

H

B

5

88

# COMMITTEE REPORT

## SENATE

FURTHER:

Date \_\_\_\_\_

Mr. President

The Committee on \_\_\_\_\_ considered \_\_\_\_\_

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

- do pass
- do pass with attached amendment(s)
- replace with/or-adopt 5 CS for \_\_\_\_\_
- new title
- same title and recommends \_\_\_\_\_
- and attached a "LETTER OF INTENT"  NEW FISCAL NOTE
- reports it back without recommendation
- recommends referral to \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

MEMBERS HAVING  
OTHER RECOMMENDATIONS

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Chairman recommendation

Offered: 3/15/84  
Referred: Finance

Original sponsor: Tischer

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 588 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act providing for the award of costs and attorney  
7 fees to persons who prevail in certain state adminis-  
8 trative proceedings; and providing for an effective  
9 date."

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

11 \* Section 1. AS 09.50 is amended by adding a new section to read:

12 ARTICLE 7. COSTS AND ATTORNEY FEES IN ADMINISTRATIVE PROCEEDINGS.

13 Sec. 09.50.410. AWARD OF COSTS AND ATTORNEY FEES TO RESPONDENT  
14 IN ADMINISTRATIVE PROCEEDING. (a) If action by a state agency re-  
15 sults in an administrative proceeding in which the state agency takes  
16 a position adverse to the respondent and the proceeding is to impose a  
17 civil penalty or tax on a person or to revoke, suspend, limit, or  
18 condition a person's right, authority, license, or privilege, the  
19 hearing officer or other official who presides over the proceeding  
20 shall allow the respondent to recover from the state the respondent's  
21 costs of defense, including attorney fees, if the respondent prevails  
22 in the administrative proceeding.

23 (b) If a civil penalty or tax is imposed on a person in an  
24 administrative proceeding or the proceeding results in the revocation,  
25 suspension, limitation, or conditioning of a right, authority, li-  
26 cense, or privilege and the decision made in the administrative pro-  
27 ceeding is reversed on the merits in a subsequent court proceeding,  
28 the court shall allow the person who was the subject of that decision  
29 to recover the costs of defense in the administrative proceeding.

1 including attorney fees.

2 (c) An award of costs and attorney fees made under this section  
3 shall be 100 percent of the first \$2,000 of costs and attorney fees  
4 and 75 percent of costs and attorney fees in excess of \$2,000.

5 (d) An award of costs or attorney fees made under this section  
6 may be appealed to the superior court.

7 (e) In this section "state agency" means a department, office,  
8 agency or other instrumentality of the state, including the University  
9 of Alaska.

10 \* Sec. 2. This Act applies only to administrative proceedings that are  
11 commenced after the effective date of this Act.

12 \* Sec. 3. This Act takes effect immediately in accordance with AS 01.-  
13 10.070(c).

TRP 4462

Bill No. CSHB 588 (Finance)

Date May 23, 1984

Title "An Act providing for the award of costs and attorney fees to persons who prevail in certain state administrative proceedings."

Contact: Robert W. Landau  
465-2700

This bill appears to have been modeled after the federal Equal Access to Justice Act, 5 U.S.C. §504, which has been in effect since October 1980. The basic provision in the federal law provides as follows:

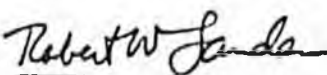
An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

While the Department of Labor does not disagree with the basic purpose of House Bill 588, we believe that the present language of the bill is too broad in scope and should be amended to more closely parallel the federal law. Specifically, the Department recommends that the term "administrative proceeding" in the bill be replaced with the term "adversary adjudication," since the former term could be interpreted to broadly cover all types of informal and non-adjudicatory proceedings between an administrative agency and a private party. Furthermore, the Department recommends that the scope of this bill, like the federal law, should be limited to adjudications under the Administrative Procedure Act since those proceedings are more formal and adversarial in nature and typically involve the use of attorney representation. We believe that if this bill is broadly applied to all manner of administrative proceedings, both informal and formal, it will tend to inject attorneys more than ever into all levels of the administrative process, which we believe over the long run would convert many administrative proceedings from the informal, speedy, and relatively inexpensive process they were designed to be into proceedings that are more formal, time consuming, and costly to all parties. |

In addition, we believe that this bill should contain the same kind of "substantial justification or special circumstances" limitation found in the parallel federal law. In many areas of administrative adjudication in Alaska, the applicable law is new, unclear, or rapidly changing; in these situations, an administrative agency may be substantially justified in going forward and should not be penalized for doing so in good faith. We believe that the inclusion of "substantial justification or special circumstances" language will provide an important safety valve to ensure that the intent of the bill is appropriately implemented.

A fiscal note has been attached.

APPROVED:

  
for Jim Robison  
Commissioner

**POSITION PAPER/**Department of Labor

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

REQUEST

Bill/Resolution No.: CS HB 588(Fin)  
Title: "award of cost and attorney fees to persons...."  
Sponsor: Tischer  
Requestor: Senate Judiciary  
Date of Request: 5/22/84

FISCAL DETAIL

Agency Affected: Labor  
Program Category Affected: Social Services  
BRU, Program or Subprogram(s) Affected: Employment Security BRU Unemployment Insurance Component

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		54.0	114.5	133.5	155.6	181.5
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		54.0	114.5	133.5	155.6	181.5
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		54.0	114.5	133.5	155.6	181.5
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

ANALYSIS: *John W. Shay, Jr.* Attach a separate page for analysis

Prepared By: John W. Shay, Jr. Phone: 465-2712  
Division: Employment Security Division Date: 5/22/84

Approved by *Robert W. Jordan* Date: 5/22/84  
Agency: Labor

LEG:B:11

Distribution (by Agency preparing fiscal note):

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

12/1/83

FISCAL NOTE

THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE

BILL/RESOLUTION NO: CSHB 588 (FII.)

