

HB

85

COMMITTEE REPORT

HOUSE

FURTHER:

January 26, 1979

Date: _____

Mr. Speaker:

The Committee on JUDICIARY has had HB 85

"An Act relating to bar examination review procedures; and amending Alaska Bar Rule 7, Section 1."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for HB 85 same title
 new title
- and recommends Do Pass
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

**MEMBERS SIGNING
DO PASS**

Russell D. Pass

Tom Martin

W. Bennett

Patrick O'Connell

James Anderson

Y. D. Anderson

Charles

John

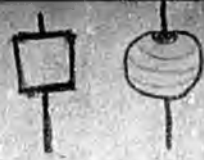
Chris

**MEMBERS HAVING
OTHER RECOMMENDATIONS:**

Chris

CHAIRMAN

HB 85
2/5/79



Bar Assn view:

appeal only on procedures, not on substance
how many examiners score test? at least two, 3rd
if disparity between first two

Norm Gorsuch -

Exam 3 parts

1. Calif part, essays (factual situations)
2. Ak " " " "
3. Multi-state part - short para, multiple choice

graded by prof. graders in Calif, use analysis giving main issues -

essays created in Ak, graders analysis

65-70 score, exams re-read, re-graded
(Ak examiners read Calif portion too)

Kevin McCarthy - lie in RI, Mass, DC
don't automatically review Ak portion -

Fred -

unconstitutional

2/17/79

Norm G.

1053 took exam, 75% passed
23 petitioned for hearing, 13 got it
40% multi state, 40% California, 20% Ak essay

Rick Helm

43 jurisdictions use multistate bar exam (1978 ed)

Barth Rozell -

applicants get: own answers
analyses
several other papers
Supreme Court Order #541 modifies Rule 7

90-100	-22	40-50	-12
85-90	-35	30-40	-9
75-80	-32	20-30	-13
60-70	-15	10-20	-6
50-60	-9	0-10	-2

HB 85

Kevin Jones - 1973 - came here
cum laude - undergraduate
Law School
3 years practical legal experience

doesn't know what to study
doesn't understand how it's graded

Oregon - Bar -

Oregonian
Fri Jan. 26
1979
Revamping of
Bar

1. eliminate multiple choice
2. allow internship (15-10)
3. # of subjects reduced
4. process of review of exam
5. out of state (eliminating residency)

he asked for a review - (if merited)
first need to show discrepancy
before a review is warranted

can only take 3 times without
special permission -

a hearing doesn't necessarily tell
how far where you goofed up

HOUSE JUDICIARY COMMITTEE MINUTES

February 5, 1979

CHAIRMAN PARR called the meeting to order at 3:10 with all members present but Representative Malone who entered later.

The subject of the meeting was House Bill 85, An Act relating to barexamination review procedures; and amending Alaska Bar Rule 7. The Chair opens the meeting to testimony.

REPRESENTATIVE JOE MCKINNON testified as prime sponsor of the bill. He introduced the bill at the request of an Anchorage person who twice failed the bar exam and felt that the lack of a right to appeal was unjustifiable. Under the present system, a examinee can review his exam and some other exams. When this person did this he found great discrepancy between his score and the score of another exam which answered the same question virtually the same. McKinnon believes the guidelines for examiners are too general and that the bar exam should primarily cover a persons competency in law, more like any other type of occupational liscensing. He believes there should be model answers to essay questions that cover the basic competency of the question.

Representative BROWN asked McKinnon if he realized any constitutional problems with the bill during drafting, to which McKinnon replied that drafter Dick Bradley thought there possibly could be Constitutional problems. Other questions from the committee members included problems with the tests and test graders being from California, questions of statistics of persons passing/failing the exam and how close the 5 points is to passing.

NORM GORSUCH appeared on behalf of the Alaska Bar Association. He explained that some of the Bar Association people who could give valid testimony were unable to be here for one reason or another. He explained the new Bar Rule 7 to the members and the procedures for examination and grading as they now exist:

C. KEVIN MCCARTHY appeared on behalf of himself in support of the legislation having experienced similar problems as MCKINNON'S constituent.

Representative FRED BROWN testified on behalf of himself. He expresses a strong belief that the legislature has no jurisdiction over Court Rules under the state's Constitution

After continued discussion on the same lines Chairman PARR suggests to the committee that they hold the bill for a few days pending further testimony from the American Bar Association.

Meeting adjourned at 4:50p.m.



Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99801

TO: House Judiciary Committee Members
FROM: *Lucky* Rocky Plotnick, Committee Assistant
DATE: February 5, 1979
SUBJECT: HB 85

I just talked with Kevin Jones in Anchorage and he wanted me to pass some information along to the Committee regarding HB 85. Mr. Jones is a law school graduate and has had three years practical legal experience in Alaska. He has taken the Alaska Bar Exam twice and failed it twice. His comments are:

1. When taking the Alaska Bar Exam a person does not know what to study or how the exam is graded.
2. A review is granted (of the exam) only if it is warranted. A discrepancy must first be shown.
3. The Alaska Bar Exam can be taken three times. Special permission is required after that.
4. The State of Oregon has been reviewing its bar admittance procedure and has come up with the following recommendations:
 - a. elimination of the multiple choice section
 - b. allow internships in place of an exam with proper endorsement
 - c. reduce the number of subjects covered from 15 to 10
 - d. establish a review process of the exam.

