SB
308

COMMITTEE REPORT

SENATE

1/14/80

FURTHER: NONE

Date: 1/14/80

Mr. President:

The Committee on JUDICIARY has had SB 308
shifting to the state the burden of proving that a challenged regulation is valid

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 _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

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MEMBERS HAVING
OTHER RECOMMENDATIONS:

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CHAIRMAN

S 60 (Rev. 12/78)

Alaska State Legislature

Senate

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

February 1, 1980

Clem V. Tillion,
President of the Senate
Room 101 Capital Building
Juneau, Alaska

Re: SB 293.

Dear Mr. President:

When the Senate Judiciary Committee considered the captioned bill at its regularly scheduled hearing on January 29, 1980, Donald P. Koch of the Division of Insurance testified before us, advising us that the Division was not opposed to the legislation.

However, Mr. Koch stated that there had been an occasion when a life insurance company, notwithstanding the double indemnity provision for accidental death contained in its policy, had paid the beneficiary only the face amount of the policy.

It is the intent of the Senate Judiciary Committee that a presumptive death certificate shall have the same force and effect as a regularly issued death certificate insofar as ascertaining the amount of insurance proceeds payable is concerned.

Respectfully submitted,

SENATOR ZIEGLER, CHAIRMAN

SENATOR MELAND, MEMBER

SENATOR BENNETT, MEMBER

SENATOR DANKWORTH, MEMBER

SENATOR RAY, MEMBER

BARRY DONNELLAN
Attorney at Law

P.O. Box 73795 • Fairbanks • Alaska • 99707 • (907) 456-2309

February 8, 1980

The Honorable Robert H. Ziegler, Sr.
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Re: Senate Bills 340 and 355

Dear Senator Ziegler:

This office represents many mining claim holders throughout most of Alaska. This affords me an excellent opportunity to guage the mood of a large segment of our population.

I can assure you, Senator Ziegler, that the question of regulations is foremost in the minds of my clients. A major flaw in our system of government is the fact that the regulations are promulgated by bureaucrats insensitive to and immune from the will of the electorate.

It is my impression that if the power to promulgate regulations is not rescinded and vested in those responsive to the will of the electorate, it is only a matter of time until the people of Alaska will take the law into their own hands. With a view to averting such a catastrophy, it is hereby suggested that you utilize the full power of your office to expedite passage of Senate Bills 340 and 355.

Many thanks for your attention to this very important matter.

Sincerely yours,

Barry Donnellan

Barry Donnellan

Copy: Senators Fahrenkamp and Sumner

(b) Only this section and § 180 of this chapter apply to

(1) a regulation which prescribes the organization or procedure of an agency, or

(2) Repealed by § 4 ch 45 SLA 1969. (§ 2(1) art IV (ch 1) ch 143 SLA 1959; am § 17 ch 143 SLA 1968; am § 8 ch 40 SLA 1969; am § 4 ch 45 SLA 1969)

Legislative committee report. — For report on ch. 45, SLA 1969 (HB 20 am S), see 1969 House Journal, p. 414.

Am. Jur. reference. — 42 Am. Jur., Public Administrative Law, §§ 26, 27.

Article 5. Judicial Review.

Section

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The difference in judicial attitude toward certain administrative rules has been characterized as a distinction between "legislative regulations" and "interpretative regulations." "Legislative rule" has been defined as "the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body." "Interpretative rules" are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law. The distinction is not always easy to draw, since interpretative

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Manner of review. — Where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, the supreme court will review the regulation in the following manner: First, it will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, the supreme court will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment. Kelly v. Zamarello, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

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"Reasonable basis" standard of review. — See Kelly v. Zamarello, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

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Application of the reasonable basis test is extremely useful where the administrative action under review resembles executive as opposed to legislative or judicial activity. Kelly v. Zamarello, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

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Quoted in State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Article 5. Judicial Review.

Sec. 44.62.300. Court review.

Two distinct types of administrative decisions, etc.

The supreme court has distinguished between two types of questions which may confront a court in judicial review of administrative action. Where the agency decision involves the formulation of fundamental policy or the particularized expertise and experience of administrative personnel, the court will defer to the administrative decision, inquiring only whether it has a reasonable basis. On the other hand, where the issues to be resolved turn on statutory interpretation, the knowledge and expertise of the agency is not conclusive of the intent of the legislature in passing a statute. Statutory interpretation is within the scope of the court's special competency, and it is the court's duty to consider the statute independently. Hood v. State, Sup. Ct. Op. No. 1559 (File No. 3289), 574 P.2d 811 (1978).