TITLE: "An Act relating to award of cost and attorney fees to persons...."

AGENCY AFFECTED: Department of Labor

Page 2

Under this bill the Department of Labor, Employment Security Division would be responsible for reimbursing costs and attorney fees to persons who prevail against the State in administrative proceedings for Unemployment Insurance benefit and tax cases.

The following assumptions have been made in preparing this fiscal note.

1. The effective date is July 1, 1984.
2. Four thousand projected cases in FY '85.
3. Thirty percent of the cases will be reversed.
4. Ten percent of the reversed cases will be represented by an attorney.
5. Average cost per case will be \$450 with a maximum fee of \$75 per hour.
6. One hundred percent of the costs and attorney fees will be reimbursable.
7. The number of cases with legal representation will double in FY '86.
8. For FY '87 thru FY '89, 10% increase annually in the reversed cases represented by an attorney.
9. Six percent inflation factor has been used for FY '86 thru FY '89.

LEG:B:11

— FILE —  
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

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:lk

Attachment

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

REQUEST

Bill/Resolution No.: HB 588  
 Title: An Act....award of costs and attorney fees....  
 Sponsor: Tischer  
 Requestor: Judiciary  
 Date of Request: 3/1/84

FISCAL DETAIL

Agency Affected: Education  
 Program Category Affected: Elementary & Secondary Education  
 BRU, Program or Subprogram(s) Affected: Management, Law & Finance

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
<b>OPERATING</b>						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
<b>TOTAL OPERATING</b>						
<b>CAPITAL</b>						
<b>REVENUE</b>						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

This is not a zero fiscal note. Financial impact of the bill is indeterminate.

ANALYSIS: Attach a separate page for analysis

Prepared By: Steve Hole Phone: 465-2800  
 Division: Commissioner's Office Date: 3/1/84

Approved by Commissioner: Harold Reynolds, Jr. Date: 3/1/84  
 Agency: Education

Distribution (by Agency preparing fiscal note):

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

12/1/83

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date \_\_\_\_\_

REQUEST

Bill/Resolution No: HB 588  
 Title: Award of costs and attorney fees.  
 Sponsor: Tischer  
 Requestor: House Judiciary  
 Date of Request: \_\_\_\_\_

FISCAL DETAIL

Agency Affected: Revenue  
 Program Category Affected: \_\_\_\_\_  
 BRU, Program of Subprogram(s) Affected: \_\_\_\_\_

EXPENDITURES/REVENUES: (in thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES	-	-	-	-	-	-
200 TRAVEL	-	-	-	-	-	-
300 CONTRACTUAL	-	-	-	-	-	-
400 SUPPLIES	-	-	-	-	-	-
500 EQUIPMENT	-	-	-	-	-	-
600 LANDS & STRUCTURES	-	-	-	-	-	-
700 GRANTS, CLAIMS	-	-	-	-	-	-
800 MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	-	-	-	-	-
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	-	-	-	-	-
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	-	-	-	-	-

POSITIONS:

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

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

Fiscal impact of this legislation would be difficult to project as the number of hearings in question is unknown.

ANALYSIS: Attach a separate page for analysis.

Prepared By: Bruce M. Botelho  
 Division: Commissioner's Office

Phone: 455-2300  
 Date: 02/29/84

Approved by Commissioner: *[Signature]*  
 Agency: *[Signature]*

Date: 2/29/84

Distribution (by Agency preparing fiscal note):

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

## Analysis for HB 588

HB 588 would require presiding officers in administrative proceedings to award respondents their "costs of defense, including attorney fees."

There are two fundamental deficiencies with this bill. First, and the most significant, is the infusion of additional issues for appeal in cases that might not otherwise be appealed. A review of Alaska Supreme Court decisions will disclose numerous cases appealed on two related issues: (1) who is the prevailing party, and (2) the reasonableness of costs and attorney fees. Because the almost universal practice in this country has been to preclude attorney fees at the administrative level, administrative hearing officers have not had to divert their attention to this issue. In this regard it should be noted that, like criminal cases, taxation and license disciplinary proceedings have been considered exercises of the sovereign's power for the public welfare for which no attorney fees should be awarded. Second, the bill is imbalanced in that it does not provide for compensation to the state when the state prevails in proceedings.

The motivation for litigation over costs and attorney fees might be reduced by inclusion of language limiting the amount of recovery. This would be especially helpful in cases before the Department of Revenue in which millions of dollars are at issue. Such a limitation might take the following form:

"A claim for costs and attorney fees may not exceed \$75 an hour for services actually performed by the attorney of the claimant and may not exceed \$5,000."

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

REQUEST

Bill/Resolution No.: HB 588  
 Title: "award of cost and attorney fees to persons...."  
 Sponsor: Tischer  
 Requestor: Judiciary Comm.  
 Date of Request: February 28, 1984

FISCAL DETAIL

Agency Affected: Labor  
 Program Category Affected: Social Services  
 BRU, Program or Subprogram(s) Affected: Employment Security BRU  
Unemployment Insurance Component

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		24.0	50.9	56.0	61.6	67.7
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		24.0	50.9	56.0	61.6	67.7
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		24.0	50.9	56.0	61.6	67.7
FEDERAL FUNDS						
OTHER						
TOTAL		24.0	50.9	56.0	61.6	67.7

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

ANALYSIS: Attach a separate page for analysis

Prepared By: John W. Shay, Jr. Phone: 465-2712  
 Division: Employment Security Division Date: 2-29-84  
 Approved by Commissioner: Jim Robinson Date: 2-29-84  
 Agency: Labor

LEC:B:11

Distribution (by Agency preparing fiscal note):

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

12/1/83

FISCAL NOTE

THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE

BILL/RESOLUTION NO: HB 588

TITLE: "An Act relating to award of cost and attorney fees to persons...."

