1:00 PM CAPITOL 120
 03/25/13 (H) Scheduled But Not Heard
 03/27/13 (H) JUD AT 1:00 PM CAPITOL 120
 03/27/13 (H) Scheduled But Not Heard
 03/29/13 (H) JUD AT 1:00 PM CAPITOL 120
 03/29/13 (H) <Bill Hearing Canceled>
 04/08/13 (H) JUD AT 1:00 PM CAPITOL 120
 04/08/13 (H) Moved CSHB 140(JUD) Out of Committee
 04/08/13 (H) MINUTE(JUD)
 04/09/13 (H) JUD RPT CS(JUD) 5DP 1NR
 04/09/13 (H) DP: PRUITT, FOSTER, LEDOUX, LYNN,
 KELLER
 04/09/13 (H) NR: GRUENBERG
 04/09/13 (H) FIN REFERRAL ADDED AFTER JUD
 03/13/14 (H) FIN AT 8:30 AM HOUSE FINANCE 519
 03/13/14 (H) Heard & Held
 03/13/14 (H) MINUTE(FIN)
 03/21/14 (H) FIN AT 1:30 PM HOUSE FINANCE 519
 03/21/14 (H) Moved CSHB 140(FIN) Out of Committee
 03/21/14 (H) MINUTE(FIN)
 03/25/14 (H) FIN RPT CS(FIN) NT 10DP
 03/25/14 (H) DP: NEUMAN, THOMPSON, EDGMON, MUNOZ,
 GARA, HOLMES, T.WILSON, COSTELLO,
 STOLTZE,
 03/25/14 (H) AUSTERMAN

03/31/14 (H) TRANSMITTED TO (S)
03/31/14 (H) VERSION: CSHB 140(FIN) AM
04/02/14 (S) READ THE FIRST TIME - REFERRALS
04/02/14 (S) JUD, FIN
04/09/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/09/14 (S) <Above Bill Hearing Canceled>
04/11/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
04/11/14 (S) -- MEETING CANCELED --
04/14/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: HB 127

SHORT TITLE: OMBUDSMAN

SPONSOR(s): RULES BY REQUEST

02/18/13 (H) READ THE FIRST TIME - REFERRALS
02/18/13 (H) STA, JUD
03/12/13 (H) STA AT 8:00 AM CAPITOL 106
03/12/13 (H) Heard & Held
03/12/13 (H) MINUTE(STA)
03/21/13 (H) STA AT 8:00 AM CAPITOL 106
03/21/13 (H) <Bill Hearing Rescheduled to 3/26/13>
03/26/13 (H) STA AT 8:00 AM CAPITOL 106
03/26/13 (H) Heard & Held; Assigned to Subcommittee
03/26/13 (H) MINUTE(STA)
02/07/14 (H) STA AT 3:00 PM CAPITOL 120
02/07/14 (H) Work Session on above Bill
02/25/14 (H) STA AT 8:00 AM CAPITOL 106
02/25/14 (H) Heard & Held
02/25/14 (H) MINUTE(STA)
02/27/14 (H) STA AT 8:00 AM CAPITOL 106
02/27/14 (H) Heard & Held
02/27/14 (H) MINUTE(STA)
03/06/14 (H) STA AT 8:00 AM CAPITOL 106
03/06/14 (H) Moved CSHB 127(STA) Out of Committee
03/06/14 (H) MINUTE(STA)
03/07/14 (H) JUD AT 1:00 PM CAPITOL 120
03/07/14 (H) <Bill Hearing Canceled>
03/10/14 (H) STA RPT CS(STA) NT 1DP 1NR 3AM
03/10/14 (H) DP: LYNN
03/10/14 (H) NR: GATTIS
03/10/14 (H) AM: KELLER, KREISS-TOMKINS, HUGHES
03/12/14 (H) JUD AT 1:00 PM CAPITOL 120
03/12/14 (H) -- MEETING CANCELED --
03/14/14 (H) JUD AT 1:00 PM CAPITOL 120
03/14/14 (H) Heard & Held
03/14/14 (H) MINUTE(JUD)
03/19/14 (H) JUD AT 1:00 PM CAPITOL 120

