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COMMITTEE REPORT

SENATE

3/17/81

Finance

FURTHER:

Date: April 19, 1981

Mr. President:

The Committee on JUDICIARY has had SB 863 providing for the award of costs and attorney fees incurred by defendants acquitted of offenses

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 SB 863 same title
 new title
- and recommends the committee should not pass
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECO'MENDATIONS:

John Perry AD REP

John D. Anderson & M. King

CHAIRMAN

Asper
4/7/82

DRIVE
UCFA

Original sponsor: Finance Committee

1 IN THE SENATE BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 563 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act providing for the award of costs and attorney
7 fees incurred by certain defendants in criminal and
8 civil actions brought by the state and by persons who
9 prevail in certain state administrative proceedings;
10 changing Rules 79 and 82, Rules of Civil Procedure, and
11 Rule 508, Rules of Appellate Procedure; and providing
12 for an effective date."

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

14 * Section 1. AS 12.45 is amended by adding a new section to read:

15 Sec. 12.45.145. COSTS AND ATTORNEY FEES FOR DEFENDANT IN A CRIMINAL
16 ACTION. (a) If a judgment of acquittal is entered in favor of a defen-
17 dant charged with committing an offense under state law, the court may
18 allow the defendant to recover the reasonable costs of defending the
19 action, including reasonable attorney fees, from the state. The court
20 shall enter on the record the amount of costs awarded to an acquitted
21 defendant.

22 (b) If a defendant is charged in the same action with more than
23 one offense, he ~~may~~ not receive an award under this section if a judgment
24 of guilty is entered against him on any (offense or) lesser included
25 offense in that action.

26 (c) If a judgment of conviction entered against a defendant charged
27 with committing an offense under state law is reversed on appeal, the
28 court that considers the appeal may allow the appellant to recover the
29 reasonable costs of the appeal and of proceedings in lower courts.

CAN BE INSERTED BEFORE
THINK

RM

1 including reasonable attorney fees, from the state.

2 (d) This section does not apply to a defendant represented by
3 counsel at public expense.

4 * Sec. 2. AS 09.50 is amended by adding new sections to read:

5 ARTICLE 7. COSTS AND ATTORNEY FEES IN ADMINISTRATIVE
6 PROCEEDINGS AND COURT ACTIONS.

7 Sec. 09.50.410. AWARD OF COSTS AND ATTORNEY FEES TO RESPONDENT IN
8 ADMINISTRATIVE PROCEEDING. (a) If an administrative proceeding is
9 commenced by a state agency against a person to impose a civil penalty
10 or to revoke, suspend, limit, or condition a right, authority, license,
11 or privilege and the proceedings terminate without the imposition of a
12 civil penalty or without the revocation, suspension, limitation, or
13 conditioning of a right, authority, license, or privilege, the hearing
14 officer or other official who presides over the proceeding may allow the
15 respondent to recover from the state the reasonable costs of defense,
16 including reasonable attorney fees.

17 (b) Subsection (a) of this section does not apply to an adminis-
18 trative proceeding that terminates without the imposition of a civil
19 penalty or without the revocation, suspension, limitation, or condition-
20 ing of a right, authority, license, or privilege because the respondent
21 has ^{voluntarily} complied with state law or regulation in the matter that is the
22 subject of the administrative proceeding. *“PRIOR TO HEARING”*

23 (c) If a civil penalty is imposed on a person in an administrative
24 proceeding or the proceeding results in the revocation, suspension,
25 limitation, or conditioning of a right, authority, license, or privilege
26 and the decision made in the administrative proceeding is reversed on
27 the merits in a subsequent court proceeding, the court may allow the
28 person who was the subject of that decision to recover reasonable costs
29 of the appeal and of the administrative proceeding, including reasonable

*COULD BE REPEALED IF DISCRETION IS
ATTORNEY AND EXPENSIVE*

INCLUDE ALL AGENCIES

1 attorney fees, from the state.

2 (d) In this section "state agency" means a department, office,
3 agency or other instrumentality of the state. spell out D.A.A.?

4 Sec. 09.50.420. AWARD OF COSTS AND ATTORNEY FEES TO DEFENDANT IN
5 CIVIL ACTION BROUGHT BY THE STATE. (a) If an individual defendant
6 prevails in a civil action brought by the state against that defendant,
7 the court may allow the defendant to recover the reasonable costs of
8 defending the action, including reasonable attorney fees, from the
9 state.

10 (b) If an individual defendant does not prevail in a civil action
11 brought by the state against that defendant, but does prevail on the
12 merits of an appeal of the judgment entered in that action, the court
13 that considers the appeal may allow the appellant to recover the reason-
14 able costs of defending the action and of appealing the decision of the
15 lower court, including reasonable attorney fees, from the state.

16 (c) This section does not apply to a defendant represented by
17 counsel at public expense.

18 * Sec. 3. This Act applies only to actions in which a judgment of acquit-
19 tal is entered, or to administrative proceedings or civil actions that are
20 terminated on or after the effective date of this Act.

21 * Sec. 4. Section 2 of this Act has the effect of changing Rules 79 and
22 82, Rules of Civil Procedure, and secs. 1 and 2 of this Act have the effect
23 of changing Rule 508, Rules of Appellate Procedure, to provide for the award
24 of costs and attorney fees to defendants and appellants who prevail in civil
25 actions brought by the state and in appeals of criminal, civil, and adminis-
26 trative actions brought by the state.