AGENCY AFFECTED: Department of Labor

Page 2

Under this bill the Department of Labor, Employment Security Division would be responsible for reimbursing costs and attorney fees to persons who prevail against the State in administrative proceedings for Unemployment Insurance benefit and tax cases.

The following assumptions have been made in preparing this fiscal note.

1. The effective date is July 1, 1984.
2. Four thousand projected cases in FY '85.
3. Thirty percent of the cases will be reversed.
4. Ten percent of the reversed cases will be represented by an attorney.
5. Average cost per case will be \$400.
6. Fifty percent of the cost will be reimbursable under Alaska Rules of Civil Procedure, Rules 32 (Designation of reasonable cost).
7. The number of cases with legal representation will double in FY '86.
8. For FY '87 thru FY '89, 10% increase annually in the reversed cases represented by an attorney.
9. Six percent inflation factor has been used for FY '86 thru FY '89

LEG:8:11

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

REQUEST

Bill/Resolution No.: 588  
 Title: An Act providing for the  
award of costs & attorney's fees.  
 Sponsor: Tischer  
 Requestor: \_\_\_\_\_  
 Date of Request: 2/9/84

FISCAL DETAIL

Agency Affected: Commerce & Economic Dev.  
 Program Category Affected: Consumer Protection  
 BRU, Program or Subprogram(s) Affected:  
Alaska Transportation Commission

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		10.0				
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		10.0				

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND		10.0				
FEDERAL FUNDS		-0-				
OTHER		-0-				
TOTAL		10.0				

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

If the Bill was 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: Keith H. Miller Phone: 561-4216  
 Division: Alaska Transportation Commission Date: 2/16/84  
 Approved by Commissioner: [Signature] Date: 3/1/84  
 Agency: Commerce and Economic Development

Distribution (by Agency preparing fiscal note):


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

12/1/83

ANALYSIS FOR FISCAL NOTE

It is not possible to accurately predict the future fiscal impact of this bill with any certainty. The problems in predicting is that there is no certainty on the number of proceedings that will occur; there is no way of predicting the number wherein the respondent prevails; and there is no way of predicting the amount of fees that would be awarded.

A review of the 283 ATC proceedings that would appear to be covered by this legislation that were initialed in 1983 indicates that four cases might have justified the awarding of costs and attorney fees to the respondent. It should be noted that some of these proceedings are still open.



STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

REQUEST

Bill/Resolution No.: HB NO. 588  
 Title: "An Act relating to costs and attorney fees."  
 Sponsor: Rep. Tischer  
 Requestor: Jud & Finance  
 Date of Request: \_\_\_\_\_

FISCAL DETAIL

Agency Affected: Commerce & Economic Dev.  
 Program Category Affected: Public Protection  
 BRU, Program or Subprogram(s) Affected: Occupational Licensing

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		70.0	73.5	77.2	81.0	85.1
400 SUPPLIES						
500 EQUIPMENT						
500 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANECUS						
TOTAL OPERATING	0	70.0	73.5	77.2	81.0	85.1
CAPITAL						
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
GENERAL FUND	0	70.0	73.5	77.2	81.0	85.1
FEDERAL FUNDS						
OTHER						
TOTAL	0	70.0	73.5	77.2	81.0	85.1

POSITIONS:

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

Not identified by the sponsor.

ANALYSIS: Attach a separate page for analysis (See Attached)

Prepared By: Darrell Miller Phone: 465-2535  
 Division: Occupational Licensing Date: 3/1/84  
 Approved by Commissioner: Richard A. Lyon Date: 3/1/84  
 Agency: Commerce & Economic Development

Distribution (by Agency preparing fiscal note):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)

FISCAL ANALYSIS:

Assumptions: This bill, if enacted in its present form, would provide a fiscal impact on the Division of Occupational licensing operations through administrative proceedings for the 22 licensing functions of the division, boards and commission.

In FY '82 the division concluded a total of 76 administrative proceedings, of which at least 17 were concluded in partial, or total, favor of the respondent.

In FY '83 the division concluded a total of 21 administrative proceedings, of which at least 11 were concluded in partial, or total, favor of the respondent.

Under the provisions of this bill, a respondent, as the prevailing party, would be entitled to an award of costs and attorney fees, in full or in part, as the case may be, in an administrative proceeding conducted by the division.

The Alaska Rules of Civil Procedure, Rules 79 and 82, are somewhat flexible in the awarding of costs and attorney fees to a prevailing party.

Each instance would require individual analysis and the estimate of the fiscal impact incurred by the division under this bill can only be an estimate that is unsupported by factual documentation at this time.

No fiscal impact would be incurred for other operating costs of the division under the provisions of this bill.

HOUSE BILL NO. 588

300 CONTRACTUAL (Note: 5% inflation rate projected for future)

The FY '82 and 83 combined total of administrative proceedings concluded in partial or full favor of the respondent was 28, or an average of 14 each year.

Estimate: Average costs and attorney fees for the respondent per proceeding; \$5,000.00.

