ALASKA STATE LEGISLATURE
SENATE LABOR AND COMMERCE STANDING COMMITTEE
February 13, 2020
1:30 p.m.

MEMBERS PRESENT

Senator Click Bishop, Chair
Senator Gary Stevens, Vice Chair
Senator Mia Costello
Senator Joshua Revak
Senator Elvi Gray-Jackson

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Senator Cathy Giessel

COMMITTEE CALENDAR

PRESENTATION: ALASKA HIRE IN 2020: IS IT UNCONSTITUTIONAL?

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

DAN WAYNE, Legal Counsel
Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: Delivered a PowerPoint on the history and constitutionality of Alaska hire.

ACTION NARRATIVE

1:30:07 PM

CHAIR CLICK BISHOP called the Senate Labor and Commerce Standing Committee meeting to order at 1:30 p.m. Present at the call to order were Senators Stevens, Costello, Revak, and Chair Bishop.

Presentation: ALASKA HIRE in 2020: Is it Unconstitutional?

1:30:54 PM
CHAIR BISHOP announced the only order of business would be a presentation by Dan Wayne on the constitutionality of Alaska Hire. He noted that Senator Giessel was in attendance as was the former commissioner of labor.

1:32:05 PM
SENATOR GRAY-JACKSON joined the meeting.

DAN WAYNE, Legal Counsel, Legislative Legal Services, Legislative Affairs Agency, Juneau, Alaska, directed attention to the title of the presentation and explained that he decided to focus on the controversial moments in the long history of Alaska Hire, most of which are court cases. He displayed a list of court cases, starting with *Hicklin v. Orbeck*, which was decided by the U.S. Supreme Court in 1978.

MR. WAYNE advised that he would first look at the current Alaska Hire controversial moment that came up after a 30-year period of quiet. This case was filed in 2019 alleging that the law was unconstitutional. The State of Alaska made the decision to settle the case. In a letter to Senate President Giessel, Attorney General Clarkson recounting the reasons that the law could not be defended. He displayed a slide showing the following:

> Based on the department of law's analysis of numbers reported by the Dept. of Labor and Workforce Development in 2017, the department has concluded as follows:
>
> "the State cannot show that nonresidents are a peculiar source of any high unemployment of Alaskans." *Letter from Attorney General Clarkson to Senator Giessel,* page 2, October 29, 2019.
>
> "there is no evidence to support the idea that Alaskan workers with necessary qualifications and skills are being passed over for permanent employment in Alaska in any significant numbers in favor of nonresident

> workers." *Letter from Attorney General Clarkson to Senator Giessel*, page 3, October 29, 2019.
>
> "Employers ... only hire nonresidents when constrained by the realities of the Alaska labor market." *Letter from Attorney General Clarkson to Senator Giessel*, page 3, October 29, 2019.

MR.WAYNE said Attorney General Clarkson also explained the decision in an October 3, 2019 opinion. He displayed the following:

> *See, 2019 Op. Alaska Att'y Gen.* (Oct. 3), and *2019 Letter* from *Alaska Att'y Gen. to Senator Cathy Giessel* (Oct. 29). These opinions cite two main legal reasons:
>
> > {1) Enserch, a 1989 Alaska Supreme Court decision finding that 160, allowing determination of "economically distressed" zones in the state, violated equal protection provision in state constitution.
> >
> > (2) P&I Clause, federal constitutional provision which reads: [11]The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

1:34:50 PM
MR. WAYNE reviewed the Enserch case. He said it's important to understand that Enserch was not a challenge to the current version of Alaska Hire in AS 36.10.150. Rather, it was a challenge to AS 36.10.160, a statute authorizing the commissioner of labor to identify economically distressed zones and require a hiring preference on certain projects for residents of those zones. The Enserch Court focused on how that preferential determination caused discrimination between residents in different regions of the state.

The Enserch Court said that discrimination between groups of state residents based on region violated the state equal protection clause in art. I, sec. 1, Constitution of the State of Alaska. It guarantees that "...all persons are equal and entitled to equal rights, opportunities, and protection under the law;".