27 * Sec. 5. This Act takes effect immediately in accordance with AS 01.10.-
28 070(c).



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

APRIL 19, 1982

Butrovic Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

- HB 206 - "An Act relating to the termination of rental agreements of mobile home park dwellers and tenants."
- SB 863 - "An Act providing for the award of costs and attorney fees incurred by defendants acquitted of offenses and by individuals who prevail in certain state administrative proceedings; changing Rules 79 and 82, Rules of Civil Procedure; and providing for an effective date."
- HB 194 - "An Act relating to prisoner employment and correctional industries; and providing for an effective date."
- SJR 61 - Proposing amendments to the Constitution of the State of Alaska relating to appropriations and the retention, investment and expenditure of certain state revenues; and superseding the amendments proposed by Legislative Resolve No. 1, First Special Session of the Twelfth Legislature (FSS FCCS SJR 4).

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:35 P.M. Committee members present were: Senators Rodey, Parr, and Fay. Senators Anderson and Bennett were absent.

003 - Call to order.

008 - Chairman Rodey brought HB 206 before the committee.

027 - Rep. Mitch Hood, prime sponsor of HB 206, testified, addressing the need of trailer park owners to be able to evict trailer space renters that don't abide by court rules.

065 - Senator Fay asked for the bill in subcommittee, and promised to report back with the bill in several days.

084 - Ben Marsh, representing himself, testified in favor of the bill and gave the legislative history of legislation dealing with evicting trailer space renters.

268 - Ira Walker, representing himself, testified in favor of HB 206, stating that it is difficult to keep a cleanly court under current law. If there is junk present, AHFC will not finance trailers in junk courts.

334 - Paul Fry, representing himself, testified in favor of the bill also. He expressed his concern of having the word "reasonable" in the present language.

363 - Kathy Cruichshank, representing herself, testified in favor of the bill, stating that unsanitary conditions under current law are not controllable by park owners which brings the value of the parks down.

405 - Anita Thompson, representing herself, expressed the problems she was having collecting her rent. She was in favor of HB 206.

445 - Chairman Rodey directed that the bill be put in a subcommittee of one with Senator Ray.

454 - Chairman Rodey next brought HB 194 before the committee.

460 - Mr. Bruce explains the changes in committee substitute.

520 - Senator Parr moved the committee substitute to be adopted. There was no objection.

526 - Senator Anderson moved to pass CSHB 194 with individual recommendations. There was no objection.

535 - Chairman Rodey next brought SJR 61 before the committee.

537 - Lt. Governor, Terry Miller, testified in favor of SJR 61, expressing his support for this bill in place of SJR 4 which was passed last year. He stated three areas which should be addressed by the committee:

- 1.) Phasing in amendment.
- 2.) Issue of liquidity.
- 3.) Catastrophic drop in revenues.

620 - Senator Ray questions need for Section 26. He felt it cluttered up the Constitution.

635 - Lt. Gov. Miller stated that maybe it should be a transitional clause.

856 - Senator Dankworth, prime sponsor of the bill, testified in favor of the resolution, stating that it is far superior to SJR 4. He had no feeling on the Governor's amendment and left it up to the committee.

268 - Rep. Hugh Malone testified, agreeing with Senator Dankworth that SJR 4 is a bad idea. He addressed the questions of having "money" or "the balance" on Line 4, Page 2. He also asked what role the Legislature would play in determining the market rate.

286 - Rep. Malone stated that the Legislature should develop projections on liquidity of fund. re: 20% of fund may be appropriated.

534 - Ron Lear, Budget and Audit, answered questions from the committee members.

575 - Senator Ray asked what "capital projects" are, stating that this language is fairly restrictive. Suggested possibly using "capital improvements".

596 - SJR 61 returned to file until Wednesday's meeting.

713 - Chairman Rodey brought SB 863 before the committee.

715 - Senator Ray moved SB 863 be passed with individual recommendations. There was no objection.

719 - The meeting was adjourned at 2:55 P.M.



Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

APRIL 14, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

- SB 863 - "An Act providing for the award of costs and attorney fees incurred by defendants acquitted of offenses and by individuals who prevail in certain state administrative proceedings; changing Rules 79 and 82, Rules of Civil Procedure; and providing for an effective date."
- HB 194 - "An Act relating to prisoner employment and correctional industries; and providing for an effective date."
- SB 861 - "An Act relating to rights of persons who report violations of law; and providing for an effective date."
- SB 175 - "An Act relating to standards of conduct for public officials and employees; establishing a State Ethics Commission; and providing for an effective date."
- SJR 68 - Proposing an amendment to the Constitution of the State of Alaska providing that a legislator who is convicted of a felony forfeits legislative office.

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:05 P.M. Committee members present were: Senators Rodey, Ray, and Parr. Senators Bennett and Anderson were absent.

002 - Call to order.

009 - Chairman Rodey brought HB 194 before the committee.

042 - Mr. Stark, Department of Law, testified in favor of HB 194.

167 - Senator Anderson entered the meeting.

385 - Senator Parr moved to add "or labor force" on page 1, Line 28. There was no objection.

