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Alaska State Legislature

SENATOR  
ROBERT H. ZIEGLER, SR.  
307 BAWDEN STREET  
KETCHIKAN, ALASKA 99901

While in Juneau  
POUCH V  
JUNEAU, ALASKA 99811



Senate

VICE CHAIRMAN  
SENATE RESOURCES COMMITTEE  
MEMBER  
SENATE JUDICIARY COMMITTEE  
WESTERN STATES LEGISLATIVE  
FORESTRY TASK FORCE  
WESTERN CONFERENCE COUNCIL  
OF STATE GOVERNMENTS

May 9, 1984

*file w/ my Bill*

Senator Bill Ray, Chairman  
Senate Judiciary Committee  
Alaska State Legislature  
Juneau, Alaska

Re: CSHB 588.

Dear Bill:

I have attached Guy's research on the captioned bill. It very well explains the subject matter of the bill; I favor the legislation.

Too often people get involved in a bureaucratic maze and encounter excessive red tape and unnecessary delay. If a hearing officer, for example, knew that the state could be assessed attorneys fees and/or costs if he made a capricious or arbitrary decision, we might arrive at more efficient processing and handling of claims.

I have not talked to the prime sponsor to find out whether she has a particular target in mind, but I'd be more than happy so to do if requested by you.

Regards,

*3-*

Robert H. Ziegler, Sr.

RHZ:1k

Attachment

TO: SENATOR ROBERT H. ZIEGLER, SR.  
FROM: GUY VAN DOREN  
ADMIN. ASST. *Guy*  
SUBJECT: CSHB 588

CSHB 588 AN ACT PROVIDING FOR THE AWARD OF COSTS  
AND ATTORNEY FEES TO PERSONS WHO PREVAIL IN CERTAIN STATE  
ADMINISTRATIVE PROCEEDINGS AND PROVIDING FOR AN EFFECTIVE DATE

NEW SECTIONS ADDED TO 09.50

Sec. 1. ARTICLE 7 COST AND ATTORNEY FEES IN ADMINISTRATIVE PROCEEDINGS.

09.50.140 AWARD OF COSTS AND ATTORNEY FEES TO RESPONDENTS IN  
ADMINISTRATIVE PROCEEDINGS.

(a) Allows a respondent, who prevails in an administrative proceeding involving a civil penalty on that person or revocation, suspension, limitation or the conditioning of a persons license or privilege, to recover from the state, the costs of defense including attorney fees.

(b) Allows respondent to recover from the state the reasonable costs of the appeal and the administrative proceedings, including reasonable attorney fees, if the original determination imposes a civil penalty or revocation, suspension, limitation or conditioning of a right, authority, license or authority and that decision is reversed in a subsequent court proceeding.

(c) Provides that the award of attorney fees may not exceed \$75 and hour for services actually rendered and the total may not exceed \$10,000 unless the limitation results in the extreme hardship of the prevailing party.

(d) Provides that the award of attorney fees or costs made under this section may be appealed to Superior Court.

\*\*\*\*\* (who pays for the appeal???)

(e) Provides that this provision does not apply to claims for costs or attorney fees that are specifically authorized by statute or rules of court.

(f) Defines state agency and includes the Univ. of Alaska

Section 2. Provides that the act applies only to proceedings commenced after the effective date of this act.

Section 3. Immediate effective date.

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: 3/20/84

**REQUEST**

Bill/Resolution No.: CASHB 588 (JUD)  
 Title: Costs and Attorney fees, administrative proceedings  
 Sponsor: Tischer  
 Requestor: House Finance  
 Date of Request: \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected: ADEC  
 Program Category Affected: \_\_\_\_\_  
 All programs  
 BRU, Program or Subprogram(s) Affected: \_\_\_\_\_

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
<b>OPERATING</b>						
100 PERSONAL SERVICES		49.5	50.1	50.7	51.3	
200 TRAVEL		10.0	10.0	12.0	15.0	
300 CONTRACTUAL		8.0	3.0	8.0	8.0	
400 SUPPLIES		1.5	1.5	1.5	1.5	
500 EQUIPMENT		2.5	.5	.5	.5	
600 LAND & STRUCTURES						
700 CRANTS, CLAIMS		50.0	75.0	100.0	125.0	
800 MISCELLANEOUS						
<b>TOTAL OPERATING</b>		121.5	140.1	172.7	201.3	
<b>CAPITAL</b>						
<b>REVENUE</b>						

**FUNDING: (Thousands of Dollars)**

GENERAL FUND		121.5	140.1	172.7	201.3	
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		121.5	140.1	172.7	201.3	

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

**SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:**

Not identified by the sponsor.