MR. WAYNE said that guarantee has been good protection against residential preference hiring laws that discriminate between

groups of state residents since the Enserch decision, but the voters amended the state constitution that same year in an effort to remove the equal protection guarantee as a barrier to discrimination against non-residents. Art 1, sec 23, Constitution of the State of Alaska was amended in 1988 to read:

> This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States. [*Amended 1988*]

MR. WAYNE said this amendment to the constitution was designed to create a path around the state's equal protection guarantee for the current version of Alaska Hire which is AS 36.10.150 that was signed into law in 1986. It is in effect today.

MR. WAYNE reminded the members that Attorney General Clarkson's recent conclusion about Alaska Hire relied heavily on Enserch, but that decision invalidated just AS 36.10.160 under an equal protection argument. It did not invalidate the "zone of underemployment" provision in AS 36.10.150. He acknowledged that it is difficult to determine the impact that the holding in the Enserch decision might have on litigation over the current Alaska Hire in AS 36.10.150.

1:37:46 PM
MR. WAYNE turned to the second legal reason Attorney General Clarkson cited in support of his October decision. He said the Privileges and Immunities Clause is still a very valid concern for the current version of Alaska Hire. That is the clause that bars discrimination against residents of other states unless there is a substantial reason for the discrimination. He said the determination of "substantial" in any given case is left to the court, depending on the circumstances brought before it.

In 1948 the U.S. Supreme Court devised a test [based on *Toomer v. Witsell*] for the kind of residential preference law a state might enact that would withstand a legal challenge based on the Privileges and Immunities Clause. In 1978, the U.S. Supreme Court applied that test in the first Alaska Hire case, *Hicklin v. Orbeck*, which wasn't anything like the current version of Alaska Hire. The court applied it to a broadly reaching statutory provision saying that any job in Alaska remotely connected to the extraction of oil and gas from the state would be subject to a resident hire preference.

1:39:31 PM
CHAIR BISHOP said that was struck down so the current Alaska Hire law doesn't capture oil and gas on the North Slope.

MR. WAYNE replied it's difficult to see how it could since the current law applies only to public construction projects. He added that he supposes that if the state were the owner of oil and gas and intended to construct something related to that, it could be considered a public construction project.

CHAIR BISHOP advised that the history of Alaska Hire was just the first of several presentations covering the entire process up to this point.

1:40:35 PM
SENATOR STEVENS asked if the "Toomer test" (from *Toomer v. Witsell*) was still in effect.

MR. WAYNE directed attention to the slide that summarizes key points of *Hicklin v. Orbeck* and the "Toomer test" the U.S. Supreme Court created:

> The Privileges and Immunities Clause bars discrimination against citizens of other States where there is no substantial reason for it.
>
> There is no substantial reason for resident hire preference unless there is evidence that non-citizens constitute a peculiar source of the problem at which the discriminatory statute is aimed.
>
> Even where nonresidents cause or exacerbate the problem the statute is aimed at, there must be a reasonable relationship between the danger represented by non-citizens, as a class, and the discrimination practiced upon them.

SENATOR STEVENS thanked him for the explanation that he found "clear as mud."

MR. WAYNE responded that a complicating factor is that some of the language in the older cases talk about "a particular source of the evil." He said he and other lawyers interpret evil to mean problem. He displayed the following quote from Hicklin:

> Regarding Alaska Hire: although the statute may not violate the Clause if the State shows something to

indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed, and, beyond this, the State has no burden to prove that its laws are not violative of the Clause, certainly no showing was made on this record that nonresidents were a peculiar source of the evil

MR. WAYNE continued to explain that when the Toomer test was applied in *Hicklin v. Orbeck*, the results were not good. The U.S. Supreme Court was critical of the oil and gas industry residential hiring preference because there was no evidence on the record to support a finding that the nonresidents that the law discriminated against were the particular cause of Alaska's high unemployment. That court identified high unemployment as the evil (the problem) that the law was aimed at. Requiring resident hire addressed the problem of high unemployment.

MR. WAYNE warned that the next few quotes from the Hicklin decision contained racist language. He explained that he left them intact because they illustrate some thinking in 1978 and that the U.S. Supreme Court might not have had a good understanding of the culture of Alaska.