441 - Senator Ray moved that on Page 5, Line 8, "on a basis that is competitive with other sources" be added after the word "service".

There was no objection. He also objected to the commission having all discretion in pay plans. He wanted some limit on the amount.

455 - Chairman Rodey directed the staff to prepare language to meet Senator Rays concerns. This language reads: On page 6, Line 4, A wage established under the pay plan may not exceed 50 percent of the minimum wage established under AS 23.10.065.

460 - HB 194 was returned to file for the language to be drafted.

465 - Chairman Rodey brought SB 861 before the committee.

478 - Jack Chenoweth, Ombudsman, testified stating that this bill should be included in Title 29.

695 - Senator Fischer testified in favor of his bill.

765 - SB 861 returned to file.

780 - Chairman Rodey adjourned due to the joint session.



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

APRIL 12, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

- SB 473 - "An Act relating to municipal powers; and providing for an effective date."
- SB 863 - "An Act providing for the award of costs and attorney fees incurred by defendants acquitted of offenses and by individuals who prevail in certain state administrative proceedings; changing Rules 79 and 82, Rules of Civil Procedure; and providing for an effective date."
- HB 194 - "An Act relating to prisoner employment and correctional industries; and providing for an effective date."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:05 P.M. Committee members present were: Senators Rodey, Ray, and Anderson. Senators Bennett and Parr were absent.

002 - Call to order.

005 - Chairman Rodey brought SB 473 before the committee.

030 - Bill Cummings, Assistant Attorney General, testified against amendment number one by Senator Zeigler, stating it would cause hardships to person's whose property was claimed.

341 - Mr. Sharp, representing the city and municipality of Juneau, also testified against Senator Zeigler's amendments.

490 - Chairman Rodey laid SB 473 on the table.

550 - Chairman Rodey brought HB 194 before the committee.

564 - Mr. Campbell, and Mr. Roman, of the Division of Corrections, testified in favor of HB 194.

630 - Senator Ray objected to the language on Page 2, Line 24.

832 - Senator Rodey offered language change to Page 2, Line 24 and directed staff to prepare language. There was no objection.

845 - HB 194 was laid on the table.

SIDE TWO

012 - Chairman Rodey brought SB 863 before the committee.

022 - After brief discussion, Chairman Rodey returned SB 863 to the file until Wednesday's meeting.

Adjourned at 2:00 P.M. for Senate Session.



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pench V
State Capitol
Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

APRIL 7, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

SB 686 - "An Act relating to the return of property received or seized by law enforcement agencies or acquired as evidence in a criminal proceeding."

SB 863 - "An Act providing for the award of costs and attorney fees incurred by defendants acquitted of offenses and by individuals who prevail in certain state administrative proceedings; changing Rules 79 and 82, Rules of Civil Procedure; and providing for an effective date."

HB 194 - "An Act relating to prisoner employment and correctional industries; and providing for an effective date."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:35 P.M. Committee members present were: Senators Rodey, Ray, Parr, and Anderson. Senator Bennett was absent.

002 - Call to order.

005 - Chairman Rodey brought SB 686 before the committee.

179 - Senator Ray moved that on Page 2, Line 22 delete [six months] and insert 60 days. There was no objection.

202 - Senator Parr moved to pass SB 686 with individual recommendations. There was no objection.

228 - Chairman Rodey brought SB 863 before the committee.

245 - Ron Lorenson, Department of Law, testified that the committee substitute was superior to the original bill and that the fiscal impact would be considerably smaller.

771 - Gary Jenkins, National Federation of Independent Business' testified in favor of this bill, but asked the committee to adopt language which would allow individuals that file against the state in tax cases be covered for attorney fees.

820 - Chairman Rodey directed Mr. Bruce to work with Mr. Asper to prepare language to include all state agencies within the bill, including the University of Alaska. Staff was directed to delete [offense or] on Line 24, Page 1, and to draft language to meet Mr. Jenkins concerns.

845 - SB 863 returned to file.

SIDE TWO

284 - Chairman Rodey brought HB 194 before the committee.

295 - Mr. Stark, Department of Law, testified in favor of HB 194.

635 - Mr. Charles Campbell and Mr. Roman, Department of HESS, Division of Corrections, testified in favor of this bill.

684 - HB 194 returned to file.

756 - Adjourned 3:05 P.M.

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CSSB 863 (Judiciary)

Title "An Act providing for the award of costs and attorney fees...

Requested by _____ Date _____

in civil actions brought by the state...and providing for an effective date."

II. FISCAL DETAIL

Agency Affected Department of Law

Program Category Affected General Government/Administration or Justice

BRU, Program, Or Subprogram(s) Affected Legal Services/Prosecution

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.		1,000.0	1,080.0	1,166.4	1,259.7	1,347.9
TOTAL		1,000.0	1,080.0	1,166.4	1,259.7	1,347.9

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND		1,000.0	1,080.0	1,166.4	1,259.7	1,347.9
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

1. Defendants Acquitted of Offenses:

As Deputy Attorney General Ron Lorensen stated, in testimony before the Senate Judiciary Committee, the committee's substitute for SB 863 has satisfied many of the department's concerns regarding the original version of the bill. There is, however, a remaining conflict between public policy considerations which the department believes should be carefully weighed before the bill is passed from the committee.