HOUSE BILL 85

1. Passing percentage for the last five years:

	# of Applicants	% of Passing Applicants
February, 1973	43	67
July, 1973	52	71
February, 1974	44	90
July, 1974	83	83
February, 1975	69	79
July, 1975	82	69
February, 1976	96	76
July, 1976	97	79
February, 1977	108	76
July, 1977	124	78
February, 1978	100	65
July, 1978	125	72
	<u>1023</u>	75.42% (average percent)

2. Number of failures (five year period) - 252 ^{64 = 25%}

3. How many repeated and passed?

From the information I researched, approximately 64 repeated and passed.

4. How many failures petitioned for a hearing?

Again, from that research, it appears 23 petitioned for a hearing.

5. How many failures were granted a hearing by the Board of Governors?

Records indicate 13 people were granted a hearing.

6. What are procedures on granted hearings?

If there appears to be grounds, the Board appoints a Master to investigate.

Kevin McCarthy

Dept. Revenue

Chairman Parr
Committee on Judiciary
Alaska House of Representatives

Dear Representative Parr,

Once again, I want to thank you and the other members of the Judiciary Committee for allowing me to testify on HB 85, the proposed change in Alaska Bar Rule 7.

What HB 85 proposes is not a radical intrusion on the part of your committee into the internal affairs of the Bar Association. It is rather, a recognition on your part, that the Bar Association does not presently comply with the spirit of Alaska Bar Rule 7, in that it arbitrarily rejects requests for a hearing, even when those requests are founded on questions of law and statutory interpretation, as mine was, and not merely on disagreement over assigned grades.

HB 85 would alleviate that problem by establishing a set standard applicable to all candidates. To my way of thinking, establishing uniform standards and removing discretion, especially in view of the fact that the Bar Association evidently exercises its judgement in bad faith, is more constitutional, and not less constitutional. HB 85 removes a constitutional defect in the Rule, by guaranteeing due process and equal protection to all candidates, and not merely the select few whom the Board of Governors favors with a hearing.

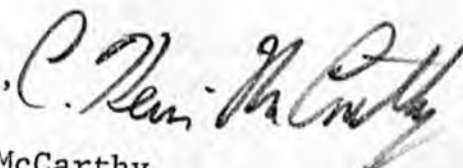
A In my case, I filed the attached Statement of Appeals and First amended Statement of Appeal on November 20 and 21, 1978, within the period prescribed by Alaska Bar Rule 7 sec. 1.

On December 18, I received the second attachment, a letter from Ken Jarvi, President of the Alaska Bar Association, informing me that the Board of Governors had reviewed my Statement of Appeal and found it to be insufficient to warrant a hearing. His answers to several of my points of appeal were not responsive, and I still believe there are questions of fact and law at issue which would warrant a hearing.

Had I been granted a hearing, then I would have been given Findings of Fact, Conclusions of Law, and a Decision, pursuant to Alaska Bar Rule 7 sec. 12, and I could've appealed the decision pursuant to Alaska Bar Rule 8. I have bona fide arguments to make, but, very possibly, no forum to make them in. I am preparing to ask the Supreme Court of Alaska to hear my petition, but the question of whether they will sit as a court of original jurisdiction, instead of just reviewing a record from below, is not clear.

I am in a state of legal limbo, or as Representative Brown aptly phrased it a "Catch 22 situation". My rights would be clear if HB 85 were law, and I urge you to enact it.

Sincerely,


C. Kevin McCarthy

In the matter of the application of)
C. KEVIN McCARTHY)
For admission to the Practice of Law)
in Alaska and membership in the)
Alaska Bar Association)

Statement of Appeal

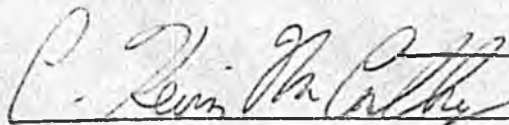
Petitioner C. Kevin McCarthy hereby requests a hearing on the failure of the Board to certify him to the Supreme Court of Alaska for admission to the Alaska Bar Association, pursuant to Alaska Bar Rules Rule 7, section 1

Petitioner relies on the following grounds, severally and cumulatively.

1. Petitioner did not fail to receive a score of 70% of the highest possible grade on the July 1978 Alaska Bar exam. Petitioner's score of 69.6% is in fact 70% of the highest possible grade and petitioner alleges an abuse of discretion on the part of the Committee of Law Examiners in not rounding his score off to 70
2. Petitioner states that neither the Committee of Law Examiners, the Board of Governors of the Alaska Bar Association, nor any of its officers have ever promulgated written standards for determining exact examination scores. Petitioner further states that given the great importance of the subjective judgements that the Committee of Law Examiners must make, and the tolerance or margin of error which must be contemplated and allowed for when human subjectivity is exercised, that this failure to promulgate written standards amounts to a denial of substantive due process and an abuse of discretion by the Board of Governors.
3. Petitioner states, and will prove to a mathematical certainty, that while the Committee of Law Examiners has credited him with a score of 69.6, that he in fact should have been credited with a score of 69.7, and this demonstrates how the lack of precise grading regulations can and did harm petitioner and operate as an abuse of discretion.
4. Petitioner further states that the Committee of Law Examiners recognizes the uncertainty and arbitrariness of essay grading and in fact conducts a review of the California essays for that reason. Petitioner states that the Committee's failure to conduct a similar review of the Alaska essays is an abuse of discretion.
5. Petitioner states that the Alaska Bar Association Rule 4, section 6 is an unfair rule in that it fails to take into consideration the changing level of difficulty of the Multistate Bar Exam, and sets a standard of 135 as a score of 70% rather than selecting whatever scaled score from that particular administration of the test corresponds to the desired level of achievement for a score of 70%. Petitioner further states that this operates as a denial of equal protection to that group of candidates who compose the class of candidates who substitute an MBE score obtained in a prior administration of the MBE exam, and that this results in an abuse of discretion.
6. Petitioner states that on either October 26, 1978 or October 27, 1978, 23 days ago, he did request in writing, pursuant to Alaska Bar Rule 4, section 5, to review his exam books and the representative sampling of passing and failing answers to the bar examination in Bethel, Alaska, as soon as possible. Petitioner further states that Bethel is presently home to 1 Superior Court House and Judge and nine

