

CS FOR HOUSE BILL NO. 322 (JUDICIARY)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 3/4/92
Referred: Finance

Sponsor(s): REPRESENTATIVES ULMER, Brown

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to protection of whistleblowers; and relating to the personnel board."

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * **Section 1.** AS 39.25.070 is amended to read:

4 Sec. 39.25.070. **POWERS AND DUTIES OF PERSONNEL BOARD.** In addition to the
5 other duties imposed by this chapter, the personnel board shall

6 (1) approve or disapprove amendments to the personnel rules in accordance with
7 AS 39.25.140;

8 (2) consider and act upon recommendations for the extension of the partially
9 exempt service and the classified service as provided in AS 39.25.130;

10 (3) hear and determine appeals by employees in the classified service as provided
11 in AS 39.25.170;

12 (4) establish its own rules of procedure; two members constitute a quorum for the
13 transaction of business and two affirmative votes are required for final action on matters acted
14 upon by the board;

- 1 (5) elect a chair [CHAIRMAN] from its membership;
- 2 (6) have the power to administer oaths, subpoena witnesses, and compel the
3 production of books and papers pertinent to a hearing authorized by this chapter or by
4 AS 39.90.100 - 39.90.250;
- 5 (7) employ staff members, who shall be in the classified service;
- 6 (8) retain independent counsel in accordance with AS 39.52.310(c);
- 7 (9) appoint, and review the findings, conclusions, and recommendations of,
8 hearing officers in accordance with AS 39.52.350(c), 39.52.360, and 39.52.370;
- 9 (10) issue findings, conclusions, and decisions regarding violations of the code
10 of ethics in AS 39.52.110 - 39.52.190; [AND]
- 11 (11) impose the penalties described in AS 39.52.410, 39.52.440, and 39.52.450;
- 12 and
- 13 (12) carry out the powers and duties assigned to it under AS 39.90.100 -
14 39.90.250.

15 * Sec. 2. AS 39.90.100(c) is amended to read:

- 16 (c) The provisions of AS 39.90.100 - 39.90.250 [AS 39.90.100 - 39.90.150] do not
- 17 (1) require an employer to compensate an employee for participation in a court
18 action or in an investigation, hearing, or inquiry by a public body;
- 19 (2) prohibit an employer from compensating an employee for participation in a
20 court action or in an investigation, hearing, or inquiry by a public body;
- 21 (3) authorize the disclosure of information that is legally required to be kept
22 confidential; or
- 23 (4) diminish or impair the rights of an employee under a collective bargaining
24 agreement.

25 * Sec. 3. AS 39.90.100(d) is amended to read:

- 26 (d) An employer shall post notices and use other appropriate means to inform employees
27 of their protections and obligations under AS 39.90.100 - 39.90.250 [AS 39.90.100 - 39.90.150].

28 * Sec. 4. AS 39.90.110(a) is amended to read:

- 29 (a) A person is not entitled to the protections under AS 39.90.100 - 39.90.250
30 [AS 39.90.100 - 39.90.150] unless the person
- 31 (1) reasonably believes that the information reported is or is about to become a

1 matter of public concern; and

2 (2) reports the information in good faith.

3 * Sec. 5. AS 39.90.110(b) is amended to read:

4 (b) A person is entitled to the protections under AS 39.90.100 - 39.90.250
5 [AS 39.90.100 - 39.90.150] only if the matter of public concern

6 (1) is not the result of conduct by the person seeking protection; or

7 (2) is the result of conduct by the person that was required by the person's
8 employer.

9 * Sec. 6. AS 39.90.130 is amended to read:

10 Sec. 39.90.130. EXEMPTION FOR MUNICIPALITIES. A municipality is not required
11 to comply with the provisions of AS 39.90.100 - 39.90.250 [AS 39.90.100 - 39.90.150] if the
12 municipality has adopted an ordinance that provides protections for its employees and other
13 persons that are substantially similar to the protections under AS 39.90.100 - 39.90.250
14 [AS 39.90.100 - 39.90.150]. Notwithstanding AS 29.25.070, the ordinance may provide for a
15 civil penalty for violation of the ordinance not to exceed \$10,000.