Section 1. of this bill, while adopting the reasonable cost standard and allowing awards at the discretion of the court, now provides that if a defendant is acquitted of a charge in the same action in which he is convicted of another charge, the court may

Richard I. Pegues
Richard I. Pegues, Director, Admin. Svcs.

IV. DATE Revised April 19, 1982 PREPARED BY _____ AGENCY Department of Law

Original: Legislative Finance PHONE 465-3672

cc: Budget and Management
Prime Sponsor (First Legislator Named)

award the defendant reasonable costs attributable to defending the charge of which the defendant was acquitted, unless the charge of which the defendant is convicted is a lesser included offense of the charge of which the defendant is acquitted. The original version of the bill provided that when a defendant is charged in the same action with more than one offense, he may not receive an award if a judgment of guilty is entered against him on any offense or lesser included offense in that action.

The department believes that its prosecutors need the tactical flexibility to use multiple charges because, in difficult cases, the theory which is eventually upheld in obtaining a guilty verdict often depends upon the actual development of evidence throughout a trial. To the extent that a prosecutor's charging determinations may be unduly constrained by this new provision, it may be impossible to bring any charges, particularly in cases involving complex legal theory. The department therefore urges that a defendant not receive an award of costs and fees in any action in which the defendant is charged with more than one offense if a judgment of guilty is entered against him on any offense or lesser included offense in that action. As stated in our original fiscal note of March 29, the department feels strongly that the state not pay the attorney's fees of persons who could be found to have committed a crime under the civil standard of a preponderance of the evidence, but were nevertheless found not guilty under the strict reasonable doubt test, because a verdict of acquittal can seldom be equated with a determination of innocence.

The cost for the current version of this section, which can only be estimated due to the absence of any historic data, will probably be reduced from our original estimate to a new level of approximately \$750,000. This new amount could be reduced somewhat further if the provision allowing costs for acquittals in actions with multiple charges is changed as the department has recommended.

2. Individuals who Prevail in State Administrative Proceedings:

The substitute version of the bill has adopted the changes the department recommended and the cost estimate should now be reduced from \$700,000 to \$250,000.

3. Award of costs and Attorney's Fees to Defendants in Civil Actions Brought by the State:

The changes incorporated by the Judiciary Committee in this section of the bill preserves the current system whereby the state pays and collects costs and fees, and therefore, the amounts representing additional costs and fees, \$150,000, and lost revenues, \$300,000 will no longer be needed. Additional amounts required by this section = 0.

FISCAL NOTE

I. REQUEST
 Bill/Resolution No. SB 863
 Title "An Act providing for the award of costs and attorney fees incurred by defendant.....and providing for an effective date."
 Requested by The Office of the Governor Date March 22, 1982

II. FISCAL DETAIL
 Agency Affected Department of Law
 Program Category Affected General Government/Administration of Justice
 BRU, Program, Or Subprogram(s) Affected Legal Services/Prosecution
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.		2,302.5	2,486.7	2,685.6	2,900.4	3,132.4
TOTAL		2,302.5	2,486.7	2,685.6	2,900.4	3,132.4

FUNDING (Thousands of Dollars)

GENERAL FUND		2,302.5	2,486.7	2,685.6	2,900.4	3,132.4
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Enactment of this bill will cause a significant fiscal impact on the state and it will also cause substantial and serious changes to long established public policy.

The bill provides for the award of actual costs and attorney's fees incurred by defendants acquitted of offenses, by individuals who prevail in certain administrative proceedings, and by individuals who prevail in civil actions brought by the state. Since each of these classes of litigation is addressed separately in the bill, and since each class of litigation involves different public policy considerations, they are discussed separately below.

Richard I. Peques

IV. DATE March 29, 1982 PREPARED BY Richard I. Peques, Director, Admin. Svcs
 AGENCY Department of Law

Original: Legislative Finance PHONE 465-3672

cc: Budget and Management
 Prime Sponsor (First Legislator Named)

1. Defendants Acquitted of Offenses:

A finding of not guilty in a criminal trial does not necessarily mean that the defendant did not commit the crime out, rather, that the jury had a reasonable doubt as to the defendant's guilt. If the bill is enacted, the state would be paying the attorney's fees of persons who could be found to have committed a crime under the civil standard of preponderance of the evidence but were nevertheless found not guilty under the strict reasonable doubt test. It is seldom that an acquittal can be equated with a determination of innocence. A not guilty verdict usually means that the state has failed to prove beyond a reasonable doubt the guilt of the defendant.

In many cases where the defendant is found not guilty, critical evidence against the defendant has been suppressed because of the application of the exclusionary rule. This legislation could very well have the unintended effect of rewarding criminals for technically inadmissible evidence or the reluctance of key witnesses to come forward. By awarding costs and attorney fees to acquitted defendants, the bill will usually be making payment to individuals who have in fact committed a crime for which they should have been prosecuted.

The state's prosecutors have legal and ethical obligations not only to prosecute violations of the law but also to protect the factually or legally innocent. The state's standards governing case screening provide, in part, that: "Charges shall be initiated only if at the time of filing, a case presented for prosecution contains, on its face, sufficient legally admissible evidence to warrant a trier of fact to conclude that the defendant committed the offense charged beyond a reasonable doubt."