C. Kevin McCarthy
AVCP
Box 219
Bethel, AK 99559
(907) 543-3521

other attorneys who are members in good standing of the Alaska Bar Association, anyone of whom could serve ably as proctors during his review of the exam books. Petitioner alleges that the Alaska Bar Associations failure to respond to his request is further abuse of discretion, in that it has unreasonably deprived him of the timely opportunity to review his exam that all residents of Anchorage, Fairbanks, Juneau and other urban areas of the state have.



C. Kevin McCarthy, Petitioner

DATED: 11-20-78



Notary Public

C. Kevin McCarthy
AVCP
Box 219
Bethel, AK 99559
(907) 543-3521

In the matter of the application of)
C. Kevin McCarthy)
For admission to the Practice of Law)
in Alaska and membership in the)
Alaska Bar Association)

Statement of Appeal
First Amended

Petitioner C. Kevin McCarthy, stating that the time period for filing a Statement of Appeal has not passed, makes the following amendment to his Statement of Appeal of November 20, 1978.

Grounds 1 thru 6 inclusive are hereby incorporated by reference to this Statement.

7. Petitioner states that the Alaska Essay section of the July 1978 Alaska Bar Exam is not truly representative of an exam on the law of Alaska, in that it fails to question candidates on their knowledge of truly Alaskan legal principles of the Limited Entry Fishing Laws, Alaska Native Claims Settlement Act, Native Land Claim Allotments, Public Land Laws, and the Revenue Laws of the State of Alaska pertaining to Oil and Gas Severance and Income Taxes. Petitioner further states that if the Committee of Law Examiners were to truly examine a candidate on his knowledge of the law of Alaska, they would include mandatory or optional questions on some or all of these subjects. Petitioner further states that attorneys, such as himself, who have immersed themselves in the knowledge of these subjects, which form the backbone of the unique cultural, commercial, and financial jurisprudence of this state, are disadvantaged by the Committee's failure to do so and that failure constitutes an abuse of discretion on the part of the Committee of Law Examiners.



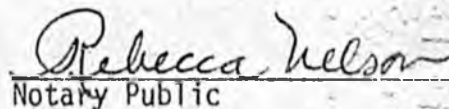
C. Kevin McCarthy, Petitioner

C. Kevin McCarthy
AVCP
Box 219
Bethel, AK
(907) 543-3521

99559

DATED: _____

11-21-78



Notary Public

My Commission Expires
April 2, 1979

ATTACHMENT # 2

BOARD OF GOVERNORS

ALASKA BAR ASSOCIATION

OFFICERS
KENNETH O. JARVI
PRESIDENT
ANCHORAGE
DONNA C. WILLARD
PRESIDENT ELECT
ANCHORAGE
ALBERT H. BRANSON
VICE PRESIDENT
ANCHORAGE
RICHARD D. SAVELL
SECRETARY
FAIRBANKS

P. O. BOX 279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

RONALD L. KULL, EXECUTIVE DIRECTOR
WILLIAM GARRISON, BAR COUNSEL

BOARD MEMBERS
ALBERT H. BRANSON
STANLEY T. FISCHER
KAREN L. HUNT
KENNETH O. JARVI
EDWARD G. KING
JONATHAN H. LINK
WILLIAM B. ROZELL
RICHARD D. SAVELL
DONNA C. WILLARD

December 8, 1978

C. Kevin McCarthy
Box 219
Bethel, Alaska 99559

RE: Admissions Appeal

Dear Mr. McCarthy:

The Board of Governors on December 3, 1978, reviewed your statement of appeal and the amendments. The appeal is rejected for the following reasons:

1. In reference to your allegation #1 as set forth in your letter of November 20, 1978, it does not appear that you understand the Board's policy regarding the rounding of test scores. Rounding is done at the one-hundredth percentile point not at the tenth decimal point. In other words, in order for your score to be rounded to 70% you would have to have received a 69.95% or better. The score of 69.6% was your final score after rounding.

2. Written standards have been established for determining exact examination scores and have been used consistently in determining the final grade. The scores are exact to the degree that the final scores are carried out to the second decimal point.

3. The score sheet has been reviewed and your final rounded composite score was again determined to be 69.6%. Assuming, for the sake of argument, that you did receive a 69.7% you nevertheless would have failed the exam.

4. The Supreme Court, in In re Butterfield, 581 P. 2d 1109 (Ak. 1978) considered the issue regarding review of the Alaska Essay Portion of the exam and rejected the argument that you advance at number four of your allegations.

APPLICATION OF BUTTERFIELD

Alaska 1109

CITE AS, ALASKA, 541 P.2d 1109

Application of Rhonda F. BUTTERFIELD, for Admission to the Practice of Law in the State of Alaska and Membership in the Alaska Bar Association.

No. 1659.

Supreme Court of Alaska.

July 14, 1978.

An applicant for admission to the Alaska Bar appealed from an order of the Board of Governors of the Alaska Bar Association refusing to regrade the Alaska essay portion of the applicant's Alaska Bar examination. The Supreme Court, Burke, J., held, *inter alia*, that denial of neither due process nor equal protection occurred by virtue of the Board's refusal to regrade the Alaska portions of the examination.