14 proceedings x \$5,000.00 = \$70,000.00

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

REQUEST

Bill/Resolution No.: CS HB588(Fin)  
Title: An Act providing for the  
award of costs and attorney fees....  
Sponsor: Tischer  
Requestor: Sen Judiciary  
Date of Request: 5-9-84

FISCAL DETAIL

Agency Affected: Public Safety  
Program Category Affected: Life and Property Protection  
BRU, Program or Subprogram(s) Affected: Motor Vehicles/Driver Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES		69.0	74.9	79.4	84.2	89.3
200 TRAVEL		6.0	6.4	6.8	7.2	7.6
300 CONTRACTUAL		19.6	20.8	22.0	23.3	24.7
400 SUPPLIES		.4	.4	.4	.4	.5
500 EQUIPMENT		17.7	-0-	-0-	-0-	.5
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS		463.2	491.0	520.5	551.7	584.8
800 MISCELLANEOUS						
TOTAL OPERATING		575.9	593.5	629.1	666.8	707.4
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		575.9	593.5	629.1	666.8	707.4
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		2	2	2	2	2
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Bill Brown  
Division: Motor Vehicles

Phone: 465-4335  
Date: May 8, 1984

Approved by Commissioner: [Signature]  
Agency: Public Safety

Date: 5/9/84

Distribution (by Agency preparing fiscal note):

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

12/1/83

In 1983, the Division of Motor Vehicles held approximately 350 driver's license suspension/revocation hearings (not including November and December DWI hearings), and 180 motor vehicles title revocation and determination hearings. This year we are averaging over 100 driver's license hearings per month as a result of the new DWI law. About 25% of last year's hearings were found in favor of the citizen. Attorney time on driver's license hearings is estimated at 4 hours for each hearing, and for motor vehicle titles at 6 hours each.

Recently some attorneys have been advertising that they will take cases on a contingency basis in which there would be no cost to the client. In the situations addressed in this bill, if the attorney won the case the attorney would be paid by the State. If the case was lost, however, the attorney would collect no fee.

If this bill were to pass, especially with the above type of advertisements, it would have a tendency to increase the number of hearings. It is also felt that if this bill were to pass, regardless of the above-mentioned advertisements, more people would request hearings than in the past. Thus one additional hearing officer and clerical support will be needed.

100 - Personal Service

1 Hearing Office, Range 16 (new Class)	41.0	
1 Clerk IV, Range 9	28.2	
		69.0

200 - Travel

Hearing Officer to various locations to conduct hearings	6.0	6.0
--	-----	-----

300 - Contractual

310 Phones, tolls, postage	1.2	
320 Forms	.3	
330 Space Rental, 300 sq. ft. @2.25	8.1	
360 Equipment Rental	8.0	
1 AJIS terminal		
.382 DP Chargeback	2.0	
Programming and maintenance		19.6

400 - Commodities

Normal Office Supplies	.4	.4
------------------------	----	----

500 - Equipment

Office Equipment, 2 employees	3.9	
WAN, Word processing station	12.0	
Recording/Transcribing Equipment	1.8	
		17.7

700 - Claims

ATTORNEY FEES

A. Driver's License:

1. Limited licenses issued at hearings:  
60 per month = 720 annually x 4 hours  
each = 2,880 hours x \$75 per hour 216.0
2. Respondent complies with law, thus license  
action is rescinded at hearing:  
10 per month = 120 annually x 4 hours  
each = 480 hours x \$75 per hour 36.0
3. Other driver's license hearings:  
10 per month = 120 annually  
x 4 hours each = 480 hours x \$75 per  
hour 36.0

B. Title and Registration

1. Determination of ownership:  
10 per month = 120 annually x 6 hours  
each = 720 hours x \$75 per hour 54.0
2. Other  
2 per month = 24 annually x 6 hours  
each = 144 hours x \$75 per hour 10.8

TOTAL: 352.8

OTHER COSTS

Respondent's transportation, loss of wages,  
transcript preparation; etc. 1,104 incidents  
@\$100 average per case 110.4  
SUBTOTAL 463.2

TOTAL 575.9

ASSUMPTIONS:

Effective date of July 1, 1984. Six percent inflation factor used for FY-86 and subsequent years. Due to uncertain areas involving technical/procedural problems outlined in our bill analysis and position paper, the assumption was made that the respondent was "prevailing" in the situations outlined in those areas, and the State would have to pay costs and attorney fees. Clarification of those areas may change the projected expenditures listed in Line Item 700.

1.	POSITION TITLE Clerk IV				RANGE/STEP 9B	BARG. UNIT GGU	FORM 12 PAGE/LINE	GOV.	APPROV.	DISAPP.
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION Anch	ELECTION DISTRICT 7-15	LEG.		
3.	CONTINUATION LEVEL				JUSTIFICATION					
4.	TYPE OF EXPENDITURE			AMOUNT						
	1	2	3							
	PERSONAL SERVICES									
5.	Salary	20,400								
6.	Benefits	3,656								
7.	Supplemental Benefits	1,251								
8.	Fixed Benefits	2,723								
9.	TOTAL PERSONAL SERVICES	01	28,0							
10.	Travel	02								
11.	Contractual	03								
12.	Commodities	04	.1							
13.	Equipment	05	2.1							
14.	Other									
15.	TOTAL COST		36.2							
	RECEIPT CODE	FUNDING SOURCE								
16.		Federal Receipts	1002							
17.		G.F. Match	1003							
18.		General Funds	1004	30.2						
19.		I-A Receipts	1005							
20.		Program Receipts	1028							
21.		Other								
FOR B&M USE ONLY										
4A KEY NUMBER _____										

Each time action is taken against a person's driving privilege or vehicle registration/title, the individual has the right to ask for a hearing per AS 28.05.131-141. With passage of this bill additional hearings will be requested, and this position will be necessary to process the paperwork generated by hearings requests, and hearings.

Would handle paperwork for scheduling hearings, notifying individuals of hearing date, time and location, and keep appropriate records. Would handle inquiries concerning hearings.

Would be responsible to see that computer files are updated to reflect when license action is stayed upon receipt of a request for a hearing. Also that the computer files are updated to reflect a hearing officer's decision.

Would be responsible to see that hearing records are transcribed as necessary, and to prepare certified copies of those records for courts, prosecutors, private attorneys, etc

Would prepare documents required by the court whenever an appeal is filed. This includes "Notice of Parties", "Affidavits", "Notice of Filing of Record", etc.