The fact that attorney's fees will be awarded in cases where a not guilty verdict is returned may cause a prosecutor to be even more selective than the state's already strict guidelines in deciding what cases to accept for prosecution. The public, on the other hand, often complains that the prosecutor dismisses too many cases. Enactment of this bill will almost certainly lead to more dismissals with more public complaints.

Although we do not believe the bill to be in the public interest, any proposal to pay costs and attorney's fees in criminal cases should provide that such payment be appropriated to and administered by a department other than the Department of Law, such as the Department of Administration, to ensure that a prosecutor's charging determinations are not improperly influenced by the monetary provisions of the bill.

The bill's fiscal impact is substantial. Not guilty verdicts are returned in approximately 25% of criminal trials. In FY81, 206 misdemeanor and 51 felony cases resulted in not guilty verdicts. At an approximate cost of \$2,500 for a misdemeanor trial and \$12,500 for a felony case, the cost of assuming the defendant's attorney fees in these cases would be \$1,152,500.

2. Individuals who prevail in state administrative proceedings:

The state does not have a mechanism or policy which allows for the award of attorney's fees and costs to individuals who prevail in certain administrative proceedings brought against those individuals by the state. As a matter of simple equity, the public interest might be better served if some limited allowance for costs and attorney's fees was provided in these matters. Any such provision, however, should treat all litigants equally, insofar as the setting of costs is concerned.

The reasonable cost method, used by the court system, provides the fairest means whereby costs and fees can be awarded to a prevailing party. This method respects the good faith of each of the parties to a dispute, weighs the relative gain and loss between the winner and the loser, and discourages claims for unnecessary or extravagant legal expenses. As a practical matter, the courts rarely award more than one half of actual costs, their purpose being to partially compensate a prevailing party for the costs and fees incurred where such compensation is justified and not to penalize a party for litigating a good faith claim. Actual costs are usually not awarded unless there is a clear showing that that action was brought frivolously or was otherwise devoid of merit. The bill provides that actual costs may be paid to the respondent whenever an administrative proceeding is terminated without taking the action sought by the state. The result of this latter standard will be to unjustly enrich, at the state's expense, respondents in instances where the proceeding is terminated due to a defect in the hearing process or where the respondent, through his own actions, corrects the situation sought in the state's claim, making further proceedings unnecessary. The department supports payment of "reasonable costs" to prevailing respondents in those administrative proceedings covered by the bill; however, it strongly urges that actual costs be allowed only in those cases where a hearing officer or other official makes a clear finding that the state's claim was without merit.

The department carefully screens agency complaints before deciding to initiate proceedings or advising some other agency to initiate proceedings. Consequently the state prevails in approximately 85% of the administrative proceedings that it brings. The costs involved in these actions range from a few hundred dollars to several hundred thousand dollars. It is our best estimate that this section of the bill, as presently written, could cost \$700,000 annually. Substitution of "reasonable costs" for actual costs would probably reduce this amount to about \$250,000.

3. Award of costs and attorney's fees to defendant in civil action brought by the state.

The state is currently subject to paying costs and attorney's fees to prevailing parties in actions it brings, and in actions that are brought against it, as provided by Rule 82 of the Civil Rules of Procedure. Such costs are, of course, limited to the Rule 82 fee schedule or, in the absence of an easily determinable monetary valuation, the "reasonable cost" method. The state may also seek costs and fees, under the current rule, when it is the prevailing party.

The use of the "reasonable cost" standard under Rule 82 represents the fairest method of apportioning litigation expenses where the parties in a dispute have litigated on a good faith basis. Rule 82 recognizes that a party doesn't usually prevail totally, it requires a justification of the expenses being claimed, and it considers the good faith nature of an unsuccessful party's claim or defense. Using this standard, a prevailing party is typically awarded about one half of its justified actual expenses. Absent a showing of good faith on the part of the unsuccessful party, the prevailing party may be awarded all of its justified expenses. The purpose of Rule 82 is to compensate a prevailing party for the costs of litigation without placing such a heavy burden on the unsuccessful party as to discourage access to the courts. The department does not believe this rule should be disturbed, especially in a manner that treats the state less equal than other parties to civil litigation.

It is our belief that this section of the bill will not only subject the state to unjustly inflated claims for costs and fees, but that it will have the effect of establishing a special, disadvantaged class of litigant, of which the state will be the only member. The bill will more than likely be read as a signal that the state now lives on a one-way street where it must pay, but need not be paid. Excepting public interest suits, the state often seeks costs and fees where it is a defendant and prevails. The bill, however, appears to remove the state as an equal party in Rule 82 matters, making it doubtful the state, as the prevailing party, would be allowed to collect costs and fees whether as plaintiff or defendant. The upshot may be the inadvertent setting up of the state as a "deep pocket" for litigators and litigants who are not otherwise gainfully employed. Certainly, the number of suits the state defends will increase without access to Rule 82 and the protection it affords against frivolous actions.

The department collects more than \$300,000 each year, in costs, fees and judgment settlements, as a result of civil actions in which it prevails. Much, if not all of this amount, will be lost if the state is no longer given full access to Rule 82 proceedings. Costs, fees and judgment settlements paid by the state vary greatly between fiscal years. However, they have averaged \$150,000 over the past several years.