Affirmed.

1. Constitutional Law — 230.3(9), 287.2(5)

Neither due process nor equal protection was denied to applicant for admission to Alaska Bar by virtue of refusal of Board of Governors of Bar Association to regrade Alaska portions of applicant's bar examination. State Bar Rules, rules 1, § 3, 4, § 6.

2. Attorney and Client — 6

Policy of Board of Governors of Alaska Bar Association not to regrade Alaska essay questions contained in Alaska bar examination did not constitute abuse of discretion

1. Rule 23, Alaska R.Civ.P., provides in pertinent part:

(c) *Determination by Order Whether Class Action to Be Maintained—Notice—Judgment—Actions Conducted Partially as Class Actions*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

2. Alaska Bar Rule 1, § 3, provides:

The Board shall examine or provide by contract or otherwise for the examination of all applicants for admission to the practice of law and shall determine or approve the time,

on theory that it denied applicants possibility of increase in scores from application of "whole person" concept to their Alaska scores. State Bar Rules, rules 1, § 3, 4, § 6.

Lloyd I. Hoppner, Rice, Hoppner & Hedland, Fairbanks, for appellant.

William W. Garrison, Alaska Bar Ass'n, Anchorage, for appellee.

Before BOOCHEVER, C. J., and RABINOWITZ and BURKE, JJ.

OPINION

BURKE, Justice.

Rhonda F. Butterfield appeals from an order of the Board of Governors of the Alaska Bar Association ("the Board") refusing to regrade the Alaska essay portion of her February, 1977, Alaska Bar Examination. The appeal was filed as a class action but no certification of the class was obtained as required by Rule 23, Alaska R.Civ.P.¹ Therefore, our opinion is limited to consideration of the issues as to Butterfield alone.

I

Appellant's arguments are comprehensible only if one understands the grading procedures utilized by the Board, which is charged with the responsibility for administering and grading the Alaska Bar Examination.² The Alaska Bar Examination con-

place, scope, form and content of all bar examinations. Bar examinations may, in whole or in part, be prepared, administered and graded by or in cooperation with other states or the National Conference of Bar Examiners consistent with standards fixed or approved by the Board acting with the advice of the Committee of Law Examiners. No contract or cooperative agreement for the preparation, administration or grading of a bar examination shall operate to divest the Board of its authority (1) to cause the Committee to review any examination, and (2) independently to determine the eligibility of an applicant to be admitted to the practice of law. The Board or any member thereof may require an applicant to appear before the Board, a committee or a master appointed by

5. Regarding the MBE portion of the exam, answers to the MBE portion are returned to the National Conference of Bar Examiners where they are scored by computer.

In February, 1974, the MBE program developed the use of "scaled scores". A scaled MBE score is a standard score converted from a raw MBE score (number of correct answers) based on the re-use of questions from prior examinations. The scaled score represents the same level of ability of applicants from test to test though the difficulty of the test and the ability of the examinees may vary. The Educational Testing Service will report to each state a raw score and a scaled score for each applicant then the state has the choice of using either score. The Supreme Court of the State of Alaska has determined that a scaled MBE score of 135 is equivalent to 70%.

The purpose of converting scores to a scale is to make reported scores as independent as possible of the particular form of a test an examinee has taken and the composition of the candidate group at a particular administration. A particular scaled score, for example, of 135, is intended to indicate the same level of ability from year to year and from examination to examination. In other words, if an applicant took a second MBE exam, assuming he maintained the same level of ability, his scaled score on the second exam should be the same as that obtained on the first exam even though one test may have been more difficult than the other and the applicants raw score is different in each examination. Since MBE testing and the use of scaled scores ostensibly not only eliminates the subjective element inherent in essay exams but also does away with the variables which occur due to the degree of difficulty which exist between different exams Alaska Bar Rule I-4 Section 7 allows an examinee to transfer his most recent MBE scaled score, taken within one year prior to the Bar exam, from any other state and thereby to be excused from the MBE exam administered in Alaska.

Before computing the combined scores, all MBE scaled scores are adjusted or converted to place them on a common scale with the essay scores. The converted score will be a percentage ranging from one (1) and one-hundred (100) with seventy (70) percent equivalent to an MBE scaled score of one-thirty-five (135). The converted scores can then be added to the essay scores.

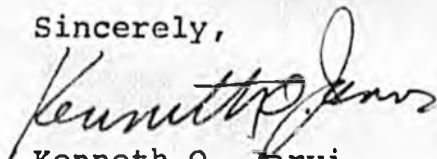
6. Alaska Bar Rule 4 Section 5 states that exam review material shall be available in the Bar office in Anchorage or other places designated by the Board. It is Board policy to send the exam booklets, etc. to a member of the Board of Governors in the area where the applicant resides. In that there is no member of the Board of Governors residing in Bethel the Board determined that Judge Christopher Cook was a suitable person to assume responsibility for the exam items. The material was sent by certified mail to Judge Cook on November 16th. A copy of the letter of transmittal was sent to you on that date also.

C. Kevin McCarthy
December 8, 1978
Page - 3

7. The Alaska Supreme Court, in In re Kennelly, 567 P. 2d 301 (Ak. 1977) has ruled that the Alaska Bar Examination need not allow applicants an opportunity to demonstrate their mastery of legal subjects in which they may have a particular interest and knowledge.

The allegations as set forth in the varified statement of appeal are not sufficient to establish abuse of discretion or improper conduct on the part of the Board, the Executive Director or the Committee.