If the Bill were amended, the State agency could collect its cost and attorney fees when it prevails thus offsetting the costs when the respondent prevails.

**ANALYSIS:** Attach a separate page for analysis

Prepared By: Billie Trent Phone: 465-2600  
 Division: Commissioner's Office Date: 3/20/84  
 Approved by Commissioner: Richard A. Neve Date: 3/20/84  
 Agency: Environmental Conservation

**Distribution (by Agency preparing fiscal note):**

Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)

12/1/84

## FISCAL ANALYSIS

CSHB 588 (Jud)

This legislation, if it becomes law, will create the need for a staff attorney/hearing officer to handle the more sophisticated proceedings which would result from the involvement of attorneys. At the very least, a contract attorney would be required to advise the commissioner.

We further believe it would be necessary to contract the services of court reporters to record the hearings and prepare transcripts which meet the more stringent expectations of an attorney.

Since hearings are requested and granted statewide, travel would be substantial in order to hold the hearings in locations most convenient to the participants.

The claims figures are based on the fact that in 1983, ten hearings were granted, only one of which could result in the reversal of an agency decision, at an estimated cost of \$50,000 for costs and attorney fees.

In estimating future fiscal impact, we have assumed that passage of HB 588 would result in more hearings being requested and granted, with a similar percentage of reversals.

In truth, there is no way to accurately estimate fiscal impact. Each case is unique and could result in complications and costs even greater than anticipated herein.

1.	POSITION TITLE ATTORNEY II			RANGE/STEP 19	BARG. UNIT GGU	FORM 12 PAGE/LINE	GOV.	APPRDV.	DISAPP.
2.	TYPE OF POSITION Permanent	STAFF MONTHS 12	RP NUMBER ----	PCN NUMBER pending	BRU PRIORITY	LOCATION Juneau	ELECTION DISTRICT 99	LEC.	
3.	CONTINUATION LEVEL			JUSTIFICATION					
4.	TYPE OF EXPENDITURE			<p>Should HB 588 become law, this position would be necessary to handle the more sophisticated hearings which would result.</p> <p>It is also anticipated that there would be an increase in the number of hearings requested, thereby precluding the Commissioner from acting as hearing officer, even if he had the legal expertise to do so.</p> <p>Since hearings are held statewide, a substantial travel increment would be required. We further believe it would be necessary to contract the recording of the hearings to court reporters rather than simple cassette recordings by persons unfamiliar with formal proceedings.</p>					
	1	2	3						
	PERSONAL SERVICES								
5.	Salary	38,124							
6.	Benefits	6,282							
7.	Supplemental Benefits	2,337							
8.	Fixed Benefits	2,728							
9.	TOTAL PERSONAL SERVICES	01	49.5						
10.	Travel	02	10.0						
11.	Contractual	03	8.0						
12.	Commodities	04	1.5						
13.	Equipment	05	2.5						
14.	Other								
15.	TOTAL COST		71.5						
	RECEIPT CODE	FUNDING SOURCE							
16.		Federal Receipts 1002							
17.		G.F. Match 1003							
18.		General Funds 1004							
19.		I-A Receipts 1005							
20.		Program Receipts 1028							
21.		Other							
FOR B&M USE ONLY									
4A KEY NUMBER -----									

**13** REQUEST FOR  
NEW POSITION

AGENCY Environmental Conservation  
PROGRAM All  
BRU \_\_\_\_\_  
COMPONENT \_\_\_\_\_

Page 1 of 1  
Revised Date 3/20/84

**FY 85**

## POSITION PAPER

### DEPARTMENT OF ENVIRONMENTAL CONSERVATION

#### CSHB 588 (Judiciary)

#### Award of Costs and Attorney Fees, State Administrative Proceedings

While we have no problem with the concept of reimbursing reasonable costs to persons who challenge permit decisions and prove that the department erred, we believe encouraging the involvement of attorneys would complicate what is now a very simple process within our regulations and would result in an increase in hearings at great expense to the state with a disproportionate benefit to the public, given the fact that most of this department's challenged decisions have been upheld.