Substitution of actual costs for "reasonable costs" would likely double the amount the state has been paying, or an approximate annual increase of \$150,000. The amount which it will cost to defend against frivolous actions, if Rule 82 protection is not available to the state, is speculative. In terms of wasted attorney time, this cost could be considerable within just a few years, probably equaling the time of one or more attorneys.

Summary of Costs:

Criminal Actions	\$ 1,152,500	
Administrative Proceedings	700,000	
Civil Actions	150,000	
	300,000	(Lost Revenues)
TOTAL	<u>\$ 2,302,500</u>	

Costs beyond FY83 have been shown using an 8% inflation factor.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. SB-863

Title An Act For The Award Of Costs And Attorney Fees Incurred

Requested by _____ Date _____

II. FISCAL DETAIL

Agency Affected Department of Public Safety

Program Category Affected Life and Property Protection

BRU, Program, Or Subprogram(s) Affected Driver/Vehicle Services

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES				75.0	81.0	87.4
200 TRAVEL				6.3	6.8	7.3
300 CONTRACTUAL				24.8	26.3	28.9
400 COMMODITIES				1.3	1.4	1.5
500 EQUIPMENT				10.0		
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.	-0-	69.0	75.9	83.5	91.9	101.1
TOTAL	-0-	69.0	75.9	200.9	207.9	226.2

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	-0-	69.0	75.9	200.9	207.9	226.2
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME				2	2	2
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Last year the Division of Motor Vehicles held approximately 200 driver's license suspension-revocation hearings, 360 financial responsibility hearings, and 120 motor vehicle title, registration or license revocation or determination hearings. About 25% of all these hearings were found in favor of the citizen. This is the figure used to determine costs, although a few of those who lose the hearing later appeal in district court. Attorney time on driver's license and FR hearings is estimated at 4 hours, and 6 hours for vehicle hearings.

(Continued on Page 2)

IV. DATE March 23, 1982

PREPARED BY Robert J. Rowan

AGENCY DPS-Division of Motor Vehicles

Original: Legislative Finance
cc: Budget and Management

PHONE 269-5551

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

The number of hearings conducted each year is increasing and a 10% annual increase factor was used to estimate costs for claims to be paid under this legislation.

Currently, various department and AG personnel serve as hearing officers on an as-required, as-available basis. By FY85 it is expected that the administrative hearing workload will have increased such that it cannot be adequately handled by existing staff, especially in light of the possibility of reimbursement of attorney fees. A hearing officer (Range 16) and a Clerk IV (Range 9) will be required to augment the present staff. FY85 operating costs are based on FY82 estimates using an 8% annual inflation factor. Included are the costs of additional office and hearing room space, rental of equipment to access AJIS, and the acquisition of normal office supplies and equipment as well as recording/transcription equipment.

Formulas are as follows:

$(200 \text{ DL and } 360 \text{ FR Hearings}) \times 25\% \times 4 \text{ hours} = 560 \text{ hours attorney time}$

$120 \text{ vehicle hearings} \times 25\% \times 6 \text{ hours} = 180 \text{ hours attorney time}$

FY 82 Total = 740 hours attorney time

Average hourly attorney fees = \$85

FY 83 Formula:

$740 \times 1.1 \text{ (10\% increase)} \times \$85 = \$69,190$

We dropped the \$190 to make a round figure of \$69.0

FY 84 Formula:

$\$69.0 \times 1.1 = \75.9

STATE OF ALASKA

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

JAY S. HAMMOND, GOVERNOR

POUCH 5
JUNEAU, ALASKA 99811
PHONE: (907) 465-2300

March 31, 1982

The Honorable Patrick M. Rodey
Chairman
Senate Judiciary Committee
Room 125 - Capitol Building
Juneau, Alaska

Re: Senate Bill No. 863

Dear Senator Rodey:

Senate Bill No. 863, an Act providing for the award of costs and attorney fees incurred by defendants acquitted of offenses and by individuals who prevail in certain state administrative proceedings; changing Rules 79 and 82, Rules of Civil Procedure, was introduced in the Senate on March 17, 1982 and was referred to the Senate Judiciary and Finance Committees.

For the consideration of the Senate Judiciary Committee, I am enclosing copies of Fiscal Notes prepared by Mr. Robert R. Kessel, Director, Audit Division, Department of Revenue concerning the proposed legislation.

Sincerely,



R. D. Stevenson
Special Assistant

Enclosures

cc: The Honorable Don Bennett
The Honorable M. E. Dankworth
Co-Chairmen
Senate Finance Committee

Joseph K. Donohue
Deputy Commissioner
Department of Revenue

Robert R. Kessel, Director
Audit Division
Department of Revenue

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution Number: SB 863

Title: An Act providing for the award of costs and attorney fees.

Requested by: Finance Committee

Date: March 26, 1982

II. FISCAL DETAIL

Agency Affected: Department of Revenue

Program Category Affected: Revenue Collection and Management

BRU, Program, or Subprogram(s) Affected: Audit Division

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES	-	500	500	500	500	500
200 TRAVEL	-	-	-	-	-	-
300 CONTRACTUAL	-	-	-	-	-	-
400 COMMODITIES	-	-	-	-	-	-
500 EQUIPMENT	-	-	-	-	-	-
600 LAND & STRUCTURES	-	-	-	-	-	-
700 GRANTS, CLAIMS, ETC	-	-	-	-	-	-
800 MISCELLANEOUS	-	-	-	-	-	-
TOTAL	-	500	500	500	500	500

FUNDING (Thousands of Dollars)

GENERAL FUND	-	500	500	500	500	500
FEDERAL FUNDS	-	-	-	-	-	-
OTHER (Specify Source)	-	-	-	-	-	-

POSITIONS

FULL TIME	-	-	-	-	-	-
PART TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

See attached memo to R. D. Stevenson dated March 26, 1982.