**13** REQUEST FOR  
NEW POSITION

AGENCY Public Safety  
 PROGRAM Life and Property Protection  
 BRU Motor Vehicles  
 COMPONENT Driver Services

Page \_\_\_\_\_ of \_\_\_\_\_  
 Revised Date \_\_\_\_\_

**FY 85**

1.	POSITION TITLE (Hearing Officer) Driver Improvement Specialist				RANGE/STEP 16A	BARC. UNIT GGU	FORM 12 PAGE/LINE	GOV.	APPRD.	DISAPP.
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION Anch	ELECTION DISTRICT 7-15	LEG.		
3.	CONTINUATION LEVEL				JUSTIFICATION					
4.	TYPE OF EXPENDITURE				AMOUNT					
	1		2		3					
	PERSONAL SERVICES									
5.	Salary		30,876							
6.	Benefits		5,534							
7.	Supplemental Benefits		1,893							
8.	Fixed Benefits		2,728							
9.	TOTAL PERSONAL SERVICES		01		41.0					
10.	Travel		02		6.0					
11.	Contractual		03							
12.	Commodities		04		.3					
13.	Equipment		05		1.8					
14.	Other									
15.	TOTAL COST				49.1					
	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 _____										

This position will be responsible to hold hearings under the Division of Motor Vehicles administrative suspension program. The majority will be driver license hearings. In addition to holding hearings, would be required to prepare for each hearing, maintain appropriate records, and render a written decision of each hearing.

Each time action is taken against a person's driving privilege, or vehicle registration/title, the individual has the right to ask for a hearing per AS 28.05.131-141. With the passage of this bill additional hearings will be requested, and this position will be necessary if hearings are to be held in a timely manner.

Will travel to various cities throughout Southcentral Alaska to conduct hearings at the office of the department nearest to the residence of the person requesting the hearing, as required by AS 28.05.141(b).

**13** REQUEST FOR  
NEW POSITION

AGENCY Public Safety  
PROGRAM Life and Property Protection  
BRU Motor Vehicles  
COMPONENT Driver Services

Page \_\_\_\_\_ of \_\_\_\_\_  
Revised Date \_\_\_\_\_

**FY 85**

POSITION PAPER

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

HB 588

Award of Costs and Attorney Fees,  
State Administrative Proceedings

While this department supports the intent of this legislation, we believe that, as it is presently written, it would result in the complication and escalation of what is now a very simple process.

The great majority of adjudicatory hearings and compliance 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 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 for us.

Further, 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."

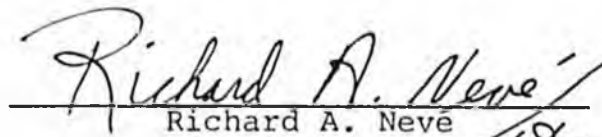

Another factor to consider is that very few of the decisions which have been adjudicated before this agency have been overturned. That fact indicates that, in most cases, the person who challenges a department decision, hoping to recover costs under this legislation, would then face the unnecessary burden of paying for an attorney.

We certainly appreciate the intent of this legislation. Not many private citizens can devote the time and effort spent by Juanita McCallon in her adjudication of the Auke Bay Breakwater permit, or by Mr. and Mrs. Allen in their adjudication of the Soldotna Landfill permit. The best we were able to do was commend them for their efforts. Perhaps a ceiling amount awardable for reasonable costs only would be more appropriate in such matters.

On the other extreme we find the Cube Cove adjudication where five attorneys participated. I do not think it would be out of line to suggest that costs and fees in that case will amount to five figures. In addition to extensive attorney time (at \$110/hour), expert witnesses, consultants, and heavy travel costs were incurred for field work. Assessing fiscal impact from future hearings of this type (which this legislation would encourage) would be close to impossible.

We recommend amendments that would either place a ceiling on any amount that might be awarded, or that would at least restrict the award of attorney fees to proceedings which fall strictly under the Administrative Procedure Act.

DATED: March 1, 1984.

  
Richard A. Neve  
Commissioner 

STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

**REQUEST**

Bill/Resolution No.: HB 588  
Title: Costs & attorney fees, administrative proceedings

Sponsor: Tischer  
Requestor: Tischer  
Date of Request: 2/29/84

**FISCAL DETAIL**

Agency Affected: ADEC  
Program Category Affected: \_\_\_\_\_

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						
200 TRAVEL						
300 CONTRACTUAL		50.0	100.0	150.0	200.0	
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
<b>TOTAL OPERATING</b>		50.0	100.0	150.0	200.0	
<b>CAPITAL</b>						
<b>REVENUE</b>						

**FUNDING: (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

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

Prepared By: Billie Trent Phone: 465-2600  
Division: Commissioner's Office Date: 3/1/84  
Approved by Commissioner: Richard A. Newell Date: 3/1/84  
Agency: Environmental Conservation

Distribution (by Agency preparing fiscal note):

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

12/1/83

FISCAL ANALYSIS

HB 588

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

For 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 different and could result in complications and costs even greater than the case now pending and mentioned above.

ENVIRONMENTAL CONSERVATION

Article 5. ADJUDICATORY HEARINGS

Section

- 200. Request for an adjudicatory hearing
- 210. Stay of decision
- 220. Action on hearing requests; intervention.
- 230. Consolidation
- 240. Discovery
- 250. Prehearing conference
- 260. Deciding officer
- 270. Hearings
- 280. Certification of record
- 290. Findings and briefs
- 300. Decision
- 310. Relaxation of regulations

18 AAC 15.200. REQUEST FOR AN ADJUDICATORY HEARING.

(a) Within 30 days after service of a decision under secs. 80 or 160 of this chapter, or AS 46.03.170, any person may serve a request on the commissioner for an adjudicatory hearing. The request must contain:

(1) the name, mailing address, and telephone number of the person making the request;

(2) the names and addresses of all persons adversely affected by the decision whom the requestor represents;

(3) a clear and concise factual statement of the nature and scope of the interests of the requestor, and an explanation of how and to what extent those interests would be directly and adversely affected by the decision;

(4) a clear and concise statement of the genuine factual issues proposed for consideration at the hearing; and

(5) where applicable, specific reference to the contested terms or conditions of the decision, as well as suggested alternative terms and conditions, which, in the judgment of the requestor, would be required to implement applicable criteria.