Our adjudicatory process was created for use by laypersons. It provides an informal forum whereby anyone may challenge a department decision and bring that challenge before the commissioner. In such cases, the Department of Law attorney assigned to defend the decision has kept a low profile with regard to strict legal procedure, keeping objections to a minimum and giving as much leeway to the layperson as possible.

Most of the adjudicatory hearings before this department have not involved attorneys. Those that have become a nightmare of motions to be decided, and extensions of time that delayed the decision many months beyond the limits set in our regulations. A formal atmosphere was created in what was intended to be a quasi-judicial setting.

Under AS 46.35.090 (e), this department "need not conform to the Administrative Procedure Act" when a permit decision is adjudicated. However, when a proceeding becomes complicated with factors not anticipated when our regulations were drafted, we are forced to look elsewhere for guidance, i.e., the Administrative Procedure Act and the Alaska Rules of Court. Such complication was clearly not envisioned when the adjudicatory process was developed. If this bill becomes law, we would require a staff attorney/hearing officer or, at the very least, a contract attorney to advise the commissioner. It would also be necessary to rewrite our regulations to include more sophisticated procedures.

A memo dated July 8, 1982 from Art Peterson at Department of Law addressing award of costs and fees, states "It is difficult to relate [the concept of 'prevailing party'] to either the single-party or multi-party permit-application adjudications handled by your department."

For example, when someone challenges a permit issued for a solid waste disposal site, that challenge usually reflects the undesirability of having such a site near their home. That argument is a zoning issue beyond our jurisdiction. For that person to "prevail," we would have to withhold the permit and prevent the site from being established. What actually happens, however, when a decision is found lacking in some respect, is that the matter is remanded back to the regional office for further study or refinement. Permit conditions are sometimes amended. While that could be interpreted as a "victory" for the requestor, in the very strictest sense, it is not.

We certainly appreciate the intent of this legislation. Not many private citizens will devote the time and effort spent by Mrs. McCallon in her "successful" adjudication of the Auke Bay Breakwater permit, or by Mr. and Mrs. Allen in their "unsuccessful" adjudication of the Soldotna Landfill permit. They had no apparent difficulty with the hearing process and met most deadlines with ease.

At the other extreme we find the Cube Cove adjudication where five attorneys participated, and the Atwood adjudication with four attorneys. The Cube Cove decision was delayed for several months by complicated procedures, and the Atwood matter is still undecided nearly three years later. Costs and fees in those matters will probably amount to five figures.

While Cube Cove and Atwood would have involved attorneys with or without HB 588, that legislation will encourage even cases such as Auke Bay and Soldotna to escalate to the same unwieldy proportions.

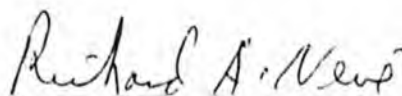
Compliance order and emergency order hearings, on the other hand, are more formal, and more appropriately lend themselves to the presence of attorneys. This is evident from the requirement for the appointment of a formal hearing officer. Of the two types of hearings, it is suggested that adjudicatory hearings be exempted from this legislation, while compliance order and emergency order hearings be covered.

The amendment that places a ceiling on the amount that might be awarded is an improvement over the original bill, but it will still be costly for the state to bear this expense. Assessing fiscal impact is close to impossible.

We do not believe the delays inherent with a more complicated approach would serve the best interests of the public. Neither is the public well served by the state addressing increased, convoluted hearings at increased cost to the taxpayer, with no provision for reimbursement to the state from unsuccessful requestors.

If the award of attorney fees were restricted to proceedings which fall strictly under the Administrative Procedure Act (exempting our adjudicatory hearings but not our compliance hearings), while reasonable costs (excluding attorney fees but including expert witness fees--probably of far greater benefit to the requestor) were allowed for all proceedings, we believe the intent of the legislation would be carried out without jeopardizing the simple hearing process we follow.

DATED: March 20, 1984.



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Richard A. Neve  
Commissioner