IV. DATE: March 26, 1982

PREPARED BY: Robert R. Kessel

AGENCY: Audit Division

PHONE: 465-2320

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution Number: SB 863

Title: An Act providing for the award of costs and attorney fees.

Requested by: Finance Committee

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Program Category Affected: Revenue Collection and Management

BRU, Program, or Subprogram(s) Affected: Audit Division

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES	-	23.2	25.5	27.1	29.8	32.7
200 TRAVEL	-	5.0	5.5	6.0	6.5	7.0
300 CONTRACTUAL	-	-	-	-	-	-
400 COMMODITIES	-	.3	-	-	-	-
500 EQUIPMENT	-	-	-	-	-	-
600 LAND & STRUCTURES	-	-	-	-	-	-
700 GRANTS, CLAIMS, ETC	-	-	-	-	-	-
800 MISCELLANEOUS	-	-	-	-	-	-
TOTAL	-	28.5	31.0	33.1	36.3	39.0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	-	28.5	31.0	33.1	36.3	39.0
FEDERAL FUNDS	-	-	-	-	-	-
OTHER (Specify Source)	-	-	-	-	-	-

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME	-	1	1	1	1	1
PART TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

See attached memo to R. D. Stevenson dated March 26, 1982.

IV. DATE: March 26, 1982

PREPARED BY: Robert R. Kessel

AGENCY: Audit Division

PHONE: 465-2320

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

Robert R. Kessel

M E M O R A N D U M

TO: R. D. Stevenson
Special Assistant

FROM: Robert R. Kessel
Director, Audit Division *RC*

DATE: March 26, 1982

RE: SB 863

Analysis

Section 1 of SB 863 refers to a judgement of acquittal when an offense has been committed under State law. Apparently, in matters relating to taxation, this section would only impact those cases dealing with criminal penalties as included in Section 43.05.290 of Title 43, Alaska Statute. There have been relatively few actions of this nature brought by the Revenue Department and therefore the fiscal impact would be minimal.

Section 2 of SB 863 would have a dramatic fiscal impact since this section substantially affects the Revenue Department because of the many cases involving civil penalties and revoking of licenses.

Section 3 of SB 863 would also have a substantial fiscal impact for the Revenue Department activities since administrative actions often advance to the courts and become civil action cases.

Comments

SB 863 leaves many unanswered questions. For example, the bill does not define the term "actual costs." Does the term include travel costs of the taxpayer? Does the term include loss of taxpayer wages resulting from litigation preparation?

If the civil penalty is only a small part of the total action and the taxpayer prevails on the civil penalty but loses on the more substantial monetary issues, would all attorney fees be recoverable?

Unless adequate funding was provided to the Department of Revenue, the Department might have to forego court cases because of large potential costs. This would be a tragedy if substantial tax dollars were involved in a particular case.

The Department would need additional conference officers. The bill would encourage more litigation.

Incidentally, a taxpayer, for Federal Income Tax purposes, can write off under current law the total expenses incurred to prepare an appeal of a tax issue. Already, part of litigation costs are borne by a government agency.

Fiscal Impact

Scientific development of a fiscal note is impossible. However, the costs to the State as a whole would be magnanimous. The cost attributable to tax appeals would be only a small part of the overall fiscal impact.

In 1981, HB 227, a bill similar to SB 863 but relating only to taxes, was introduced. The previous Audit Director, Gary Jenkins, estimated losses to the General Fund of \$500,000 per year. I see no reason to change that estimate. The \$500,000 relates to tax appeals only.

RRK/gb

1 IN THE SENATE

BY THE FINANCE COMMITTEE

2 SENATE BILL NO. 863

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act providing for the award of costs and attorney
7 fees incurred by defendants acquitted of offenses and
8 by individuals who prevail in certain state administra-
9 tive proceedings, changing Rules 79 and 82, Rules of
10 Civil Procedure; and providing for an effective date."

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

12 * Section 1. AS 12.45 is amended by adding a new section to read:

13 Sec. 12.45.145. COSTS AND ATTORNEY FEES FOR ACQUITTED DEFENDANT.

14 (a) If a judgment of acquittal is entered in favor of a defendant
15 charged with committing an offense under state law, the court may allow
16 the defendant to recover the actual costs of defending the action,
17 including actual attorney fees, from the state. The court shall enter
18 on the record the amount of costs awarded to an acquitted defendant.

19 (b) If a defendant is charged in the same action with more than
20 one offense, he may not receive an award under this section if a judgment
21 of guilty is entered against him on any offense or lesser included
22 offense in that action.

23 (c) This section does not apply to a defendant represented by
24 counsel at public expense.