03/19/14 (H) Heard & Held
 03/19/14 (H) MINUTE(JUD)
 03/24/14 (H) JUD AT 1:00 PM CAPITOL 120
 03/24/14 (H) Moved CSHB 127(JUD) Out of Committee
 03/24/14 (H) MINUTE(JUD)
 03/25/14 (H) JUD RPT CS(JUD) NT 3DP 2NR
 03/25/14 (H) DP: GRUENBERG, LYNN, KELLER
 03/25/14 (H) NR: LEDOUX, PRUITT
 03/25/14 (H) FIN REFERRAL ADDED AFTER JUD
 03/31/14 (H) FIN AT 8:30 AM HOUSE FINANCE 519
 03/31/14 (H) Heard & Held
 03/31/14 (H) MINUTE(FIN)
 04/01/14 (H) FIN RPT CS(JUD) NT 9DP 1NR
 04/01/14 (H) DP: GUTTENBERG, HOLMES, MUNOZ,
 THOMPSON, EDGMON, T.WILSON, COSTELLO,
 STOLTZE,
 04/01/14 (H) AUSTERMAN
 04/01/14 (H) NR: NEUMAN
 04/01/14 (H) FIN AT 8:30 AM HOUSE FINANCE 519
 04/01/14 (H) Moved CSHB 127(JUD) Out of Committee
 04/01/14 (H) MINUTE(FIN)
 04/07/14 (H) RLS AT 5:00 PM CAPITOL 120
 04/07/14 (H) -- MEETING CANCELED --
 04/09/14 (H) TRANSMITTED TO (S)
 04/09/14 (H) VERSION: CSHB 127(JUD)
 04/11/14 (S) READ THE FIRST TIME - REFERRALS
 04/11/14 (S) JUD
 04/14/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: HB 250

SHORT TITLE: MEDICAL MALPRACTICE ACTIONS

SPONSOR(s): OLSON

01/21/14 (H) PREFILE RELEASED 1/17/14
 01/21/14 (H) READ THE FIRST TIME - REFERRALS
 01/21/14 (H) HSS, JUD
 02/27/14 (H) HSS AT 3:00 PM CAPITOL 106
 02/27/14 (H) Heard & Held
 02/27/14 (H) MINUTE(HSS)
 03/13/14 (H) HSS AT 3:00 PM CAPITOL 106
 03/13/14 (H) Scheduled But Not Heard
 03/14/14 (H) HSS AT 8:00 AM CAPITOL 106
 03/14/14 (H) Moved CSHB 250(HSS) Out of Committee
 03/14/14 (H) MINUTE(HSS)
 03/17/14 (H) HSS RPT CS(HSS) NT 6DP
 03/17/14 (H) DP: REINBOLD, PRUITT, KELLER, NAGEAK,
 TARR, HIGGINS

03/24/14 (H) JUD AT 1:00 PM CAPITOL 120
 03/24/14 (H) Heard & Held
 03/24/14 (H) MINUTE(JUD)
 03/26/14 (H) JUD AT 1:00 PM CAPITOL 120
 03/26/14 (H) Moved CSHB 250(HSS) Out of Committee
 03/26/14 (H) MINUTE(JUD)
 03/27/14 (H) JUD RPT CS(HSS) NT 3DP 2NR
 03/27/14 (H) DP: FOSTER, GRUENBERG, KELLER
 03/27/14 (H) NR: LEDOUX, LYNN
 04/11/14 (H) TRANSMITTED TO (S)
 04/11/14 (H) VERSION: CSHB 250(HSS) AM
 04/11/14 (S) READ THE FIRST TIME - REFERRALS
 04/11/14 (S) JUD
 04/14/14 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

REPRESENTATIVE LORA REINBOLD
 Alaska State Legislature
 Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 140.

SARAH GEARY, Legislative Coordinator
 Alaska Municipal League
 Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 140.

LESLEE OREBAUGH
 Assisted Living Association of Alaska
 Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 140.

AL TAMAGNI, Leadership Chair
 National Federation of Independent Business (NFIB)
 Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 140.

LINDA LORD-JENKINS, Ombudsman
 Alaska Office of the Ombudsman
 Alaska State Legislature
 Anchorage, Alaska
POSITION STATEMENT: Presented HB 127.

BETH LEIBOWITZ, Assistant Ombudsman
 Alaska Office of the Ombudsman
 Alaska State Legislature
 Juneau, Alaska

POSITION STATEMENT: Provided supporting information related to HB 127.