Sincerely,



Kenneth O. Jarvi
President
Alaska Bar Association

KOJ/lms

sists of three separate parts: (1) the Multi-State Bar Examination which constitutes two-fifths of the examination; (2) California Bar Examination essay questions which make up another two-fifths of the examination; and (3) essay questions concerning Alaska law which account for the remaining one-fifth of the examination. An overall score of 70% is required to pass the examination. Alaska Bar Rule 4, § 6.

The California portion of the examination is sent to California where the answers to each question are graded by one person. In contrast, the answers to each of the Alaska essay questions are graded, in Alaska, by two graders. If there is a significant disparity between the grades assigned to an Alaska essay, a third grader reviews the essay to resolve the difference. Pursuant to Regulation 8 of the Regulations Concerning Grading of Examinations,³ the California essays of those receiving an overall score of 65-70% are regraded by Alaska graders. The Board has no similar regrading procedure for the Alaska essays.

Butterfield received an overall score of 68.9% upon the first grading of her examination. Upon the regrading of her answers to the California essay questions, as provided by Regulation 8, her overall score increased to 69.6%, still a failing score. In spite of the Board's policy not to regrade the Alaska essays, Butterfield petitioned the Board requesting that that portion of her examination also be regraded. In her petition she alleged that the Board's policy of not regrading the Alaska essays was arbitrary and an abuse of the Board's discretion. She further alleged that the Board's policy denied her due process and equal protection of the law. The Board

the President for such purpose, at such times and places as may be required, for oral examination and to furnish any such supplemental information or evidence in such form as may be required.

3. Alaska Bar Regulation 8 provides:

Scores received on the California essay portion of the examination will be reappraised by the graders

if the applicant's weighted combined score (total essay plus MBE) falls between 65 and 70 percent; or

denied her petition to regrade the Alaska essays. By this appeal, appellant seeks an order that her February, 1977, Alaska essays be regraded.

II

[1] Butterfield contends that the Board's refusal to regrade the Alaska portions of her examination denied her due process and the equal protection of the law. Because appellant's rationale for each of these arguments is identical, the two issues will be treated together.

The question presented by appellant's equal protection argument is whether the Board's policy by which those with an overall examination score between 65 and 70 receive a regrading of their California examination questions but not of their Alaska questions, bears a fair and substantial relation to the purpose of examining applicants, when the means used and the reasons advanced therefore are closely scrutinized. *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976).

For the due process clause to apply there must be "state action and the deprivation of an individual interest of sufficient importance to warrant constitutional protection." *Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1973). Butterfield argues that the pursuit of a career in law is an interest worthy of constitutional protection and that the action of the Board constitutes state action. Appellant concludes her due process argument asserting that the Board's policy of reappraising the California essays and not the Alaska essays denies her due process of law because it bears no rational connection

if the applicant's weighted total essay score is 65 or greater.

Two graders will be assigned to each borderline applicant to reappraise the California essay examinations. Each grader will assign one grade for all answers. The two grades will be averaged to determine a final reappraisal score that will then be weighted and averaged with the Alaska essay and MBE scores.

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to determining minimal competence to practice law.⁴

In support of her position that the Board's policy satisfies neither the equal protection test of *Isakson v. Rickey, supra*, nor the requirements of due process, Butterfield contends that the sole reason for regrading the California essays is a sense of mistrust of the California graders. She argues that such mistrust is without support or foundation; that a vague sense of mistrust is insufficient justification for treating the California exam questions differently from the Alaska questions; and that therefore the Board's policy of regrading only the California exams is arbitrary.⁵

Appellant concludes her argument for finding the Board's policy violative of equal protection and due process requirements by asserting that the Board's policy appears to be particularly arbitrary in light of the Board's position in *Application of Kennelly*, 567 P.2d 301 (Alaska 1977). In *Kennelly* we concluded that by contracting with California for the supply of California questions and the grading of the California essays, the Board had not violated the rule⁶ requiring that it retain authority over testing. We agreed with the Board that it was within its discretion "to take advantage of the . . . expertise and experience available to the California bar examiners . . ." *Id.* at 303. Butterfield contends that the Board's mistrust of California graders contradicts the Board's assertion of reliance on their expertise as set forth in *Kennelly*. She points to this alleged contradiction as support for her argument that the Board's policy is arbitrary.

We find no merit in appellant's arguments. The only support Butterfield sets forth for her argument that the regrading of the California essays is conducted out of a sense of mistrust is a quotation from the deposition of one of the Alaska graders of

the bar exam. The quotation upon which appellant relies is taken out of context and reading the quotation as a whole, it is clear that appellant's interpretation is untenable. The quote in no way suggests that the Board mistrusts the California graders.

Similarly appellant's contention that the regrading procedure contradicts the Board's position in *Kennelly* does not survive scrutiny. As we noted in *Kennelly*, the Board is given broad discretion to conduct and grade the bar examination. The Board does not regrade all of the California essays. It regrades only those of applicants receiving an initial overall score of 65-70%. Appellant has not challenged that classification nor does she suggest that the members within that group are treated differently. The Board continues to rely on the expertise of the California graders for the grading of those exams with scores of less than 65% and more than 70%.

We think it entirely reasonable for the Board to have a reappraisal policy of the California essays for those candidates on the borderline of passing in light of the fact that without reappraisal, the California essays would be graded by only one grader. This double-check ensures that a single California grader does not assess a candidate's essays too harshly. It seems reasonable to assume that such an occurrence would have a significant effect only in the case of candidates on the borderline so that a review of the California essays of those in the borderline group is entirely justified. The same danger does not exist as to the Alaska questions because they are reviewed initially by at least two graders.

