

**ALASKA STATE LEGISLATURE
LEGISLATIVE BUDGET AND AUDIT COMMITTEE**

Anchorage, Alaska

November 6, 2020

1:01 p.m.

MEMBERS PRESENT

Representative Chris Tuck, Chair
Senator Click Bishop, Vice Chair (via teleconference)
Representative Neal Foster (via teleconference)
Representative Andy Josephson
Representative Ivy Spohnholz
Senator Bert Stedman (via teleconference)
Senator Natasha von Imhof
Senator Cathy Giessel
Senator Lyman Hoffman
Representative Jennifer Johnston (alternate)
Senator Bill Wielechowski (alternate) (via teleconference)

MEMBERS ABSENT

Representative Mark Neuman

OTHER LEGISLATORS PRESENT

Senator Lora Reinbold
Senator David Wilson (via teleconference)
Representative DeLena Johnson (via teleconference)

COMMITTEE CALENDAR

APPROVAL OF MINUTES
EXECUTIVE SESSION
SPECIAL REQUEST AUDIT

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

No witnesses to record

ACTION NARRATIVE

[1:01:28 PM](#)

CHAIR CHRIS TUCK called the Legislative Budget and Audit Committee meeting to order at 1:01 p.m. Representatives Tuck, Josephson, Spohnholz, Foster (via teleconference), and Johnston (alternate) and Senators Bishop (via teleconference) and Stedman (via teleconference) were present at the call to order. Senators von Imhof, Giessel, Hoffman, and Wielechowski (alternate) (via teleconference) arrived as the meeting was in progress.

APPROVAL OF MINUTES

1:02:20 PM

CHAIR TUCK announced the first order of business would be the approval of minutes.

1:02:27 PM

SENATOR BISHOP moved that the Legislative Budget and Audit Committee approve the minutes of the 5/1/20, 5/11/20, 8/27/20, and 9/16/20 meetings, as presented. There being no objection, the minutes were approved.

EXECUTIVE SESSION

1:02:52 PM

CHAIR TUCK announced the next order of business would be an executive session to address the following audits:

- a. Final Audit Release
 - i. Board of Governors of the Alaska Bar Association (Sunset)
 - ii. Special Education Service Agency (Sunset)
 - iii. Citizens' Advisory Commission on Federal Areas (Sunset)
 - iv. Board of Public Accountancy (Sunset)
 - v. Criminal Justice Commission (Sunset)
 - vi. Regulatory Commission of Alaska FY 19 Annual Report
 - vii. Department of Revenue Mustang Operations Center 1 LLC Loan
- b. Preliminary Audit Release
 - i. Board of Direct-Entry Midwives (Sunset)

- ii. Medicaid and Children's Health Insurance Program Eligibility (Special)
- iii. Medicaid and Children's Health Insurance Program Transportation Costs (Special)

1:03:37 PM

SENATOR BISHOP moved that the Legislative Budget and Audit Committee go into executive session under Uniform Rule 22(b)(3), discussion of matters that may, by law, be required to be confidential. He asked that the following persons remain in the room or on the phone lines: the legislative auditor and necessary staff for the auditor; any legislators not on the committee; and staff for legislators who are members of the committee.

CHAIR TUCK stated that there being no objection, the committee would take an at-ease for the purpose of the executive session.

1:04:18 PM

The committee took an at-ease from 1:04 p.m. to 3:50 p.m.

3:50:22 PM

CHAIR TUCK called the Legislative Budget and Audit Committee meeting back to order. Present at the call back to order were Representatives Tuck, Josephson, Spohnholz, Foster (via teleconference), and Johnston (alternate) and Senators Bishop (via teleconference), Hoffman, Giessel, von Imhof, Stedman (via teleconference), and Wielechowski (alternate) (via teleconference). Also present were Senators Reinbold and Wilson (via teleconference) and Representative Johnson (via teleconference).

3:51:18 PM

SENATOR BISHOP moved that the Legislative Budget and Audit Committee release the following audits as final public reports:

- Alaska Court System, Board of Governors of the Alaska Bar Association;
- Department of Education and Early Development and Department of Health and Social Services, Special Education Service Agency;
- Department of Natural Resources, Citizens' Advisory Commission on Federal Areas;

- Department of Commerce, Community, and Economic Development, Board of Accountancy;
- Governor's Office, Criminal Justice Commission;
- Department of Commerce, Community, and Economic Development, Regulatory Commission of Alaska FY 19 Annual Report; and
- Department of Revenue, Mustang Operations Center 1 LLC Loan Special Audit

There being no objection, it was so ordered.