ERIKA O'SULLIVAN, Staff
Representative Kurt Olson
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Introduced HB 250 on behalf of the sponsor.

MIKE HAUGEN, Executive Director
Alaska State Medical Association
Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 250.

ACTION NARRATIVE

[1:58:22 PM](#)

CHAIR JOHN COGHILL called the Senate Judiciary Standing Committee meeting to order at 1:58 p.m. Present at the call to order were Senators Wielechowski, McGuire, and Chair Coghill.

HB 366-INVOLUNTARY COMMITMENT; FIREARMS

[1:59:39 PM](#)

CHAIR COGHILL announced the consideration of HB 366. "An Act relating to reporting an involuntary mental health commitment to the National Instant Criminal Background Check System; relating to the sealing of records of mental health proceedings; and relating to relief from a disability resulting from an involuntary commitment or an adjudication of mental illness or mental incompetence." This was the second hearing. [CSB 366(JUD) was before the committee.] He noted that he found nothing in the bill that caused him concern.

SENATOR WIELECHOWSKI asked the sponsor if he was aware of any opposition to the bill.

REPRESENTATIVE LANCE PRUITT, Alaska State Legislature, Juneau, Alaska, sponsor of HB 366, noting the negative testimony during the previous hearing, said he contacted [Mr. Nelson] to try to allay his concerns by explaining what the bill actually would do.

CHAIR COGHILL found no further questions or comments and asked the will of the committee.

[2:01:17 PM](#)

SENATOR MCGUIRE moved to report the CS for HB 366, Version R, from committee with individual recommendations and attached fiscal note(s).

CHAIR COGHILL announced that without objection CSHB 366(JUD) moved from the Senate Judiciary Committee.

[2:01:47 PM](#)

At Ease

HB 140-REGULATIONS: NOTICE, REVIEW, COMMENT

[2:02:54 PM](#)

CHAIR COGHILL reconvened the meeting and announced the consideration of HB 140. "An Act relating to the proposed adoption, amendment, or repeal of a regulation; and relating to contact with agencies about regulations." [This was the first hearing and CSHB 127(FIN) am was before the committee.]

[2:03:24 PM](#)

REPRESENTATIVE LORA REINBOLD, Alaska State Legislature, Juneau, Alaska, sponsor of HB 140, explained that this legislation is intended to address the problem of government over regulation, which local businesses believe is stifling growth. She read the following excerpt from the Alaska State Medical Association and stated that it was the motivation to continue her mission to help reform the regulatory process:

The regulatory process is deficient and closed. The Department of Law's advice to departments on the regulatory process dissuades public discussion or discourse once a regulatory package is released publicly. In fact, departments are often instructed not to answer questions or provide additional information during the public hearings except for pointing to the exact language in the proposed regulation. This leads to a frustrating and seemingly meaningless public process, beyond submitting written comment. Furthermore, once public hearings are held, there is no requirement that the final regulations be similar to the proposed regulation.

REPRESENTATIVE REINBOLD described HB 140 as a significant step toward increased transparency in the regulatory process and a more business-friendly climate in Alaska.

She provided the following sectional analysis: [Original punctuation provided.]

Bill section 1. Gives the Act a short title.

Bill section 2. Amends AS 44.62.040(c) to remove the exemption for boards and commissions. Adds language to accommodate those agencies that have different rules for the adoption of regulations. Allows the governor 30 days to return regulations to the adopting agency.

Bill section 3. Amends AS 44.62.190(d) to identify additional information that may be included, if applicable, about the reason for the proposed action, including federal or state action requiring the proposed action. Adds information that is to be provided for the estimated annual costs of the proposed action, including the costs to private persons, other state agencies, and municipalities. States that the estimated annual costs are to be based on a good faith effort to estimate the costs using information available to the state agency.

Bill section 4. Adds new subsections to the notice statute, AS 44.62.190. The first, sec. 44.62.190(f), prohibits court actions to challenge a regulatory action for the inaccuracy or insufficiency of the cost estimates. The second, sec. 44.62.190(g), requires, as feasible, that the subject lines of electronic mail and titles of written publications providing the information required by AS 44.62.190(d) give the reader a fair idea of the substance of the proposed regulation, amended regulation, or repealed regulation.

Bill section 5. Amends AS 44.62.200(c) to require that a complete copy of each regulatory action, and, if feasible, the material incorporated by reference, be posted on the Alaska Online Public Notice System.