Because we conclude that the Board's policy is a reasonable grading procedure and consistent with the Board's broad grant of authority to examine and grade applicants for admission to the Alaska Bar, we hold that appellant was not denied due

4. Butterfield does not contend that she was denied procedural due process as required by *Application of Peterson*, 459 P.2d 703 (Alaska 1969), as she pursued her *Peterson* remedies including the opportunity to compare her exam with model answers.

5. Appellant does not suggest, however, that the Board discontinue regrading the California essays of the applicants with scores of 65-70% in order to achieve consistency.

6. See note 2, *supra*.

process of law. Similarly we conclude that the Board's policy satisfies the requirements of equal protection as enunciated in *Isakson*.⁷

[2] Appellant premises her final challenge to the Board's regrading policy on a slightly different aspect of the regrading procedure. Upon regrading the California essays, the Alaska graders may apply what is called the "whole person" concept. The "whole person" concept comes into play if the grader, upon totalling the separate California essay scores, feels that the number does not accurately represent the applicant's performance on the California essays. Under those circumstances the grader, in his or her discretion, may increase the score of the applicant.

Butterfield contends that the policy of not regrading Alaska essay questions denies applicants the possibility of an increase from the application of the "whole person" concept to their Alaska scores. She concludes that the denial of this possibility is an abuse of discretion.⁸

We are unconvinced by appellant's argument. As we noted previously, the grant of authority given the Board to conduct and grade the bar exams is broad. A certain amount of flexibility is required in order for the graders to assess fairly the performance of applicants. The occasional application of the "whole person" theory appears to be well within the sort of flexibility required to perform the grading task fairly. We cannot agree with appellant that the occasional application of this theory to the California essays and the refusal to apply it to the Alaska essays rises to the level of an abuse of discretion.

AFFIRMED.

CONNOR and MATHEWS, JJ., not participating.

7. Our conclusion that the circumstances in this case satisfy both the equal protection and the due process tests is not meant to suggest that in all cases the tests are co-extensive.

NORTH SLOPE BOROUGH, Appellant,

v.

Robert LeRESCHÉ, Commissioner of Alaska Department of Natural Resources, Michael C. T. Smith, Director, Division of Lands, Alaska Department of Natural Resources and the State of Alaska, Appellees.

No. 3275.

Supreme Court of Alaska.

Aug. 4, 1978.

Borough appealed from the Commissioner of Natural Resources' rejection of its application to select state lands overlaying the Prudhoe Bay oil field. The Superior Court, Third Judicial District, Eben H. Lewis, J., rendered judgment for the Commissioner and borough appealed. The Supreme Court, Matthews, J., held that: (1) the Commissioner had the authority to reject the selection application on the grounds that it was inconsistent with the best interests of the state, and (2) the Commissioner did not abuse his discretion in rejecting the selections made by the borough.

Affirmed.

1. Public Lands ⇔ 142%

State Commissioner of Natural Resources had authority to reject borough selection application on ground that it was inconsistent with best interests of state. AS 29.18.190.

2. Public Lands ⇔ 142%

When state rejects selection application as contrary to best interests of state, it

8. The graders do not have information as to the names of those taking the examination, and it is not contended that the selection of applicants for application of the "whole person" concept is made on an arbitrary basis dependent upon the identity of the examinee.

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THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 341

Amending Alaska Bar Rules
7 and 8, Relating to
Admissions and Adding a
New Section, 7.1.

IT IS ORDERED:

1. Sections 6, 7, 8, 9, 10, 11, and 12 of Rule 7, Alaska Bar Rules, are deleted and a new section 6 is added to read:

Section 6. Only the following materials shall be subject to production by the Alaska Bar Association in any proceedings held pursuant to this Rule:

(a) Where certification for admission to practice has been denied, the failing applicant has the right to inspect his examination books, the grades assigned thereto, the examination questions, the graders' analyses of the questions and a representative sampling of passing and failing answers to the bar examination at the office of the Alaska Bar Association or at such other place and such time or times as the Board may designate;

(b) Where an examination permit has been denied because of failure to meet residency requirements, the applicant has a right to inspect the minutes of any meeting of the Board of Governors at which his application has been discussed, together with a synopsis of the facts with respect to any other person who, within the last two years, has been denied an examination permit for the same reason; and

(c) Where an examination permit has been denied on the basis of character, the applicant has a right to inspect the minutes of any meeting of the Board of Governors at which his application has been discussed, together with a statement of the

specific grounds upon which denial of the permit was based.

2. The Alaska Bar Rules are amended by adding a new section, 7.1, to read:

Rule 7.1. Procedures.

Section 1. All hearings before the master shall be electronically recorded with facilities provided by the Alaska Court System. The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision. The record may be destroyed two years following the last date upon which administrative appeal rights may be available under the provisions of this rule.

Section 2. From the time he has been designated to preside until issuance of his proposed decision and the transfer of the proceeding to the Board, the master shall have the following authority to:

- (a) take or cause depositions to be taken;
- (b) require the filing of memoranda of law and the presentation of oral argument with respect to any question of law upon which a ruling will be required;
- (c) hold conferences for the settlement or simplification of the issues by consent of the parties;
- (d) dispose of procedural requests;
- (e) establish the time limitations for the filing of pleadings and set the times for any hearings;
- (f) preside at and regulate the course of the hearing, maintain decorum, and exclude from the hearing any person engaged in contentious conduct or otherwise disrupting the proceedings;
- (g) administer oaths and affirmations;

- (h) examine witnesses;
- (i) rule upon questions of evidence; and
- (j) render interlocutory decisions which are appealable to the Board of Governors of which no fewer than three members shall constitute a quorum.