Alaska Hire was *enacted to remedy, namely, Alaska's uniquely high unemployment. What evidence the record* does *contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that* a *substantial number of Alaska's jobless residents- especially the unemployed Eskimo and Indian residents-were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities: and that the employment* of *nonresidents threatened, to deny jobs to Alaska residents only to the extent that jobs* for *which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed.*

"*even if the State's showing is accepted* as *sufficient to indicate that nonresidents were* a *peculiar source* of *evil, Alaska Hire nevertheless fails to* pass *constitutional muster. For the discrimination the Act works against nonresidents* does *not bear* a *substantial relationship to the particular evil they are said to present. Alaska Hire simply grants all Alaskans,*

> *regardless of their employment status, education, or training, a flat employment preference for all jobs* covered *by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training* program."

1:43:53 PM
CHAIR BISHOP asked if this was the U.S. Supreme Court's language.

MR. WAYNE answered yes, but the underlining was his. He pointed out that the U.S. Supreme Court was critical of the absence of evidence in the record supporting the oil and gas industry residential preference law. He said one way to interpret their unhappiness is that it concluded that high unemployment in Alaska was caused by resident workers themselves who didn't have the proper training or live in the right part of the state. He commented that the decision seems to blame the unemployed.

1:44:55 PM
CHAIR BISHOP provided an historical perspective. He said this was the U.S. Supreme Court opinion on Alaska Hire in 1978 relating to the Trans Alaska Pipeline, but this phenomenon goes back to WWII and the buildup of the military assets in the state at Ladd Field in Fairbanks and Fort Richardson in Anchorage. Residents complained then that they were the last hired and the first laid off of those projects.

1:46:20 PM
MR. WAYNE said it seems that employers in 1978 would follow that sort of policy if they had the same poor view of resident workers that the U.S. Supreme Court had. But it's possible that in 2020 that same court would lay less blame for Alaska's high unemployment on the unemployed themselves. He said the important takeaway from the foregoing slide is not the racially and culturally insensitive language, it's that for Alaska Hire in its current version to withstand a court challenge based on the P&I Clause, the state would need to show a strong link between the law's discrimination against nonresidents and the problem that nonresidents present.

> [11]If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents-again, a policy

> which may present serious constitutional questions-the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit. Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the- board grant of a job preference to all Alaskan residents clearly is not.

1:48:20 PM
MR. WAYNE moved to the 1985 *United Building and Construction Trades Council v. City of Camden* resident hire case that the U.S. Supreme Court took up and decided outside of Alaska.

> The Camden Court found employment on public works projects is protected by P&I clause, but said "Every inquiry under the Privileges and Immunities Clause must be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures. This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls."

MR. WAYNE explained that the U.S. Supreme Court considered a challenge of a resident hiring preference for city public works jobs that favored Camden residents over residents from outside Camden. He pointed out that New Jersey is surrounded by states with qualified workers who can drive to Camden to work each day and drive back to their state of residence at the end of the day, but that situation doesn't exist in Alaska.

The City of Camden was under assault from out-of-city and out-of-state workers who wanted those government jobs. He said the important takeaway from the above quote is underlined. It seems to indicate that in the right circumstances, the Privileges and Immunities Clause is not an absolute bar to a residential hiring preference.

> "The Alaska Hire statute at issue in *Hicklin v. Orbeck* (U.S.1978) swept within its strictures not only contractors and subcontractors dealing directly with the State's oil and gas: it also covered suppliers who provided goods and services to those contractors and subcontractors. We invalidated the Act as an attempt to force virtually all businesses that benefit in some

> way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. No similar "ripple effect" appears to infect the Camden ordinance. It is limited in scope to employees working directly on city public works projects."

MR. WAYNE noted that in the above quote the court seems to say that one of those circumstances is a preference limited to hiring for jobs on public works projects.

1:51:39 PM
CHAIR BISHOP emphasized that in the Camden case, the U.S. Supreme Court said that states should have considerable leeway in identifying the problem and finding a solution.