Bill section 6. Amends AS 44.62.200(d) to remove the exemptions for the Regulatory Commission of Alaska, the Board of Fisheries, and the Board of Game, from the requirement to provide a brief description of the changes made by the proposed regulation, amended regulation, or repealed regulation.

Bill section 7. Adds sec. 44.62.213(a) to authorize contact between agencies and the public when developing regulations. Adds sec. 44.62.213(b), which directs agencies to make a good faith effort to answer written or at meeting questions before the public comment period ends. After that, allows an agency to answer the questions. Requires an answer to be written and that the question and answer be made available to the public. In sec. 44.62.213(c), prohibits court actions to challenge a regulatory action for the inaccuracy or insufficiency of answers provided under sec. 44.62.2 13.

Bill section 8. Amends AS 44.62.215, which requires an agency to keep a record of public comment when adopting a regulation, to delete the exemption for boards and commissions and to require that an agency keep a record of public comment received electronically or orally as well as in writing.

Bill section 9. Amends AS 44.62.245(c) to require an agency to send certain notices to the members of the Administrative Regulation Review Committee.

Bill section 10. Amends AS 44.62.320(b) to tie the submission of regulations by the lieutenant governor to the Administrative Regulation Review Committee for review to the time the regulation is submitted to the lieutenant governor for filing.

Bill section 11. Amends AS 44.62.320 to allow the Administrative Regulation Review Committee chair to submit comment on a regulation to the lieutenant governor within 10 days after receiving the regulation from the agency under (b) of the section.

Bill section 12. Provides applicability provisions for the sections of the bill.

REPRESENTATIVE REINBOLD mentioned the indeterminate fiscal note and stated that her office was talking with certain agencies to see, based on input from this committee, whether they potentially need to be exempted from certain provisions in the bill.

SENATOR COGHILL recalled that the exemptions relate to Section 6.

REPRESENTATIVE REINBOLD offered to return and talk about the specific provisions.

SENATOR WIELECHOWSKI directed attention to the letter from the Alaska Oil and Gas Conservation Commission (AOGCC) that expressed concerns with the bill. One concern was that, "giving the Governor veto power over the decisions of an agency that is, by design and statute, independent would violate that independence." He questioned whether it wouldn't be better to strip Section 2 from the bill.

REPRESENTATIVE REINBOLD referenced the memorandum from Legislative Legal Services that addresses the question of whether a quasi-judicial entity ought to be excluded from the bill.

CHAIR COGHILL asked the sponsor to provide the committee a copy of the opinion. He asked her understanding of the question about the governor's veto power.

REPRESENTATIVE REINBOLD stressed the nothing in the bill gives veto power to anyone. Section 2 does allow the governor to send a regulation back to an agency for two reasons. The first is if the regulation is inconsistent with law. The second is that the governor may send the regulation back [so the agency can respond to specific issues that were raised.]

SENATOR WIELECHOWSKI questioned giving the governor what is tantamount to veto power over agencies that are set up to be independent.

CHAIR COGHILL referenced Section 11 and asked if 10 days was sufficient for the Administrative Regulation Review Committee (ARRC) to review a regulation.

REPRESENTATIVE REINBOLD opined that it was adequate if the committee is active and has good staff.

SENATOR MCGUIRE said she believes that 10 days strikes an appropriate balance and she likes that the provision is discretionary with regard to submitting the regulation to the lieutenant governor. She offered personal experiences when she chaired the committee.

CHAIR COGHILL noted the individuals available to answer questions.

[2:18:54 PM](#)

SENATOR WIELECHOWSKI noted that AOGCC's first concern was that the bill would force commissioners to participate in ex parte communications. He asked the sponsor her thoughts on that concern.

REPRESENTATIVE REINBOLD responded that there was nothing that requires a commissioner to participate in ex parte communications.

SENATOR WIELECHOWSKI read the explanation from AOGCC and summarized that the commissioners are saying that they make their decisions in the public, but the bill would allow people to call a commissioner and demand an explanation of their reasons for a proposed regulation or a change in regulation. He pointed out that the public can't engage in that kind of back and forth with judges and that's what raises the ex parte issue in the bill.

REPRESENTATIVE REINBOLD responded that the commissioners can deal with that through a "frequently asked questions" page on the website, they could have staff respond to questions, or they could hold a public hearing and answer questions then. The goal is to ensure that people have an opportunity to speak with their government, but the communication doesn't have to be direct.