16 * Sec. 7. AS 39.90.140 is amended to read:

17 Sec. 39.90.140. DEFINITIONS. In AS 39.90.100 - 39.90.250 [AS 39.90.100 - 39.90.150]

18 (1) "employee" or "public employee" means a person who performs a service for
19 wages or other remuneration under a contract of hire, written or oral, express or implied, for a
20 public employer;

21 (2) "employer" or "public employer" includes the state, a public or quasi-public
22 corporation or authority established by state law, the University of Alaska, and a political
23 subdivision of the state including a municipality, school district, and rural educational attendance
24 area;

25 (3) "matter of public concern" means

26 (A) a violation of a state, federal, or municipal law, regulation, or
27 ordinance;

28 (B) a danger to public health or safety;

29 (C) gross mismanagement, a substantial waste of funds, or a clear abuse
30 of authority; or

31 (D) a matter accepted for investigation by the office of the ombudsman

- 1 under AS 24.55.100 or 24.55.320;
- 2 (4) **"prohibited practice" means a violation of AS 39.90.100;**
- 3 (5) "public body" includes an officer or agency of
- 4 (A) the federal government;
- 5 (B) the state;
- 6 (C) a political subdivision of the state including
- 7 (i) a municipality;
- 8 (ii) a school district; and
- 9 (iii) a rural educational attendance area;
- 10 (D) a public or quasi-public corporation or authority established by state
- 11 law including the Alaska Railroad Corporation; and
- 12 (E) the University of Alaska.

13 * Sec. 8. AS 39.90.150 is amended to read:

14 Sec. 39.90.150. SHORT TITLE. AS 39.90.100 - 39.90.250 [AS 39.90.100 - 39.90.150]

15 may be cited as the Alaska Whistleblower Act.

16 * Sec. 9. AS 39.90 is amended by adding new sections to read:

17 Sec. 39.90.160. ADMINISTRATIVE REMEDY. Instead of bringing a civil action under

18 AS 39.90.120, a public employee, former public employee, or applicant for public employment

19 who alleges a violation of AS 39.90.100 may, within one year after the date the current or former

20 public employee or applicant reasonably should have known of the violation, file an allegation

21 with the personnel board. However, if a court of competent jurisdiction either has issued a final

22 determination resolving some or all of the issues raised by the allegation or has a matter under

23 consideration that will require resolution of some or all of the issues, the personnel board may

24 not accept or shall discontinue investigation of the allegation as to those issues. If the allegation

25 relates to a matter that is outside the jurisdiction of the personnel board under AS 39.90.100 -

26 39.90.250, the board may not accept the allegation but may refer the current or former public

27 employee or applicant to other appropriate agencies. If the matter appears to be within the

28 jurisdiction of the board, the board shall immediately appoint a hearing officer to investigate and

29 report on the allegation.

30 Sec. 39.90.170. INVESTIGATION BY HEARING OFFICER. (a) The hearing officer

31 shall investigate an allegation referred by the personnel board to determine whether there are

1 reasonable grounds to believe that a prohibited practice has occurred, is occurring, or is about
2 to occur. Within 10 days after appointment, the hearing officer shall provide written notice to
3 the current or former public employee or applicant who made the allegation that the hearing
4 officer has received and will investigate the allegation. The notice must include the name of the
5 person who will serve as a contact with the current or former public employee or applicant
6 making the allegation.

7 (b) If, after investigation, the hearing officer determines that there are reasonable grounds
8 to believe that a prohibited practice that requires corrective action has occurred, is occurring, or
9 is about to occur, the hearing officer shall report the findings and determination to the personnel
10 board, the agency involved, and the elected or appointed head of the agency. The report may
11 include recommendations for corrective action.

12 (c) If, after a reasonable time, the public employer does not act to correct the prohibited
13 practice, the hearing officer may petition the personnel board for corrective action. If the hearing
14 officer finds, after consulting with the current or former public employee or applicant subject to
15 the prohibited practice, that the employer has acted to correct the prohibited practice, the hearing
16 officer shall file the finding with the board, together with any written comments provided by the
17 current or former public employee or applicant and the employer.

18 (d) If, after investigation, the hearing officer determines that there is reasonable cause
19 to believe that a criminal violation has occurred, the hearing officer shall report the determination
20 to the attorney general, the head of the public employer involved, and the personnel board.