Section 3. The Alaska Rules of Civil Procedure shall not apply to proceedings held pursuant to Rule I-7.

Section 4. The applicant shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, even if not covered in direct examination, to impeach any witness regardless of which party called him, and to rebut the evidence against him. The applicant may be called and examined as a witness in cross-examination whether or not he testified on his own behalf. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient standing alone to support a finding unless it would be admissible over objections in civil actions. Irrelevant and unduly repetitious evidence shall be excluded. The sworn testimony of a witness subpoenaed under these rules shall be deemed testimony received in a judicial proceeding. In any action for defamation arising out of such sworn testimony, the witness shall be entitled to the defense of privilege to the same extent available to witnesses in judicial proceedings with the State of Alaska.

Section 5. The master shall prepare in writing a proposed decision supported by findings of fact and conclusions of law. In cases in which the majority of the Board was not present during the

evidentiary hearing, the master shall file the proposed decision with the Board and cause the entire record to be certified to the Board for decision. The record, upon payment of costs, shall be made available to the applicant. Copies of the proposed decision shall be served by the master on the applicant or his attorney of record and on the Executive Director, or the Bar Association's attorney of record. Within twenty days after service of the proposed decision, the applicant and the Executive Director or attorney for the Alaska Bar Association may file exceptions and briefs and, upon request, may appear and present oral argument to the Board. Copies of the exceptions and briefs, when filed, shall be served on the applicant or the Executive Director or attorney for the Bar Association, as the case may be.

Section 6. The Board may adopt the proposed findings, conclusions and decision, ruling or order of the master in whole or in part or reject it in its entirety and adopt its own findings of fact, conclusions of law, decision or order.

Section 7. The findings of fact, conclusions of law and final decision of the Board shall be conclusive as to the matter alleged in applicant's statement of appeal unless an appeal to the Supreme Court shall be filed within thirty days following service upon applicant of the findings of fact, conclusions of law and decision in the manner provided by these rules.

3. Rule 8, Alaska Bar Rules, is rescinded and re-promulgated to read as follows:

Rule 8. Supreme Court Review.

Section 1. Any interlocutory order of the Board of Governors may be subject to review as provided in Part VI, Rules of Appellate Procedure.

Section 2. An appeal to the Supreme Court may be filed by an applicant from a decision of the Board entered as provided in Section 7 of Rule 7.1.

Section 3. To the extent practicable, the procedure governing an appeal by an applicant for admission to the practice of law from a final decision of the Board of Governors shall be governed by the rules of practice in civil matters set forth in Part IV, Rules of Appellate Procedure.

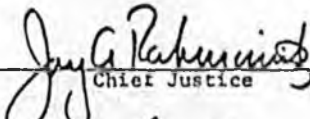
Section 4. The filing fees normally charged for matters brought before the Supreme Court shall be applicable in all admissions cases.

DATED: December 18, 1979


EFFECTIVE DATE: April 1, 1979

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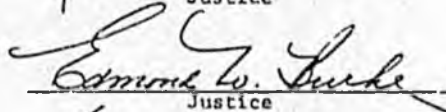
Chief Justice



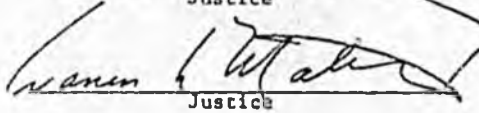
Justice



Justice



Justice



Justice

ignated by the code number of each, the maximum possible point value of each bar examination part or section and other information the committee or the board may deem relevant.

Section 4. The board shall determine the qualifications of each applicant upon the basis of the report of examination, the recommendations of the executive director, and such other matter it may consider pertinent under these rules. The board shall certify to the supreme court the results of the bar examination and its recommendations as to those applicants who are determined qualified for admission to the practice of law and who have complied with the provisions of Rule 6. Notice of the board's determination shall be provided in writing to each applicant. Notice to an applicant determined not qualified shall state the reason for such determination.

✓ Section 5. If written request is made of the board within one month following notice of failure to pass a bar examination and except to the extent that such material or information is unavailable under the rules or policies of the National Conference of Bar Examiners, an applicant who takes and fails to pass the bar examination has the right to inspect his examination books, the grades assigned thereto, and a representative sampling of passing and failing answers to the bar examination at the office of the Alaska Bar Association, or at such other place and at such time or times as the board may designate. An applicant who passes the bar examination is not entitled to inspect any examination books or discover the grades assigned thereto

Section 6. The passing grade of the bar examination shall be seventy percent of the highest possible grade. A scaled score, as determined by the National Conference of Bar Examiners, of 135 on the Multistate Bar Examination shall be the equivalent of seventy percent of the highest possible grade on that portion of the examination. (Amended by Supreme Court Order 247(I) effective April 1, 1976)

Section 7. An applicant who has taken the Multistate Bar Examination within one year prior to the bar examination as part of an examination required by a state, territory or the District of Columbia for admission to the practice of law may

Introduced: 1/26/79
Referred: Judiciary

1 IN THE HOUSE

BY MCKINNON

2 CS HOUSE BILL NO. 85
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 ELEVENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to bar examination review procedures:
7 and amending Alaska Bar Rule 7, Section 1."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. Alaska Bar Rule 7, section 1 is amended to read:

10 SECTION 1. An applicant who has been denied an examination permit
11 or who has been denied certification to the Supreme Court for admission
12 to practice shall have the right within thirty days after notice of such
13 denial to file with the Board a written verified statement of appeal.
14 Failure timely to file an appeal statement shall constitute waiver of
15 appeal rights. In his statement an applicant shall state all grounds
16 upon which he intends to rely and may:

17 (a) object to the form of notice from which such appeal is taken
18 on the ground that it is so indefinite or uncertain that he cannot
19 reasonably prepare his statement;

20 (b) present new matter on which he relies to establish his eligi-
21 bility for admission to practice.