SENATOR WIELECHOWSKI said he's very supportive of parts of the bill, but is concerned that decision makers who are acting like judges would be required to participate in ex parte communications. He suggested including a provision that excludes quasi-judicial decisions.

REPRESENTATIVE REINBOLD responded that Legislative Legal Services issued an opinion that said that just because an agency is independent or quasi-judicial does not exclude it from provisions in the bill. However, there is a statute that states that the way that the AOGCC writes regulations may be cause for concern. She said her office was working with the chair of AOGCC to address that issue.

CHAIR COGHILL advised that the committee was working on a Senate committee substitute that would address some of the concerns and still allow some review.

He opened public testimony.

[2:22:47 PM](#)

SARAH GEARY, Legislative Coordinator, Alaska Municipal League (AML), Juneau, Alaska, stated support for HB 140 on behalf of AML. She said that because many state and federal regulations impact municipality budgets, it would be helpful for planning purposes to have an idea of what those impacts will be. HB 140 will ensure that agencies consider the costs that regulations potentially impose on individuals, businesses, and municipalities. She expressed gratitude for the attempt to look at the broader impacts of regulation changes.

[2:24:11 PM](#)

LESLEE OREBAUGH, Assisted Living Association of Alaska (ALAA), testified in support of HB 140 on behalf of ALAA. She said the unintended consequences and costs of regulations have long plagued individuals and the business industry in the state. She offered this view from the perspective of 24 years of business ownership. Although government officials often say that they have considered private business, it doesn't appear to make a difference. She restated support for the legislation.

[2:25:49 PM](#)

AL TAMAGNI Leadership Chair, National Federation of Independent Business (NFIB), Anchorage, Alaska, said his comments echo those of the previous speaker. HB 140 gives the business community an opportunity to voice opinions and place some responsibility on agencies. It levels the playing field by providing full and open disclosure.

[2:26:58 PM](#)

CHAIR COGHILL stated he would hold HB 140 for further consideration.

HB 127-OMBUDSMAN

[2:28:02 PM](#)

CHAIR COGHILL announced the consideration of HB 127. "An Act relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; and amending Rules 501 and 503, Alaska Rules of Evidence." [This was the first hearing and CSHB 127(JUD) was before the committee.]

[2:28:32 PM](#)

LINDA LORD-JENKINS, Ombudsman, Alaska Office of the Ombudsman, Alaska State Legislature, Anchorage, Alaska, introduced HB 127 speaking to the following sponsor statement and sectional description:

The Ombudsman Act (AS 24.55) has not changed much since enactment in 1975, which speaks well for its basic structure. The ombudsman requested and obtained some modifications of the Ombudsman Act in 1990. It has become apparent that the Ombudsman Act would benefit from updates to address several issues that have arisen since 1990.

The following is a brief sectional description of the bill:

- Section 1 of CSHB 127(JUD) provides that the ombudsman may receive a step increase in salary, rather than remaining Step A of Range 26 for the ombudsman's entire term or terms.
- Section 2 clarifies the ombudsman's authority to hire additional staff using a personal services contract pursuant to AS 24.55.060(f).
- Section 3 amends a section on the ombudsman's investigatory authority to refer simply to "agency" instead of "state agency." This brings the section into conformance with the rest of the Ombudsman Act (AS 24.55), which consistently refers to the ombudsman's authority to investigate an administrative "agency."
- Section 4 prevents a general waiver of attorney-client privilege by an agency if it shares its attorney's advice with the Office of the Ombudsman in order to explain the agency's actions.
- Section 5 improves the wording of the ombudsman's existing privilege not to testify or produce records regarding matters brought to the ombudsman's attention in the course of her duties.
- Section 6 modernizes the ombudsman's procurement authority.
- Sections 7 and 8 state that sections 4 and 5 are indirect court rule amendments because they

modify evidentiary rules, and that therefore sections 4 and 5 only take effect if the legislation is approved by a two-thirds majority vote of each house, as required by Art. IV, Section 15 of the Constitution of the State of Alaska.

[2:33:50 PM](#)

SENATOR WIELECHOWSKI summarized an account of a constituent's false arrest. He noted that she filed a complaint and it languished for a year or so. He inquired if there are timelines for completing an investigation and releasing the ombudsman's report.