21 Sec. 39.90.180. STAY OF PERSONNEL ACTION. (a) If the hearing officer determines
22 that there are reasonable grounds to believe that a violation of AS 39.90.100 has occurred, the
23 hearing officer may request the personnel board or a member of the board to stay any personnel
24 action against the current or former public employee or applicant making the allegation or against
25 another current or former public employee or applicant. Unless the board or board member finds
26 that the stay would not be appropriate, the board or board member shall order a stay, valid for
27 no more than 45 days. The board or board member shall act within three working days of
28 receiving a request for a stay.

29 (b) If the stay or an extension of a stay is granted, the board shall allow the public
30 employer that is the subject of a stay to comment on the stay and to request an amendment to
31 it. The board may terminate the stay at any time after notice and opportunity for oral or written

1 comments are provided to the hearing officer and the current or former public employee or
2 applicant on whose behalf the stay was ordered.

3 (c) The board may extend the period of a stay granted under this section for any period
4 that the board considers appropriate.

5 Sec. 39.90.190. INVESTIGATION PROCEDURES. (a) In an investigation, the hearing
6 officer may

7 (1) make inquiries and obtain information considered necessary;

8 (2) enter without notice to inspect the premises of a public employer, but only
9 when agency personnel are present;

10 (3) hold hearings that are closed to the public notwithstanding AS 44.62.310; and

11 (4) notwithstanding other provisions of law, have access at all times to records
12 of every public employer other than the records of the office of the ombudsman, including
13 confidential records; however, the personnel board may only compel the production of sealed
14 court records by subpoena and may not compel production of records of active criminal
15 investigations and records that could lead to the identity of confidential police informants; as to
16 the records of the office of the ombudsman, the personnel board may only require that the office
17 confirm or deny that it has accepted a complaint for investigation.

18 (b) The hearing officer and the personnel board shall maintain confidentiality with respect
19 to all matters and the identities of the complainants or witnesses coming before the officer or the
20 board except insofar as disclosures may be necessary to enable the officer or the board to carry
21 out their duties and to support recommendations. However, the officer or the board may not
22 disclose a confidential record obtained from an agency.

23 Sec. 39.90.200. SUBPOENA POWERS. (a) Subject to the privileges that witnesses have
24 in the courts of this state, the personnel board may, at the request of the hearing officer or on its
25 own request, compel by subpoena, at a specified time and place, the

26 (1) appearance and sworn testimony of a person who the personnel board or the
27 hearing officer reasonably believes may be able to give information relating to a matter under
28 investigation; and

29 (2) production by a person of a record or object that the personnel board or
30 hearing officer reasonably believes may relate to the matter under investigation.

31 (b) If a person refuses to comply with a subpoena issued under (a) of this section, the

1 comments are provided to the hearing officer and the current or former public employee or
2 applicant on whose behalf the stay was ordered.

3 (c) The board may extend the period of a stay granted under this section for any period
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28 investigation; and

29 (2) production by a person of a record or object that the personnel board or
30 hearing officer reasonably believes may relate to the matter under investigation.

31 (b) If a person refuses to comply with a subpoena issued under (a) of this section, the

1 reasonable grounds to believe that a prohibited practice has occurred, is occurring, or is about
2 to occur. Within 10 days after appointment, the hearing officer shall provide written notice to
3 the current or former public employee or applicant who made the allegation that the hearing
4 officer has received and will investigate the allegation. The notice must include the name of the
5 person who will serve as a contact with the current or former public employee or applicant
6 making the allegation.

7 (b) If, after investigation, the hearing officer determines that there are reasonable grounds
8 to believe that a prohibited practice that requires corrective action has occurred, is occurring, or
9 is about to occur, the hearing officer shall report the findings and determination to the personnel
10 board, the agency involved, and the elected or appointed head of the agency. The report may
11 include recommendations for corrective action.

12 (c) If, after a reasonable time, the public employer does not act to correct the prohibited
13 practice, the hearing officer may petition the personnel board for corrective action. If the hearing
14 officer finds, after consulting with the current or former public employee or applicant subject to
15 the prohibited practice, that the employer has acted to correct the prohibited practice, the hearing
16 officer shall file the finding with the board, together with any written comments provided by the
17 current or former public employee or applicant and the employer.

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19 to believe that a criminal violation has occurred, the hearing officer shall report the determination
20 to the attorney general, the head of the public employer involved, and the personnel board.

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24 action against the current or former public employee or applicant making the allegation or against
25 another current or former public employee or applicant. Unless the board or board member finds
26 that the stay would not be appropriate, the board or board member shall order a stay, valid for
27 no more than 45 days. The board or board member shall act within three working days of
28 receiving a request for a stay.

