SB

210

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M

March 27, 1981

SUBJECT: Appropriation based on race distinction (SB 210)

TO: Senate Labor and Commerce Committee

FROM: Billy G. Berrier
Director
Division of Leg . Services

You have asked whether an appropriation based on race distinction violates the equal protection clause of the constitution.

Any legislation based on race distinction is in a suspect category and may be subject to strict scrutiny by the courts. The classification must serve a compelling state interest and the means selected must be narrowly drawn to fulfill the governmental purpose. The courts have not clearly articulated guidelines to determine the constitutionality of specific legislation.

There are very many cases dealing with aspects of this problem. An analysis of these would serve little purpose in this opinion since the United States Supreme Court has recently spoken in this area in the case of Fullilove v. Kluznick, 65 L.Ed.2d 902 (48 L.W. 4979) (1980). In this case there was a total of five opinions. The reasoning in three of the opinions, with a total of six justices, found the classification constitutional while the reasoning of two opinions, with three justices, found the classification unconstitutional. Together these opinions reflect the different approaches to the case.

Two justices view racial classification as always unconstitutional.

The other justices are of the opinion that racial classifications may be used in certain circumstances but have different views as to what circumstances justify a racial classification. All agree that the legislation must be an attempt to remedy past discriminatory practices.

The issue in that case was whether the minority businesses set-aside of the Public Works Employment Act of 1977 was constitutional. The set-aside requirement that ten percent of all public works contracts be awarded to minority business, defining minority group members as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

Of those justices finding the set-aside constitutional, Justice Powell took the strictest view. He stated:

> "In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sanford, 19 How. 393 (60 U.S.) (1857). At least since the decision in Brown v. Board of Education, 347 U.S. 483 (1954), the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.
>
> "Distinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task. When we first confronted such an issue in Bakke, I concluded that the Regents of the University of California were not competent to make, and had not made, findings sufficient to uphold the use of the race-conscious remedy they adopted. As my opinion made clear, I believe that the use of racial classifications, which are fundamentally at odds with the ideals of a democratic

> society implicit in the Due Process and Equal Protection Clauses, cannot be imposed simply to serve transient social or political goals, however worthy they may be."

He stated that the essential elements to consider were:

(1) the efficacy of alternative remedies;

(2) the planned duration of the remedy;

(3) the relationship between the percentage of workers to be employed and the percentage of minority group members in the relevant population or work force; and

(4) the availability of waiver provisions if the hiring plan could not be met.

He added "a race-conscious remedy should not be approved without consideration of an additional crucial factor -- the effect of the set-aside on innocent third parties."

Training and planning employment is one of the least intrusive remedies available and the program is limited in duration. Since it does not set aside jobs, the ratio provisions and the availability of waiver provisions would not be a factor. The effect on innocent third parties of exclusion from job training is clearly less than the effect of a contract percentage approved in Fullilove.

In my opinion an appropriation for the purpose of a comprehensive Southeast Alaska Native training program would be found constitutional under any analysis in Fullilove, which found the minority business set-aside constitutional.

BGB:ljb

Bill No. Senate Bill 210

Date March 2, 1981

Title An Act making an appropriation to the Department of Labor for a contract with the Central Council Tlingit and Haida Indian Tribes of Alaska for a comprehensive Southeast Alaska Native training and employment plan; E.D.

Contact: Glenn Lundell
465-2700

The bill does not contain sufficient information to develop a position paper. It will be necessary to review a copy of the proposal to determine if this effort could be coordinated with other employment service activities, would create a duplication of effort, or would benefit the unemployed or underemployed.

Pursuant to the Alaska Manpower Program Policy statement made by the Governor on January 24, 1976, training and employment programs are to be reviewed and coordinated by the State Manpower Services Council. It is recommended that the proposal be reviewed by that body and appropriate recommendations be made to legislative committees. The next meeting of that Council will be held in Juneau on April 2 and 3, 1981.

It is possible that an appropriation based on race distinction would violate the equal protection clause of the U. S. Constitution. A legal opinion should probably be requested.

POSITION PAPER/Department of Labor

Alaska State Legislature

Senate

Committee on Labor & Commerce

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

SUMMARY SB 210:

$253,000 is appropriated from the general fund to the Department of Labor for a contract with the Central Council Tlingit and Haida Indian Tribes of Alaska for a comprehensive SE Alaska Native Training and employment plan. Takes effect immediately.

(8) "personal property" includes money, goods, chattels, things in action, and evidences of debt;

(9) "property" includes real and personal property;

(10) "real property" is coextensive with land, tenements, and hereditaments;

(11) Repealed by § 2 ch 66 SLA 1965.