MS. LORD-JENKINS replied there are timelines, but they're impractical given the workload and the fact that the office has just one executive and one administrative secretary. She acknowledged that she was the bottleneck because she was the only one who could vet a case.

SENATOR WIELECHOWSKI asked how many complaints or investigations are requested each year.

MR. LORD-JENKINS said 1,200 complaints came in last year and the number is up 34 percent this year.

SENATOR WIELECHOWSKI asked if she had suggestions on how to speed the process because the concern about timelines wasn't unique to that one constituent.

MS. LORD-JENKINS responded that the solution was additional money and staff. She explained that she doesn't request money for additional staffing unless there is a sizeable jump in caseload. She anticipates that she'll ask for more staff next year.

[2:38:46 PM](#)

CHAIR COGHILL expressed a desire to send the matter to finance.

MS. LORD-JENKINS clarified that there was no finance referral.

CHAIR COGHILL commented that the authority to contract offers some flexibility.

MS. LORD-JENKINS provided an example to show how she had used the contracting authority in the past. In 2008 she hired two Tier I retirees; one had worked in the office in the 1990s and

the other had broad, general governmental experience. Because the contract workers were Tier I there wasn't a requirement to pay into the PERS system or for health insurance. This amounted to getting two employees for the price of one.

[2:40:54 PM](#)

SENATOR WIELECHOWSKI noted that the original version referenced the Alaska Bar Association.

CHAIR COGHILL said several things were removed as the bill went through the process in the other body, including looking at the Alaska Bar Association as an agency. He offered his perspective that a lot was expected of the ombudsman and the legislature had been reluctant to loosen the reins.

SENATOR MCGUIRE thanked Ms. Lord-Jenkins for her work.

SENATOR WIELECHOWSKI requested more detail on sections 4 and 5.

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BETH LEIBOWITZ, Assistant Ombudsman, Alaska Office of the Ombudsman, Alaska State Legislature, Juneau, Alaska, addressed Section 4. She explained that the Office of the Ombudsman has mandatory access to most state agency records, but it specifically excludes attorney-client privileged communications and attorney work product. However, there have been instances where executive branch agencies have given the Office of the Ombudsman communications from their assistant attorney general. She noted that this is often helpful because it may help explain the conduct.

MS. LEIBOWITZ advised that, on closer review, she realized that case law in other states and federal cases indicates that this could inadvertently create a general waiver of privilege for those agencies. That's not a desirable consequence. The Office of the Ombudsman would therefore like to preserve an agency's ability to cooperate with an investigation without potentially creating an unfortunate consequence in some unrelated litigation.

She told the committee that the Office of the Ombudsman cannot disclose that attorney-client material once it is received. It is confidential under statute and the enhanced testimonial privilege in this bill is designed specifically to ensure that the information doesn't leave the office once it comes in.

SENATOR WIELECHOWSKI said that last part piqued his interest. He inquired what the Office of the Ombudsman does if it finds that an agency has broken the law and there are privileged conversations about that. "Isn't that something you would want to disclose to the public or you would want people to know about?" he asked.

MS. LEIBOWITZ explained that the ombudsman can tell the agency it is breaking the law and the ombudsman can tell the legislature and the public that the agency is acting contrary to law, but the Office of the Ombudsman cannot publicize material that would otherwise not be public.

CHAIR COGHILL added that the ombudsman can't disclose confidential information about children or people who are incarcerated, but the ombudsman can tell if medical information isn't handled correctly or people aren't being well served.

SENATOR WIELECHOWSKI pointed out that the ombudsman may be privy to communications between an attorney and an agency director admitting he/she broke the law. He asked if the legislature could disclose that if the ombudsman disclosed it to the legislature.

MS. LEIBOWITZ said her understanding of the statute is that the ombudsman cannot disclose the information once the office is let into that bubble of privilege. Conclusions can be reported to the public and the legislature, but the confidence has to be respected. She acknowledged there is a potential problem, but she believes that it's highly unlikely that an agency would share a communication about breaking the law.

MS. LORD-JENKINS said there have been cases where agencies have inadvertently provided attorney-client privileged information and the agency hasn't followed that attorney general's advice. In those instances her office has notified the agency, the department commissioner, and the attorney general. That generally takes care of the problem, she said. The complainant is told that the confidential information can't be divulged, but that the particular allegation is justified.