[3:52:49 PM](#)

SENATOR BISHOP moved that the Legislative Budget and Audit Committee release the following preliminary audits to the agencies for response:

- Department of Commerce, Community and Economic Development, Board of Direct-Entry Midwives;
- Department of Health and Social Services, Medicaid and Children's Health Insurance Program Eligibility; and
- Department of Health and Social Services, Medicaid and Children's Health Insurance Program Transportation Costs.

There being no objection, it was so ordered.

SPECIAL REQUEST AUDIT

[3:53:32 PM](#)

CHAIR TUCK announced the final order of business would be a special request audit.

[3:53:51 PM](#)

REPRESENTATIVE JOSEPHSON reviewed that the legislature had officially "wrapped up" on March 28, 2020, having passed HB 205, which was the operating budget. That legislation created, for the Department of Law (DOL), a new structure for the Civil Division by splitting it into two structures. The first structure was the main structure and was funded at approximately \$48 million to pay the division attorneys and "to do the things the Civil Division does." He said the caption for the structure was: Civil Division, except contracts relating to interpretation of Janus v. AFSCME [American Federation of State,

County and Municipal Employees]. The second structure, he said, was funded at \$20,000 for the purpose of legal contracts relating to interpretation of the Janus v. AFSCME decision. He explained that through structure - not intent language - the legislature specified that the \$20,000 could only be spent on Janus-related contracts, while the \$48 million could be spent on everything else the division does.

[3:56:00 PM](#)

REPRESENTATIVE JOSEPHSON said he received a call on October 12 and was told that in a Ninth Circuit Court case [Belgau v. Inslee], the administration had sought and received a contract from Consovoy McCarthy PLLC to file a 19-page amicus brief, in which Janus is mentioned over 40 times. He said that violates the budget structure; therefore, it violates Title 37 and, arguably, parts of the Constitution of the State of Alaska. Representative Josephson said he wrote to Attorney General Designee Ed Sniffen to inquire whether he was spending money outside the \$20,000 on Janus-related litigation. He explained that he knew DOL was not spending from the \$20,000, because Governor Mike Dunleavy vetoed that item. He said the governor offered no other objection related to the DOL appropriation; there was no veto of the structure set up by the legislature prohibiting spending on Janus-related contracts. Representative Josephson said he did not hear from the attorney general, so he followed up with a phone call, and on October 29, he was informed that DOL "took a different view."

REPRESENTATIVE JOSEPHSON, regarding the viewpoint of DOL, said under the constitution, the attorney general is an important arm of the governor, who can "direct a pathway for any litigation he or she wants." He indicated that the Office of the Attorney General cited a case from 1975, which supports that, with limitations. Another case cited was Alaska Legislative Council v. Knowles. He opined that the Knowles decision largely harms the department's position. He emphasized that the Knowles decision concerns a veto of intent language. He said this is a key point because Governor Dunleavy did not veto intent language; he vetoed the \$20,000. Representative Josephson said, "You're really supposed to veto an item." He said an item is typically a dollar figure, but Governor Dunleavy vetoed the structure created by the legislature. Representative Josephson said the House, in subcommittee, full Finance Committee, and on the floor made the argument that [Janus litigation] was too expensive at \$600 an hour. He said, "The structure we created does not prohibit him from advancing any Janus-related

litigation he wants to, but he ... must use our own assistant attorneys general to do it." He opined that Governor Dunleavy did not offer a timely objection to the core structure laid out by the legislature; therefore, he should implement what the legislature passed. He said the Knowles position had much more prescriptive intent language. He reiterated the caption for the structure the legislature created was: Civil Division, except contracts relating to interpretation of Janus v. AFSCME.

[4:03:21 PM](#)

REPRESENTATIVE JOSEPHSON said the issue is that DOL concedes that it is spending beyond the authority of the structure, but is thus far spending only \$6,000. He said at the time he wrote the letter, he thought DOL was filing only in the Ninth Circuit Court, but that was wrong. The department is advancing Janus-related litigation with expensive contracts in Alaska Superior Court and Alaska District Court. He said he was not told this information, and said he had not asked. He continued:

I'm asking in this audit - I have a small amendment that I'd like to request - that we authorize Ms. Curtis and her team and find out: How much are they spending on Janus-related contracts? Is it ... on these expensive contracts? Where are they doing it? Are they violating any other laws?