(12) "signature" or "subscription" includes mark when the person cannot write, with his name written near the mark by a witness who writes his own name near the person's name; but a signature or subscription by mark can be acknowledged or can serve as a signature or subscription to a sworn statement only when two witnesses so sign their own names thereto;

(13) "state" means the State of Alaska unless applied to the different parts of the United States and in the latter case it includes the District of Columbia and the territories;

(14) "writing" includes printing. (§ 4 ch 62 SLA 1962; am § 2 ch 66 SLA 1965; am § 10 ch 117 SLA 1968)

Cross references. — For additional definition of "peace officer," see AS 11.30.100. For further definition of "person," see AS 15.56.250. For additional definitions, see AS 15.60.010.

Effect of amendments. — The 1965 amendment repealed paragraph (11).

The 1968 amendment substituted "state troopers" for "state police" in paragraph (6).

Quoted in Matanuska-Susitna Borough v. King's Lake Camp, Sup. Ct. Op. No. 472 (File No. 857), 439 P.2d 441 (1968); Stroh v. State Housing Authority, 7 Alas. L.J. No. 9, p. 647 (Sept., 1969); Stroh v. Alaska State Housing Authority, Sup. Ct. Op. No. 496 (File No. 924), 459 P.2d 480 (1969).

Sec. 01.10.065. Certified mail. When the use of registered mail is authorized or required by the laws of the state, certified mail, with return receipt requested, may be used. (§ 1 ch 66 SLA 1965)

Article 3. Effect of Statutes.

Sec. 01.10.070. Time statutes take effect. (a) All laws passed by the legislature become effective 90 days after enactment. The legislature may by concurrence of two-thirds of the membership of each house, provide for another effective date.

(b) The actual effective date of a bill having no effective date clause is determined by starting with the day after signature by the governor or the day on which he gives written notice that he is allowing it to become law without his signature, and counting 90 calendar days, the law becoming effective at 12:01 a.m., Pacific Standard time, on the 90th day.

(c) A law having an immediate effective date clause becomes

ing the law to become effective without his approval.

(d) A law which specified a definite effective date becomes effective at 12:01 a.m., Pacific Standard time, on the date specified. (§ 5 ch 62 SLA 1962; am § 8 ch 126 SLA 1966)

Effect of amendment.—The 1966 amendment rewrote this section.

Sec. 01.10.080. Computation of time. The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday. and then it is also excluded. (§ 6 ch 62 SLA 1962)

This section was taken from the laws of Oregon. Mahan v. Sparks, 10 Alaska 292 (1942); Lowe v. Hess, 10 Alaska 174 (1941).

It merely states the common-law rule. Lowe v. Hess, 10 Alaska 174 (1941).

This statutory computation is declaratory of the common-law rule in Alaska. Turnbull v. Bonkowski, 274 F. Supp. 733 (D. Alas. 1967).

Alaska's computation-of-time statute merely expresses the common law. Turnbull v. Bonkowski, 419 F.2d 104 (9th Cir. 1969).

Common law.—At common law it was established if the last day on which an act was to be performed fell on a Sunday, then that Sunday was excluded and the time was extended to the following day Wade v. Dworkin, Sup. Ct. Op. No. 306 (File No 603), 407 P.2d 587 (1965).

The common-law rule is that when the period of time within which an act is to be performed exceeds one week, an intervening Sunday is included in the computation. Wade v. Dworkin, Sup. Ct. Op. No. 306 (File No. 603), 407 P.2d 587 (1965).

Legislative intent.—The legislature, by virtue of its enactment of this section, manifested its intent to exclude Sundays in the computation of time only when Sunday falls on the last day of a period in question. Wade v Dworkin, Sup. Ct. Op. No. 306 (File No. 603), 407 P.2d 587 (1965)

Exception in common law as to computation of person's age.—There exists a well-recognized exception in the common law as to the computation of a person's age. This exception, briefly stated, is that a year must be counted, not from the day of birth, but from the preceding day when limitation is figured. Turnbull v. Bonkowski, 274 F. Supp. 733 (D. Alas. 1967).

The computation-of-time statute is expressive of only the general common-law rule and does not presume to abrogate the well-established exception thereto governing the computation of a person's age. It follows that the statute has no application in calculating a person's age. Turnbull v. Bonkowski, 419 F.2d 104 (9th Cir. 1969).

The supreme court is enjoined by the legislature to observe the provisions of AS 01.10.020, in resolving any issue relating to this section and its applicability to the five-day recount provision of AS 15.20.430. Wade v. Dworkin, Sup Ct. Op. No. 306 (File No. 603), 407 P.2d 587 (1965).

Computing limitation under AS 15.20.430.—In computing the five-day period of limitation prescribed by AS 15.20.430, an intervening Sunday is to be included. Wade v Dworkin, Sup. Ct. Op. No. 306 (File No. 603), 407 P.2d 587 (1965).

Computation of the limitations period provided by AS 09.10.070 subsequent to the removal of the disability of minority is to be made by excluding the first day and including the last. Turnbull v. Bonkowski, 274 F. Supp. 733 (D. Alas. 1967).

Filing appeal.—Under this section, the day on which the judgment is entered should be excluded in computing the time within which an application for an appeal must be filed. Mahan v. Sparks, 10 Alaska 292 (1942).