(b) Where application was made solely for a permit amendment, requests for an adjudicatory hearing may not raise issues relating to the validity of the permit for which an amendment is sought, nor to unrelated terms and

## ENVIRONMENTAL CONSERVATION

18 AAC 15.220. ACTION ON HEARING REQUESTS; INTERVENTION. Within 10 days after service of a request for an adjudicatory hearing, the department will serve its decision on the request upon the requestor. The department will grant a request for a hearing if the request discloses that the requestor would be adversely affected by the department's decision, that the requestor has raised a genuine issue of fact material to the decision, and that the requirements of sec. 200 of this chapter have otherwise been met. If the department grants an adjudicatory hearing request, it will publish notice of the action in a newspaper of general circulation for the affected area, and will serve notice on all persons who either submitted timely written comments or testified at a public hearing on the application. A person wanting to intervene in the proceedings may serve upon the commissioner and all parties a petition for intervention containing the information specified in sec. 200 of this chapter, within 10 days after publication of notice or mailing of notice under this section, whichever first occurs. Any party may serve an objection to the intervention petition within 10 days after service of the petition upon him. The department will reach a decision on the intervention request within 10 days after the expiration of the period for serving an objection according to the criteria established in this section. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10)  
 AS 46.03.090  
 AS 46.03.100  
 AS 46.03.110  
 AS 46.03.160  
 AS 46.03.330  
 AS 46.03.720  
 AS 46.35.090(e)

18 AAC 15.230. CONSOLIDATION. When more than one hearing request is granted, all requests will be joined in a single proceeding. Each requestor, the applicant where the applicant has made no request, and the department will be made parties to the proceeding. Notice of consolidation will be given to all parties within 20 days after the granting of the last timely request for an adjudicatory hearing. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10)  
 AS 46.03.090  
 AS 46.03.100  
 AS 46.03.110  
 AS 46.03.160  
 AS 46.03.330  
 AS 46.03.720  
 AS 46.35.090(e)

## ENVIRONMENTAL CONSERVATION

(b) At the pre-hearing conference, the deciding officer may explore, and is empowered to make any appropriate order regarding:

(1) the simplification, clarification, or limitation of the issues, the striking of immaterial issues, and the summary disposition of issues over which there is no genuine dispute;

(2) the admission of facts and the genuineness of documents, and stipulations with respect to facts and documents;

(3) objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits, or other submissions proposed by a party; however, the failure to raise an evidentiary objection at the conference does not preclude a party from raising the objection at the hearing;

(4) matters of which official notice will be taken;

(5) establishment of a schedule, including definite or tentative times relating to the progress of the hearing;

(6) the taking and introduction of depositions;

(7) the use of affidavits in place of oral testimony;

(8) accepting, on good cause shown, supplements to the witness and evidence lists provided under sec. 240 of this chapter (specifically including rebuttal evidence to matters submitted under sec. 240(b) of this chapter);

(9) the exclusion of unduly repetitive or irrelevant evidence; and

(10) any other matter which will expedite the hearing or aid disposition of the matter.

(c) The prehearing conference will be tape recorded.

(d) The deciding officer will prepare, and will serve upon all parties, within 10 days after holding the conference, a written prehearing order reciting the actions taken at the prehearing conference and setting out the schedule for the hearing. The order will include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in

ENVIRONMENTAL CONSERVATION

(d) No issue, testimony or real or documentary evidence may be introduced or advanced at the hearing which was not previously disclosed under secs. 240 or 250(b)(8) of this chapter. The deciding officer may waive this prohibition if the failure to previously disclose was due to:

- (1) surprise;
- (2) newly-discovered evidence which by due diligence could not have previously been discovered and disclosed; or
- (3) fraud, misrepresentation, or other misconduct of an opposing party.

(e) The prohibition of (d) of this section does not apply to evidence offered solely to rebut or impeach matters first disclosed pursuant to sec. 250(b)(8) of this chapter. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10)  
AS 46.03.090  
AS 46.03.100  
AS 46.03.110  
AS 46.03.160  
AS 46.03.330  
AS 46.03.720  
AS 46.35.090(e)

18 AAC 15.280. CERTIFICATION OF RECORD. As soon as the hearing transcript has been prepared, the deciding officer shall certify the record of the hearing and provide notice of the certification to all parties. Except for good cause shown, the cost of transcribing the hearing must be borne by the requestor. Where there is more than one requestor, the deciding officer may apportion the costs. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10)  
AS 46.03.090  
AS 46.03.100  
AS 46.03.110  
AS 46.03.160  
AS 46.03.330  
AS 46.03.720  
AS 46.35.090(e)

18 AAC 15.290. FINDINGS AND BRIEFS. Within 10 days after notice of the certification of the record under sec. 280 of this chapter, a party may serve upon the deciding officer, and all parties, proposed findings of fact. The deciding officer, at the close of the hearing, will, in his discretion, also order the submission of briefs if he:

ENVIRONMENTAL CONSERVATION

Article 6. GENERAL PROVISIONS

Section

900. Time computations

910. Service

920. Definitions

18 AAC 15.900. TIME COMPUTATIONS. Time computations under this chapter will be made in accordance with AS 01.-10.080. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10)  
AS 46.03.090  
AS 46.03.100  
AS 46.03.110  
AS 46.03.160  
AS 46.03.330  
AS 46.03.720

18 AAC 15.910. SERVICE. (a) Any matter required to be served under this chapter may be served by personal delivery, or by registered or certified mail (return receipt requested). Additionally, any matter required to be served before a request for an adjudicatory hearing under sec. 200 of this chapter may be served by first class mail.