29 (b) If the stay or an extension of a stay is granted, the board shall allow the public
30 employer that is the subject of a stay to comment on the stay and to request an amendment to
31 it. The board may terminate the stay at any time after notice and opportunity for oral or written

1 superior court may, on application of the personnel board, compel obedience by proceedings for
2 contempt in the same manner as in the case of disobedience to the requirements of a subpoena
3 issued by the court or refusal to testify in the court.

4 Sec. 39.90.210. DECISION BY PERSONNEL BOARD. (a) After receipt of a report
5 from the hearing officer, the personnel board may accept, amend, or reject the report or return
6 the report to the hearing officer for further proceedings.

7 (b) When the hearing officer petitions the personnel board for corrective action under
8 AS 39.90.170(c), the board shall provide an opportunity for

9 (1) oral or written comments by the hearing officer and the agency involved; and

10 (2) written comments by any current or former public employee or applicant who
11 alleges to be the subject of the prohibited practice.

12 (c) If, after review, the personnel board determines that the hearing officer has
13 demonstrated that a violation of AS 39.90.100 was a contributing factor in a personnel action that
14 was taken or is to be taken against the current or former public employee or applicant for public
15 employment, the board shall order the corrective action the board considers appropriate. For a
16 current or former public employee or applicant who has been harmed by a prohibited practice,
17 the board may order reinstatement to a previous position, promotion, transfer, the award of back
18 pay and benefits, or other personnel actions. If the board finds that a public employee, other than
19 an elected public employee or an employee confirmed by the legislative body of the public
20 employer, has violated AS 39.90.100, the board may order discipline, including suspension or
21 dismissal. The board may require that notice of its findings and determination be placed in the
22 personnel file of appropriate public employees.

23 Sec. 39.90.220. JUDICIAL REVIEW. A public employer, employee, former employee,
24 or applicant for employment adversely affected by a final order or decision of the personnel
25 board under AS 39.90.210 may appeal the decision or order to the superior court.

26 Sec. 39.90.230. REGULATIONS AND PROCEDURES. The personnel board shall adopt
27 regulations under the Administrative Procedure Act (AS 44.62) to establish procedures for
28 receiving and processing allegations, conducting investigations and hearings, reporting findings
29 and recommendations, and making decisions on them. Hearings of the personnel board under
30 AS 39.90.100 - 39.90.250 are not subject to administrative adjudication procedures under
31 AS 44.62.330 - 44.62.630.

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2 applicant on whose behalf the stay was ordered.

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26 (1) appearance and sworn testimony of a person who the personnel board or the
27 hearing officer reasonably believes may be able to give information relating to a matter under
28 investigation; and

29 (2) production by a person of a record or object that the personnel board or
30 hearing officer reasonably believes may relate to the matter under investigation.

31 (b) If a person refuses to comply with a subpoena issued under (a) of this section, the

1 superior court may, on application of the personnel board, compel obedience by proceedings for
2 contempt in the same manner as in the case of disobedience to the requirements of a subpoena
3 issued by the court or refusal to testify in the court.

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16 current or former public employee or applicant who has been harmed by a prohibited practice,
17 the board may order reinstatement to a previous position, promotion, transfer, the award of back
18 pay and benefits, or other personnel actions. If the board finds that a public employee, other than
19 an elected public employee or an employee confirmed by the legislative body of the public
20 employer, has violated AS 39.90.100, the board may order discipline, including suspension or
21 dismissal. The board may require that notice of its findings and determination be placed in the
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31 AS 44.62.330 - 44.62.630.

1 **Sec. 39.90.240. ANNUAL REPORT.** The personnel board shall submit to the legislature
2 and the public an annual report of the board's activities under AS 39.90.100 - 39.90.250.

3 **Sec. 39.90.250. EXHAUSTION OF REMEDIES NOT REQUIRED.** The provisions of
4 AS 39.90.100 - 39.90.250 do not require exhaustion of administrative, contractual, or other
5 remedies, including those provided by AS 39.90.100 - 39.90.250, before a public employee,
6 former public employee, or applicant for public employment alleging a violation may file a civil
7 action. The personnel board may not refuse to accept an allegation that is filed with the board
8 because of a civil action that was terminated without resolution on the merits of the issues raised
9 by the allegation.