MR. WAYNE pointed out that it was also the U.S. Supreme Court that decided the Hicklin case in 1978 and made it sound as though the Privileges and Immunities Clause was nearly an insurmountable barrier to a resident hire preference.

MR. WAYNE noted that the underlined sentence in the last quote seems to show that the court felt that was a circumstance that might make a difference in whether or not a residential hiring preference statute is constitutional. In the text that appears above the underlined sentence, the court distinguishes between *Hicklin v. Orbeck* (the overly broad oil and gas residential preference hiring law) and the Camden case that only dealt with city public works projects in Camden, New Jersey.

CHAIR BISHOP commented that *Hicklin v. Orbeck* had broad application whereas the scope in the Camden case was narrowed to public works projects in Camden.

MR. WAYNE confirmed that the oil and gas hiring preference law was very broad.

1:54:14 PM
MR. WAYNE turned to the second Alaska Hire case, the 1986 Alaska Supreme Court case, *Robison v. Francis*. He explained that Department of Labor Commissioner James Robison was named in a suit over the 1983 version of Alaska Hire. That version, like the current version of Alaska Hire, discriminated against nonresidents by giving Alaska residents a hiring preference on public construction projects. The state defended the 1983 law and lost. He displayed a slide showing the following points:

> Employment in construction industry is a fundamental right protected by P&I clause.
>
> Purpose of P&I clause is "to prevent states from enacting measures which discriminate against non-residents for reasons of economic protectionism"
>
> Without substantial justification for it, a law discriminating against hire of nonresident workers violates P&I clause.

MR. WAYNE advised that while the term "discrimination" has a pejorative connotation, it is not all bad or illegal. So when a court says a law discriminates against the people outside of Camden, that discrimination is not necessarily a violation of the Privileges and Immunities Clause. He posited that in defending Alaska Hire, one would not say the law doesn't discriminate because it does. Rather, the job would be to convince the court that the law measures up and answers the concerns raised in previous cases. He described that as a large but not impossible task.

MR. WAYNE displayed the following points that describe more of the Robison case:

> There is no doubt that Alaska has an unemployment rate which is higher than the national average and that this constitutes a serious problem. What is lacking is a showing that non-residents are a "peculiar source of the evil" of unemployment. (p. 266).
>
> The purpose of the local hire law is to exclude non-residents from public construction jobs so that more jobs will be available to Alaskans. In our view this is not a permissible justification for discrimination under the privileges and immunities clause. To state the same conclusion in conventional privileges and immunities terms, the justification is not "substantial." (p. 266).

The Alaska Supreme Court said the 1983 version of Alaska Hire violated the Privileges and Immunities Clause. The ruling was based on the "Toomer test" that the U.S. Supreme Court developed in 1948 and modified in 1978 in *Hicklin v. Orbeck*. He said the takeaway is that a court will find that a law aimed at lowering

unemployment by hiring more residents is unconstitutional. That goal by itself does not justify discriminating against the fundamental constitutional right of residents to work in any state they choose. That is the right the Privileges and Immunities Clause guarantees.

1:58:03 PM
SENATOR STEVENS asked if there were Robison lawsuits in both 1983 and 1986.

MR. WAYNE clarified that there was just one court case in 1986 involving Commissioner Robison, which was a challenge to the 1983 version of Alaska Hire.

MR. WAYNE displayed the following quote from the Robison case:

> *"The preferential hire statute involved in Hicklin was* struck down because, among other reasons, the statute was too broad. It applied not only to unemployed residents or *residents enrolled in job* training programs, but to all residents whether employed or *unemployed, well trained or poorly* trained. By giving preferential treatment to residents who do *not need it, the present statute (adopted in* 1983) suffers from the same vice as that struck down by the United States Supreme Court in Hicklin." (p. 268)
>
> There is no doubt that Alaska has an unemployment rate which is higher than the national average and that this constitutes a serious problem. What is lacking is a showing that non-residents are a [11]peculiar source of the evil" of unemployment. (p. 266).
>
> The purpose of the local hire law is to exclude non-residents from public construction jobs so that more jobs will be available to Alaskans. In our view this is not a permissible justification for discrimination under the privileges and immunities clause. To state the same conclusion in conventional privileges and immunities terms, the justification is not "substantial." (p. 266).
>
> *"The preferential hire statute involved in Hicklin was* struck down because, among other reasons, the statute was too broad. It applied not only to unemployed residents or *residents enrolled in job* training