22 An applicant who is denied an examination permit or who is denied
23 certification shall allege facts which, if true, would establish an
24 abuse of discretion or improper conduct on the part of the Board, the
25 Executive Director, the Committee or a master. If the allegation in the
26 verified statement are found to be sufficient by the Board, a hearing
27 shall be granted. A hearing shall be granted in all cases where the
28 applicant requests it and the score of the applicant on the bar examina-
29 tion is within five points of the passing grade of the bar examination.

delete

~~The applicant shall be given access to his examination questions, his answers to those examination questions, and the model answers for the particular examination together with a representative sampling of the examination papers of other applicants who received overall passing and overall failing grades.~~

* Sec. 2. Section 1 of this Act amends the Rules of Court (Rule 7 of Part I of the Alaska Bar Rules).

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Referred: Judiciary

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3 particular examination together with a representative sampling of the
4 examination papers of other applicants who received overall passing
5 and overall failing grades.

6 * Sec. 2. Section 1 of this Act amends the Rules of Court (Rule 7 of Part
7 I of the Alaska Bar Rules).

1976 Statistics

The following information, compiled by the National Conference of Bar Examiners for the 1976 examinations, in-

State	1976 Exam	First time appli-cants	Repeat appli-cants	Percentage passing																	
				10	20	30	40	50	60	70	80	90	100								
Alabama	Feb.	73	56																		
	July	322	38																		
Alaska	Feb.	76	20																		
	July	86	11																		
Arizona	Feb.	127	49																		
	July	353	31																		
Arkansas	March	68	6																		
	Aug.	144	12																		
California ¹	Feb.	1,175	1,958																		
	July	5,179	1,590																		
Colorado	Feb.	224	61																		
	July	458	58																		
Connecticut	Feb.	103	63																		
	July	411	20																		
Delaware	Feb.	0	18																		
	July	111	22																		
District of Columbia	Feb.	97	224																		
	July	559	153																		
Florida	No figures available																				
Georgia	Feb.	747	261																		
	July	402	416																		
Guam	March	4	0																		
	Sept.	10	0																		
Hawaii	Feb.	53	12																		
	July	189	14																		
Idaho	Feb.	44	13																		
	July	114	8																		
Illinois	Feb.	566	171																		
	July	1,611	94																		
Indiana	Feb.	174	35																		
	July	381	21																		
Iowa	Jan.	121	34																		
	June	388	13																		
Kansas	Feb.	79	11																		
	July	253	9																		
Kentucky	Feb.	108	28																		
	July	293	20																		
Louisiana	Feb.	115	78																		
	July	501	49																		
Maine	Feb.	35	8																		
	July	149	7																		
Maryland	Feb.	205	260																		
	July	590	160																		
Massachusetts	Feb.	222	275																		
	July	1,336	151																		
Michigan	Feb.	377	49																		
	July	844	44																		
Minnesota	Feb.	204	32																		
	July	542	23																		
Mississippi	Feb.	53	47																		
	July	57	63																		

First time Repeat ¹These statistics not kept on 487 taking Attorney Examination.

dicates the percentage of applicants passing in each jurisdiction and further subdivides the passing statistics into those who took the exam for the first time and those who were repeating the exam.

State	1976 Exam	First time applicants	Repeat applicants	Percentage passing										
				10	20	30	40	50	60	70	80	90	100	
Missouri	Feb.	181	48											
	July	515	18											
Montana	Oct.	39	7											
Nebraska	Jan.	58	17											
	June	226	5											
Nevada	July	144	22											
New Hampshire	Feb.	MBE only	21											
	July	125	13											
New Jersey	Feb.	240	258											
	July	1,343	185											
New Mexico	Feb.	49	48											
	July	172	22											
New York	March	440	810											
	July	3,622	158											
North Carolina	July	596	53											
North Dakota	Feb.	8	2											
	July	93	3											
Ohio	Feb.	237	82											
	July	1,260	92											
Oklahoma	Feb.	119	6											
	July	276	12											
Oregon	Feb.	44	41											
	June	465	37											
Pennsylvania	Feb.	401	154											
	July	1,577	128											
Puerto Rico	March	149	173											
	Sept.	333	261											
Rhode Island	Feb.	24	13											
	July	115	6											
South Carolina	Feb.	59	8											
	July	248	9											
South Dakota	July	18	0											
Tennessee	Feb.	154	82											
	July	400	36											
Texas	Feb.	543	45											
	July	1,122	53											
	Nov.	327	50											
Utah	Feb.	66	3											
	July	173	6											
Vermont	July	96	11											
Virgin Islands	July	21	3											
Virginia	Feb.	493	93											
	July	443	48											
Washington	Feb.	189	127											
	July	660	61											
West Virginia	Feb.	20	4											
	July	37	2											
Wisconsin	July	183	13											
Wyoming	Feb.	10	5											
	July	61	5											
Total		38,485	10,127											

First time Repeat ²Not counting 487 who wrote Attorney Examination, February and July, 1977.

Difference between Bar Rules
(even new ones) and Bill:

Bill would automatically
give examinee a rt. to a
hearing. (if exam between 65-70.)

According to Bar Rules, would
be discretionary with the
Board of Gov. of Bar Assn.

This is my understanding
after quick glance.