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In accord with 2nd paragraph in original. See Stevenson v. Burgess, Sup. Ct. Op. No. 1514 (File No. 2791), 570 P.2d 728 (1977).

Where there is primarily a question of a statutory interpretation and legislative intent, it is a question of whether "the administrative agency has acted within the scope of its authority" and concerns "statutory interpretations requiring the special competency of the courts." Therefore, the reasonable basis test is not the appropriate standard of review. Stevenson v. Burgess, Sup. Ct. Op. No. 1514 (File No. 2791), 570 P.2d 728 (1977).

Alaska Workmen's Compensation Board. — Although the Alaska Workmen's Compensation Board is a quasi-judicial agency, the same criteria for judicial review of any administrative action should apply. Hood v. State, Sup. Ct. Op. No. 1559 (File No. 3289), 574 P.2d 811 (1978).

Article 7. Legislative Review of Rules.

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320. Legislative annulment of regulations and review

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(a) The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.

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February 14, 1980

LETTER OF INTENT

SENATE JUDICIARY COMMITTEE

The Senate Judiciary Committee, in reporting out SB 308, "Relating to the Validity of Regulations", feels that various state agencies and departments from time to time promulgate regulations which are totally out of line and beyond the pale of reason.

The bureaucrats of the state are running roughshod over the people and do not seem to understand the ever-increasing public resentment for which the regulations are directly responsible. The public is sick unto death of the amount of unprovoked good that is being done for them.

It is the unanimous opinion of the committee that by compelling the state to uphold the validity of regulations when they are challenged that, although it may be true that the agencies and departments involved may become swamped with litigation and challenges, much better the onus on their backs to justify the validity of regulations than on the backs of the 400,000 some-odd citizens of the state to have the regulations adjudicated invalid.

Strong letter follows!

Respectfully submitted,

Senator Ziegler, Chairman

Senator Meland, Member

Senator Ray, Member

Senator Dankworth, Member

Senator Bennett, Member

Alaska State Legislature

Senate

Committee on Judiciary

Official Business

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SB 308

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K—STATE CAPITOL
JUNEAU, ALASKA 99811

February 26, 1980

The Honorable Terry Gardiner
Speaker of the House
Alaska State Legislature

The Honorable Samuel Cotten
Chairman
Rules Committee
House of Representatives

The Honorable Charles Parr
Chairman
Judiciary Committee
House of Representatives

The Honorable Mike Miller
Chairman
State Affairs Committee
House of Representatives

Re: SB 308 (burden of proving validity of regulations)

Gentlemen:

This bill passed the Senate by a substantial vote. (1980 S.J., p. 359) If enacted into law, it will create extremely serious problems. A floor amendment which would have alleviated some of those problems was offered yesterday and then withdrawn. I am writing in the hope that you will consider these problems before any definitive House action on the subject. I understand that the Senate recognizes that there are serious problems in this bill and anticipates substantial amendment in the House.

This bill would require that, when an adminstrative regulation is challenged under AS 44.62.300, the state bear the burden of "proving" it valid. There are two areas of difficulty: (1) the basic policy the bill reflects, and (2) more-or-less technical, legal difficulties. I am convinced that this bill would be inimical to the interests of the State of Alaska, not just of the executive branch.

03-C8LH

In reversing the presumption of validity of administrative regulations, the bill destroys the presumption heretofore applicable to statutes, regulations, and other governmental actions. Singling out regulations for a presumption of invalidity attacks an essential means of assuring governmental fairness in dealing with all people. Administrative regulations serve two fundamental governmental functions: (1) since statutes must speak in more-or-less general terms, regulations provide the details necessary to deal with the complexities of a highly technical, highly populous twentieth century society; and (2) they establish a standard for people in dealing with their government and with each other, to avoid their being subjected to possible arbitrary, ad hoc decision making by that government.

Numerous statutes expressly require the adoption of administrative regulations, and numerous statutes expressly authorize the adoption of others. In addition, several supreme court decisions have indicated that agency action taken in the absence of administrative regulations is invalid. Even the ombudsman has filed complaints about the absence of regulations. Administrative agencies thus required to adopt regulations would be unable to execute the statutes for which they are responsible if the regulations necessary to implement those statutory functions do not have the benefit of the presumption of validity.