(b) Upon the granting of a request for an adjudicatory hearing under sec. 220 of this chapter, a copy of all matters subsequently served, and proof of service, must be mailed to the deciding officer, or to the commissioner if a deciding officer has not yet been appointed. Proof of service must be made by an affidavit of service.

(c) When a pleading or paper filed in a case discloses that a requestor or respondent is represented by counsel, service upon the requestor or respondent must be made upon his attorney.

(d) When mail is used for service, service occurs upon mailing for the purpose of the serving party's obligation, and upon receipt for the purpose of commencing time limits upon the receiving party. (Eff. 11/25/77/, Register 64)

Authority: AS 46.03.020(10)  
AS 46.03.090  
AS 46.03.100  
AS 46.03.110  
AS 46.03.160  
AS 46.03.330  
AS 46.03.720

ENVIRONMENTAL CONSERVATION

(10) "respondent" means the person defending the department's decision. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10)  
AS 46.03.090  
AS 46.03.100  
AS 46.03.110  
AS 46.03.330  
AS 46.03.720

CHAPTER 95. ADMINISTRATIVE ENFORCEMENT.

ARTICLE 1. COMPLIANCE ORDERS.

SECTION

- 010. Initiation of compliance order proceedings
- 020. Respondent's report and objection
- 030. Compliance order
- 040. Effective date of order
- 050. Scheduling of hearing
- 060. Hearing officer
- 070. Discovery
- 080. Prehearing conference
- 090. Hearing procedures
- 100. Proposed findings
- 110. Decision
- 120. Petition for reconsideration
- 130. Transcript of hearing
- 140. Service
- 150. Relaxation of regulations
- 160. Consent orders
- 170. Relationship to Administrative Procedure Act

18 AAC 95.010. INITIATION OF COMPLIANCE ORDER PROCEEDINGS. (a) Compliance order proceedings are initiated by the service of a notice of intent to issue a compliance order upon the person or persons responsible for an actual or threatened violation. The notice of intent will be signed by the deputy commissioner.

(b) The notice of intent will:

- (1) recite the condition, activity or conduct which the deputy commissioner has determined is causing or is threatening to cause a violation;
- (2) disclose the basis of the deputy commissioner's determination;
- (3) specify the statute, regulation, order, permit or certificate which is being or threatens to be violated;
- (4) request of the respondent a detailed report specifying what measures have been or are being taken, or are proposed to be taken, to correct, control or prevent the violation; and
- (5) briefly describe the statutory procedures of compliance order proceedings, and the penalties and liabilities to which the respondent is exposed.

(1) if the record warrants, terminate the compliance order proceedings against the respondent;

(2) if he determines that a defense raises a serious and substantial issue, and that the public health or environment will not be unduly harmed or threatened by the delay inherent in a bifurcated hearing, treat the objection as a notice of defense and set the matter for hearing in conformity with secs. 50-130 of this chapter; or

(3) if he determines that the defenses do not raise a serious and substantial issue, or that the public health or environment would be unduly harmed or threatened by the delay inherent in a bifurcated hearing, notify the respondent of this determination, and provide the respondent with the unexpired portion of the service period for the report, or five days, whichever is greater, in which to serve his report; notification may be made orally.

(f) A determination by the deputy commissioner under (e)(3) of this section does not constitute final agency action. Findings of fact and, when appropriate, conclusions of law supporting the determination will be made in the compliance order issued under sec. 30 of this chapter, and the deputy commissioner's findings and conclusions may be contested in a hearing held after the issuance of the compliance order.

(g) If a timely served objection raises the defense specified in (c)(4) of this section, and the deputy commissioner determines that there is good cause for the objection, he shall serve a supplemental notice of intent within seven days of service of the objection. If the deputy commissioner determines that there is not good cause for the objection, he shall so notify the respondent within three days of service of the objection. Notification may be made orally. Upon notification, respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to serve his report.

(h) Upon service of a motion on the deputy commissioner within seven days of service of the notice of intent (or within three days of notification of a determination under (e)(3) or (g) of this section) the deputy commissioner shall grant an extension for service of the report upon finding that:

(1) good cause exists for the extension; and

(2) the public health or environment will not be unduly harmed or threatened by the extension.

(i) The time period specified in the notice of intent (or in a determination made under (e)(3) or (g) of this section) for service of the report will be held in abeyance from the date of service of a motion under this subsection until service of the decision by the deputy commissioner. If an extension request is denied, the respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to file the report.

(j) Neither the report, nor any evidence directly obtained as a result of exploitation of the report, will be used against a person providing the report in any criminal proceeding concerning the violation or violations to which the notice of intent is addressed.

(c) If the respondent does not make a timely request for a hearing, no other action is necessary by the deputy commissioner or the commissioner or his designee. The deadlines of the order fall due as specified in the order. (Eff. 7/24/77, Register 63)

AUTHORITY: AS 46.03.020(10)  
AS 46.03.850

18 AAC 95.050. SCHEDULING OF HEARING. (a) Immediately upon service of a request for a hearing (or upon a determination under sec. 20(c)(2) of this chapter), the department will schedule a hearing to be held no later than 20 days after service of the request or determination. The location of the hearing will conform to AS 44.62.410. Notice of the hearing will be immediately served upon the respondent.

(b) At any time before the hearing, a party may serve upon the commissioner or his designee, and the opposing party, a request for postponement of the hearing. Postponements will only be granted by the commissioner or his designee in unusually complex cases, or when a failure to grant a postponement would pose a substantial hardship to the requesting party. No postponement will be granted when significant harm to the public health or environment will result from a delay.