REPRESENTATIVE JOSEPHSON offered his view as to why the Knowles decision does not help DOL. He said the legislature at the time wanted money spent on private halfway houses, not on municipal ones. The governor vetoed that as being beyond the confinement clause. He read a portion of the court decision and explained it allowed the legislature to be descriptive; it just cannot be fully prescriptive.

[4:07:22 PM](#)

SENATOR VON IMHOF asked how many cases the State of Alaska is involved in at any given time and "how many have we line-itemed like this in the past?"

REPRESENTATIVE JOSEPHSON answered he could tell Senator von Imhof the number of criminal cases. To the second part of the question, he said, "This is not typical." He said the administration wanted to cut the budget, and there was "a lot of kerfuffle and consternation about these expensive contracts in

the media and amongst the public." He said he does not know how many civil cases there are.

SENATOR VON IMHOF speculated there are probably "multiples of tens" of civil cases. She said she does not know of any instance where the legislature has pulled out one specific case and created a budget for it. She questioned why Representative Josephson had chosen this particular case.

REPRESENTATIVE JOSEPHSON answered that it was in the budget currently. He continued that [the state] was given a discount from \$900 to \$600 an hour to pay the Consovoy firm to advance a theory of the Janus decision, which no other attorney general in the country was advancing. He said the Janus decision is closed, but he opined that the administration wanted to "throw a stick of dynamite under it," even though it was written by a conservative, Justice Samuel Alito, and was viewed as an anti-union case. He said the legislature addressed the expense, which is between \$600,000 and \$700,000. It reigned in the budget structure, and the governor is ignoring that.

[4:11:25 PM](#)

CHAIR TUCK, in response to Representative von Imhof, asked that questions be directed at the issue of legislative authority rather than the Janus argument.

SENATOR VON IMHOF noted that Representative Josephson had highlighted the \$600,000 that the case was estimated to ultimately cost, and she asked whether there was a framework for comparison of other cases that have cost the state considerable funds, especially cases that have been lengthy.

REPRESENTATIVE JOSEPHSON said there is some intent language that infers that [the legislature] does not want [the state] to spend money on contracts unless there is going to be a real return to the treasury. He said the state sometimes spends a lot of money to litigate oil and gas cases; however, \$5 million spent in attorney fees in such cases can yield a return of \$200 million. He said there could be no confusion about what the legislature wanted in this capital budget, with the aforementioned structure, which is in the law. He reiterated that a structure cannot be vetoed, only a number can. He said what he is asking is: "Do you mind that they're ignoring the structure we passed and that they didn't veto?"

[4:13:16 PM](#)

SENATOR GIESSEL said in listening to Representative Josephson make his point, she was reminded of "The Chevron case," in which the [Alaska] Supreme Court decided that if the legislature abdicates specificity, then it has abdicated it and given it to the department. She said, "In this case, we didn't, it sounds like - I didn't scrutinize the budget - but it sounds like you didn't, and so, it seems to me that specificity is required to be honored." She asked, "So, you get this information. What are you going to with it? What's the end game?"

REPRESENTATIVE JOSEPHSON offered his understanding that Representative Giessel was asking whether the legislature can do what it did and whether it should "defend that principle." He stated, "Our facts are much better than Knowles', and in Knowles the legislature won a lot of the battles, because we're just not that prescriptive. And in fact, we're telling the attorney general, 'Use your own hundreds of lawyers to litigate whatever you want, however you want to.' And I think that's an important fact." Representative Josephson told Senator Giessel that results would vary depending on the makeup of the Legislative Council Committee and whoever is its current chair. He continued:

I think this case - it's not a case yet - but I think this set of facts is very important to the future of the legislature - very. Now, is there a way to - short of an injunction - to stop them from doing this? No, no, there's not. ... They're going to do it. But just as Knowles offers this guidance now, a future case could offer future legislators guidance.

... I'm bothered because they failed to comply, in my view. In some way - even though they couldn't quite veto this - they failed ... to tell the world about this. ... It was on the OMB site, ... and that's something, but we're four months into the fiscal year, and I learned about the fact that they're going to ignore this? It seems inappropriate.