A bill such as this, essentially stating that administrative regulations are presumed invalid, invites challenges. A complaint need not even be well founded in order to force the state through the hoops of "proving" validity. The attendant expense of such a proposal is difficult to predict precisely, but it is evident that it would be substantial. With the great number of challenges certain to be inspired by this bill if it passes, the witness fees, attorney fees, and related litigation costs would require greatly expanded agency budgets. In addition, the already crowded court dockets would become even more unmanageable. Thus the bill would increase the court overload, increase the cost to the state, and provide a windfall to lawyers.

While there is certainly a popular sentiment against government regulation, it appears most logical to deal with regulations in a way that allows one to distinguish between good ones and bad ones. This bill, in a wholesale fashion, would establish a presumption applicable to all regulations -- from fish and game season opening dates to oil and gas lease provisions to rules of the road to public assistance application procedures, etc.

Many people have in mind a favorite example of a regulation that appears unnecessary or unwise, but the literally thousands of regulations which are essential to the functioning of statutorily created programs, and which raise little if any controversy, would be as affected by this bill as the controversial or questionable ones.

It has been said in support of the bill that one of its purposes is to avoid having people "presumed guilty" under some regulation and to enable them to enjoy the traditional presumption of innocence until proven guilty. But most regulations do not deal with a question of guilt or innocence. They establish procedures, set standards, set prerequisites for application for some state benefit, regulate relationships among people, and do many things unrelated to a presumption of guilt or innocence.

Moreover, the bill creates internal conflicts within the Administrative Procedure Act. The presumption of invalidity is established by this bill in AS 44.62.300. But the bill does not amend AS 44.62.100 which embodies a presumption of validity. There is thus a conflict between the bill and the existing statute in that a presumption of validity is not operable if, in fact, the agency has the burden of proving that the plaintiff's alleged facts are untrue or that if true are not sufficient grounds for invalidating the regulation.

In addition, it is not really clear what the bill means by the "burden of proving." The general concept of "burden of proof" has two essential parts: the burden of "going forward" and the burden of "persuasion." In traditional legal concepts, a presumption, such as the presumption of invalidity established by this bill, would operate only on the burden of going forward. But it is not clear whether that is what the bill means.

Another point left unclear by the bill is the standard for "proving" the regulation's validity. In reviewing various kinds of administrative actions, the courts have developed four standards. The one applicable to administrative regulations is known as the "reasonable and not arbitrary" test. But that goes to the substance of a regulation rather than to the procedure followed in adopting it. The bill leaves the point untouched.

It has also been asserted in support of this bill that it will make agencies more concerned about citizens' rights. It has been my experience through many years of dealing with state agencies that a concern for citizens and their rights is directly related to the quality of people working for the agency, and would have no relation whatsoever to statutes establishing burden of proof tests in future lawsuits. Of course, the mere fact that an agency reaches a policy decision different from the one some individual citizen or some legislator might make does not mean that the agency is not concerned about citizens' rights or that it is disregarding opinions that were expressed during the regulations-adoption process. Obviously, both houses of the legislature often have quite different opinions of what their respective constituencies require but that does not mean that either house is disregarding the needs of the people.

It has been suggested that this bill would provide a means that would be more expeditious and less expensive for individuals to relieve themselves of the requirements of regulations they do not like (whether or not thousands of other people, as well as the agency involved and perhaps a majority of the legislators, think that the regulation is wise and generally beneficial). The other avenues of protest open to an individual are AS 44.62.210's opportunity to comment; AS 44.62.230's procedure for petitioning for the adoption, amendment or repeal of a regulation; AS 44.62.060's legal review by the Department of Law; AS 44.62.300's opportunity for declaratory relief; and, of course, working with the legislature for enactment of a statute that would supersede the regulation. None of these methods is necessarily time-consuming or expensive to the individual, and they have the advantage of not interfering with the regular performance of functions by various administrative agencies. This bill, on the other hand, would be a serious disruption to the very programs mandated by the legislature and would be very expensive to the taxpayers of the state.

There is certainly a good deal of sentiment today against the multitude of regulations that affect our lives. However, before taking drastic action to respond to that sentiment, it is well to reflect on the fact that most, if not all, of these regulations, have been adopted because the legislature directed the agencies to do so. There are other ways to deal with the problem, and I would be happy to discuss them with you, but this approach would create many more serious problems that it would solve.

Yours very truly,

Arthur H. Peterson

for Avrum M. Gross
Attorney General

AMG:md

cc: The Honorable Clem V. Tillion
President
Alaska State Senate

The Honorable Robert H. Ziegler, Sr.
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