SENATOR WIELECHOWSKI pointed out that Section 5 creates a further provision that the ombudsman can't be subpoenaed, deposed or testify on anything they found in the course of the investigation.

MS. LEIBOWITZ argued that the basic nature of the section on testimonial privilege hasn't changed since the Ombudsman Act was enacted in 1975. This amendment rewrites the section to make it absolutely clear that the ombudsman doesn't appear in court to testify in litigation unless necessary to enforce the ombudsman's duties under the Act. The privilege is designed to keep the ombudsman from being an inadvertent discovery source for other litigants.

SENATOR WIELECHOWSKI read Sec. 24.55.260 and pointed out that the new language broadens the privilege not to testify, which profoundly limits what the ombudsman can release. He questioned whether it was the best policy call to say that the ombudsman can't release any information it finds in the course of an investigation.

MS. LORD-JENKINS stated that the purpose of the ombudsman is to resolve complaints against state government, but the ombudsman has never been envisioned as an entity that is an adjunct to private litigants against the state. The job would become much more difficult if the ombudsman had to provide free discovery for any entity.

CHAIR COGHILL stated that he would hold HB 127 for further consideration.

HB 250-MEDICAL MALPRACTICE ACTIONS

[2:53:55 PM](#)

CHAIR COGHILL announced the consideration of HB 250. "An Act making an expression of apology, sympathy, commiseration, compassion, or benevolence by a health care provider inadmissible in a medical malpractice case; requiring a health care provider to advise a patient or the patient's legal representative to seek legal advice before making an agreement with the patient to correct an unanticipated outcome of medical treatment or care; and amending Rules 402, 407, 408, 409, and 801, Alaska Rules of Evidence." [This was the first hearing and CSHB 250(HSS)am was before the committee.]

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ERIKA O'SULLIVAN, Staff, Representative Kurt Olson, Alaska State Legislature, Juneau, Alaska, introduced herself.

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MIKE HAUGEN, Executive Director, Alaska State Medical Association, Anchorage, Alaska, testified in support of HB 250.

He stated that physicians feel that open communication with their patients is vital to ensure the best possible healthcare outcomes. The fear of being sued can hinder open communication and HB 250 seeks to address those concerns by making expressions of sorrow, sympathy or apology inadmissible in a medical malpractice case. He opined that it was appropriate to draw a line between an admission of liability and an expression of apology or sympathy.

MS. O'SULLIVAN addressed the intent of HB 250 paraphrasing the following from the sponsor statement:

HB 250, also known as the "benevolent gesture" or "I'm Sorry" bill, would render expressions of apology or sympathy by a health care provider to a patient related to an unanticipated outcome of treatment inadmissible as evidence in a medical malpractice case.

The bill is intended to clear up the gray area which now exists between apologies and admissions of neglect. The goal of HB 250 is to improve doctor-patient relationships, especially in cases ending with a less-than-favorable outcome. It is not negligence, but rather a failure in communication between the provider and patient, that often results in malpractice lawsuits.

HB 250 aims to improve the climate of communication, disclosure and analysis. Similar legislation has already passed in over 30 states. This legislation will enable health care providers to better fulfill their moral and ethical responsibilities to patients and their families through expressions of compassion and sympathy without fear of retribution in the form of a lawsuit.

CHAIR COGHILL noted that the terms "liability" and "responsibility" were removed.

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SENATOR WIELECHOWSKI asked if it would be admissible if a doctor apologized for leaving a sponge in a patient's stomach during an operation.

MS. O'SULLIVAN said not necessarily, and directed attention to subsection (b) on page 2, lines 18-22. The subsection is

intended to add scrutiny to a statement of apology or sympathy that's made in conjunction with an admission of negligence or liability. The apology is inadmissible but not necessarily the admission of negligence or liability.

SENATOR WIELECHOWSKI mused that the apology would be inadmissible but the admission of leaving a sponge in the patient's stomach would be admissible.

MS. O'SULLIVAN responded that it potentially would be admissible. Responding to a further query about apologizing for leaving a sponge behind, she restated that the intent is that an apology is not admissible.

CHAIR COGHILL stated he would hold HB 250 for further consideration.

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There being no further business to come before the committee, Chair Coghill adjourned the Senate Judiciary Standing Committee meeting at 3:01 p.m.