[4:16:43 PM](#)

CHAIR TUCK expressed support for the special audit request. He said it comes down to whether the legislature has the authority and what the legislature can do to enforce the laws it creates "if the administration decides to do whatever it wants." He said the administration has taken a lot of liberties over the

last few months. He opined that if the legislature sets up a program with not only intent but legislative will, then it should be carried out. He pointed out that Legislative Council has the authority, through resolution, to pursue lawsuits on behalf of the full legislature during session. The Legislative Budget and Audit Committee has the authority to act on behalf of the full legislature to move lawsuits, especially when not in session.

[4:18:24 PM](#)

SENATOR BISHOP asked, "At the end of the day, you're just requesting how much money has been spent, to date, on contracts related to the issue of Janus, correct? That's all your asking?"

REPRESENTATIVE JOSEPHSON answered that's correct. He added, "We're also asking Ms. Curtis to find out whether she thinks this is a violation of law." If so, she would contact Ms. Wallace.

[4:19:17 PM](#)

SENATOR BISHOP moved that the Legislative Budget and Audit Committee approve Representative Josephson's request for an audit, as amended, of the Department of Law's spending on contracts related to Janus. [The amendment was subsequently treated separately.]

[4:19:32 PM](#)

CHAIR TUCK objected for the purpose of discussion.

[4:19:58 PM](#)

REPRESENTATIVE JOSEPHSON moved to amend the Special Audit Request, as follows:

On page 2 of the memorandum, at the second bullet point:

Following "*Belgau v Inslee*"

Insert ", or other filing in Alaska Superior Court, Alaska Federal District Court or any other court."

CHAIR TUCK objected to Amendment 1 for the purpose of discussion.

[4:20:32 PM](#)

SENATOR VON IMHOF said she does not have the legal background that Representative Josephson has and does not know what the proposed amendment would do; therefore, she does not feel comfortable voting. She said she has read Representative Josephson's Special Audit Request and has heard his [explanation of] it. She indicated that the acting attorney general, Mr. Sniffen, had refuted Representative Josephson's stance. She objected to the motion to adopt Amendment 1 to the Special Audit Request.

[4:22:02 PM](#)

CHAIR TUCK clarified that the Special Audit Request is not to dispute authority but rather to find out how much is being spent and how much of that is being spent on Outside contracts.

[4:22:47 PM](#)

SENATOR VON IMHOF said the information in the committee packet shows that the department anticipates expenses of less than \$6,000.

CHAIR TUCK replied, "Well, we don't know if that's true right now."

[4:23:00 PM](#)

REPRESENTATIVE JOSEPHSON recounted his previous remark about having asked only about the Ninth Circuit Court case, to which Mr. Sniffen had responded accordingly, but that subsequently Representative Josephson had discovered more was being spent in the Alaska Supreme Court and the Alaska Federal District Court. He said this Special Audit Request would ask Ms. Curtis to find out what is being spent.

CHAIR TUCK removed his objection to, and expressed his support of, the motion to adopt Amendment 1 to the Special Audit Request.

SENATOR VON IMHOF [maintained her objection].

[4:24:11 PM](#)

The committee took a brief at-ease at 4:24 p.m.

[4:24:34 PM](#)

A roll call vote was taken. Representatives Josephson, Foster, Spohnholz, and Tuck and Senators Giessel and Bishop voted in favor of Amendment 1 to the Special Audit Request. Senator von Imhof voted against it. Therefore, Amendment 1 was adopted by a vote of 6-1.

[4:25:58 PM](#)

CHAIR TUCK removed his objection to the motion to approve the Special Audit Request [as amended]. He asked if there was further objection.

[4:26:13 PM](#)

SENATOR VON IMHOF objected.

[4:26:20 PM](#)

A roll call vote was taken. Representatives Josephson, Foster, Spohnholz, and Tuck and Senators Giessel and Bishop voted in favor of the motion to approve the Special Audit Request, as amended. Senator von Imhof voted against it. Therefore, the Special Audit Request, as amended, was approved by a vote of 6-1.

[4:27:44 PM](#)

ADJOURNMENT

There being no further business before the committee, the Legislative Budget and Audit Committee meeting was adjourned at [4:28] p.m.