25 * Sec. 2. AS 09.50 is amended by adding new sections to read:

26 ARTICLE 7. COSTS AND ATTORNEY FEES IN ADMINISTRATIVE
27 PROCEEDINGS AND COURT ACTIONS.

28 Sec. 09.50.410. AWARD OF COSTS AND ATTORNEY FEES TO RESPONDENT IN
29 ADMINISTRATIVE PROCEEDING. (a) If an administrative proceeding is

1 commenced by a state agency against a person to impose a civil penalty
2 or to revoke, suspend, limit, or condition a right, authority, license,
3 or privilege and the proceedings terminate without the imposition of a
4 civil penalty or the revocation, suspension, limitation, or conditioning
5 of a right, authority, license, or privilege, the hearing officer or
6 other official who presides over the proceeding may allow the respondent
7 to recover from the state his actual costs of defense, including actual
8 attorney fees.

9 (b) In this section "state agency" means a department, office,
10 agency or other instrumentality of the state.

11 Sec. C9.50.420. AWARD OF COSTS AND ATTORNEY FEES TO DEFENDANT IN
12 CIVIL ACTION BROUGHT BY THE STATE. (a) If an individual defendant
13 prevails in a civil action brought by the state against that defendant,
14 the court may allow the defendant to recover the actual costs of defend-
15 ing the action, including actual attorney fees, from the state.

16 (b) This section does not apply to a defendant represented by
17 counsel at public expense.

18 * Sec. 3. This Act applies only to actions in which a judgment of acquit-
19 tal is entered, or to administrative proceedings or civil actions that are
20 ^{Brown} terminated] on or after the effective date of this Act.

21 * Sec. 4. Section 2 of this Act has the effect of changing Rules 79 and
22 82, Rules of Civil Procedure, to provide for the award of costs and attorney
23 fees to defendants who prevail in civil actions brought by the state.

24 * Sec. 5. This Act takes effect immediately in accordance with AS 01.10.-
25 070(c).

Rule 508. Costs.

(a) **Dismissal or Denial.** If an appeal is dismissed or petition denied by the appellate court, costs shall not be allowed to the appellee or respondent, unless otherwise ordered by the court.

(b) **Affirmance of Judgment.** In all cases of affirmance of a judgment or any order or decision of the superior court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

(c) **Reversal of Judgment or Order.** In cases of reversal of any judgment, order or decision of the superior court, costs shall be allowed the appellant or petitioner unless otherwise ordered by the court.

(d) **Costs to be Awarded.** When costs are awarded in the appellate court, they shall include, unless the court otherwise orders, the filing fee, the costs of preparing the original record and transcript, and the costs of duplicating and mailing briefs. Costs for duplicating briefs will not be awarded in excess of the rate generally charged by printers in the city in which counsel is located.

(e) **Attorney's Fees.** Where costs are allowed in the appellate court, attorney's fees may also be allowed in an amount to be determined by the court. If the court determines that an appeal or cross-appeal is frivolous or that it has been brought simply for purposes of delay, actual attorney's fees may be awarded to the appellee or cross-appellee.

(f) **Procedure Where Allowed.** Where costs are allowed in the appellate court, the clerk shall insert the amount thereof in the body of this mandate or other process sent to the court below, and annex to the same the bill of items taxed in detail. (Supreme Court Order 439 effective November 15, 1980)

88 863
March 24, 1982

The Honorable Pat Rodey
Alaska State Senate
Chairman, Judiciary Committee
Pouch V
Juneau, AK 99811

Re: Senate Bill 863

Dear Senator Rodey:

Section 2 of the referenced bill allows the award of "actual attorney fees" where an agency commences a proceeding to impose a civil penalty or to revoke, suspend, limit or condition a right, authority, license or privilege and the proceedings terminate without the imposition of the penalty. In my opinion, the bill does not go far enough.

First, the decision to award attorney's fees rests with the hearing officer who presided over the proceeding. Because, in most cases, the hearing officer serves at the pleasure of the agency, and hence is not financially independent of it, he or she may be reluctant to award attorney's fees against his or her supervisors.

Secondly, the award of "actual" attorney's fees may be unnecessary. In civil litigation, a successful litigant receives only partial attorney's fees unless the case involves the public interest, or bad faith on the part of the losing party can be shown. I see no reason why the same rule should not apply in administrative proceedings.

Most importantly, this bill awards attorney's fees only where the agency decides not to impose the penalty. In the first place, this provides some incentive for the agency, in a close case, to rule against the individual. Secondly, it does not provide for attorney's fees where the agency decides against the individual, the individual appeals the case to the Superior Court and the the Superior Court reverses the agency's decision. Since the award of attorney's fees in administrative appeals is usually nominal (around \$750) and since a successful appellant has no opportunity to receive compensation for all the money he paid attorneys who represented him at the hearing (except in workmen's compensation cases), a person can spend a great deal of money on the administrative proceedings, and the appeal, for which he receives next to no compensation, even though the Court

The Honorable Pat Rodey
March 24, 1982
Page Two

determines that the agency was wrong.

In short, I would favor a provision allowing a court to award attorney's fees incurred in the administrative process if the individual obtains a reversal of the agency's decision. This would not only compensate the individuals for part of their losses due to attorney's fees but would in addition discourage agencies from making legally or factually unsound decisions.

Thank you for your attention.

Sincerely,

Pamela Finley

Pamela Finley

820 6th Street

Quincy 99801

PLF/jka