> programs, but to all residents whether employed or *unemployed, well trained or poorly* trained. By giving preferential treatment to residents who do *not need it, the present statute (adopted in* 1983) suffers from the same vice as that struck down by the United States Supreme Court in Hicklin." (p. 268)

MR. WAYNE said the court is reconfirming that the U.S. Supreme Court struck down the oil and gas industry hiring preference law in 1978 for being too broad. It also underscores the Alaska Supreme Court's concern that the 1983 version of Alaska Hire was too broad when it gave a non-needs-based hiring preference to residents.

MR. WAYNE recounted that the legislature went back to the drawing board following the Robison decision. He displayed the following points:

> A new version of Alaska Hire became law in 1986. The legislative record shows that
>
> the goal was to narrow the scope of the preference, and more closely tailor it to address social problems like crime, poverty, and addiction, instead of simply unemployment
>
> through testimony by experts, the legislature gathered much evidence thought to support a substantial need for the new law
>
> the state's then attorney general helped craft the law, and predicted it had a good chance of surviving court challenges

MR. WAYNE said he reviewed the 1986 legislative record and it is clear that the legislature and the Department of Law worked together to try to fix the flaws that the Robison case identified. He highlighted that an electronic database of the bill files from the 1986 session was available online.

MR. WAYNE said the legislative record supports the conclusion that the Alaska Legislature tried to identify the problems it was trying to address with the local hire law. There was lots of expert testimony about the social problems in different areas of the state that are attributable to poverty. He opined that it would be difficult for a court to say the law was aimed at

economic protectionism, which is not allowed. The record shows that the legislature also tried to construct law that addressed some of the concerns raised by the courts such as not too broad and being need-based.

2:03:16 PM
CHAIR BISHOP summarized that the legislature worked with the Department of Law to craft the law that exists today.

MR. WAYNE replied the record shows that was the case. He recalled that then Attorney General Lorenzen helped the legislature identify the legal problems that needed to be fixed, offered potential solutions, commented on the language in the various versions that were considered in the House and Senate, and ultimately said the law that passed had a good chance of withstanding a constitutional challenge. He displayed the following points.

> If commissioner determines two year zone of underemployment, residents of the zone who qualify receive hiring preference for certain work on
>
> > (1) public construction projects in zone; and
> > (2) a "craft by craft or occupational basis";
>
> Commissioner determines amount of hiring preference work based on
>
> > (1) nature of the work
> > (2) classification of workers
> > (3) number of qualified residents available
>
> Residents must qualify (under AS 36.10.140) by
>
> > (1) receiving unemployment benefits;
> > (2) being eligible to receive unemployment but benefits ran out;
> > (3) being unemployed but registered to find work;
> > (4) being underemployed or marginally employed; or
> > (5) completing approved job-training and still being unemployed or underemployed

MR. WAYNE said AS 36.10.160 was struck down as unconstitutional in the Enserch case but AS 36.10.150 has survived for more than 30 years. Under that law, several Department of Labor and Workforce Development (DOLWD) commissioners, including

Commissioner Ledbetter, have issued determinations that Alaska is a zone of underemployment. He said the fact that each zone of underemployment lasts for just two years might be important to a court that is trying to determine whether or not Alaska Hire is tied to a specific area and set of circumstances or a law of general applicability. He pointed out that conditions in a particular zone can change between one commissioner determination and the next.

MR. WAYNE related that except for the Enserch case, the current law was not challenged until 2019. The state elected to settle the case without waiting for a court decision so the constitutionality of the law is an open question. But until a court decides it's unconstitutional, it is the law.

CHAIR BISHOP thanked Mr. Wayne for the presentation. He said the jury is still out, but his takeaway was that the legislature, the Department of Law, and the Attorney General all collaborated to craft the current law.

2:14:42 PM
There being no further business to come before the committee, Chair Bishop adjourned the Senate Labor and Commerce Standing Committee meeting at 2:14 p.m.