(d) If the respondent served his request for a hearing more than 10 days after service of the compliance order, a request by the respondent for postponement of the hearing will be viewed with disfavor, and will be granted only in the most extraordinary of circumstances. (Eff. 7/24/77, Register 63)

AUTHORITY: AS 46.03.020(10)  
AS 46.03.850

18 AAC 95.060. HEARING OFFICER. (a) Immediately upon service of a request for a hearing, the department will arrange for the appointment of a hearing officer under AS 44.62.350.

(b) The department will hear the case with the hearing officer. The hearing officer will preside at the prehearing conference and the hearing, rule on the admission and exclusion of evidence, advise the department on matters of law, and be present during post-hearing consideration of the case.

(c) The case will be heard by the commissioner or his designee. The commissioner or his designee will, in his discretion, be accompanied during any proceeding, conference or deliberation by a representative of the Department of Law other than an attorney who has been involved in the investigation or prosecution of the case. The Department of Law representative shall be subject to the requirements and restrictions of AS 44.62.630. The commissioner may designate any employee of the department, other than an employee involved in the investigation or prosecution of the case.

(d) Notice of designation under (c) of this section will be served upon the respondent no later than 10 days prior to the hearing. (Eff. 7/24/77, Register 63)

AUTHORITY: AS 46.03.020(10)  
46.03.850

- (1) the identification and simplification of disputed issues of fact and law;
- (2) the entry of stipulations of fact and documents, and the exclusion of irrelevant or unduly repetitive matters;
- (3) matters of which official notice will be permitted to be taken;
- (4) scheduling an onsite inspection;
- (5) accepting, on good cause shown, supplements to the discovery responses submitted under secs. 70(b) and (c) of this chapter (specifically including rebuttal evidence by the prosecuting office);
- (6) limitation of the number of expert and other witnesses;
- (7) procedure at the hearing; or
- (8) any other matter that may expedite the hearing or aid in the disposition of the proceeding.

(c) No transcript or recording of any prehearing conference will be made unless a request for one by one of the parties is granted by the hearing officer. Except for good cause shown, the requesting party shall bear the cost of the taking of the transcript or recording. The hearing officer shall prepare and file for the record a prehearing order, which must incorporate any stipulations or agreements made by the parties at or as a result of the conference and all rulings upon matters considered at the conference. (Eff. 7/24/77, Register 63)

AUTHORITY: AS 46.03.020(10)  
AS 46.03.850

18 AAC 95.090. HEARING PROCEDURES. (a) The sequence of argument, examination and summation must follow that of a civil proceeding, except to the extent modified under sec. 80(b)(7) of this chapter. However, either the hearing officer may or the commissioner, in his discretion, will or the commissioner's designee may question a witness.

(b) No issue, defense, testimony or real or documentary evidence may be introduced at the hearing which was not previously disclosed pursuant to either secs. 70(b) or (c) or sec. 80(b)(5) of this chapter. This prohibition may be waived by the hearing officer if the introduction would not unduly prejudice the opposing party, and the failure to disclose was due to:

- (1) surprise or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have previously been discovered and disclosed; or
- (3) fraud, misrepresentation or other misconduct of the opposing party.

(c) Neither the submission nor granting of a petition for reconsideration acts as a stay of any provision of the compliance order unless the commissioner otherwise directs. Applications for a stay will be granted only when the petition raises serious and substantial questions regarding the validity of the order, and no significant harm to the public health or environment will be caused by a delay.

(d) After granting a petition, and upon a review of the record, the commissioner will affirm, modify or reverse the order made under sec. 110(a) of this chapter within 20 days of the granting of the petition. The commissioner will, in his discretion, also order the taking of new evidence.

(e) A petition for reconsideration by the respondent pertaining to a hearing held under sec. 20(e)(2) of this chapter may be served only after service of the order under sec. 110 of this chapter affirming or modifying the compliance order. (Eff. 7/24/77, Register 63)

AUTHORITY: AS 46.03.020(10)  
AS 46.03.850

18 AAC 95.130. TRANSCRIPT OF HEARING. Hearings must be tape recorded. At any time after the close of the hearing, a party may request a transcript of the hearing from the department. Except for good cause shown, the party requesting the transcript shall pay the cost of the transcript and all requested copies of it before the party may take possession of the transcript. (Eff. 7/24/77, Register 63)

AUTHORITY: AS 46.03.020(10)  
AS 46.03.850

18 AAC 95.140. SERVICE. (a) Any matter required to be served under this chapter may be served by personal service, registered mail, or certified mail, return receipt requested.

(b) Proof of service must be made by an affidavit of service, or on appropriate forms if service is made by a peace officer. Upon the filing of a notice of defense, a copy of all matters subsequently served, and proof of service, must be mailed to the commissioner or his designee; and they become part of the administrative record.

(c) When a pleading or paper filed in a case discloses that a respondent is represented by counsel, service upon the respondent must be made upon his attorney.

(d) Where applicable, service of the notice of intent and compliance order must be delivered or mailed in conformity with Rule 4(d)(4)-(11) of the Alaska Rules of Civil Procedure.

(e) When mail is used for service, service occurs upon the date of postmark for the purpose of the serving party's obligations, and upon receipt for the purpose of commencing time limits upon the receiving party.

ARTICLE 5. DEFINITIONS

SECTION

900. Definitions

18 AAC 95.900. DEFINITIONS. As used in this chapter, unless the context otherwise requires:

- (1) "commissioner" means the commissioner of the Department of Environmental Conservation;
- (2) "department" means the Department of Environmental Conservation;
- (3) "designee" means the employee of the department to whom the commissioner has delegated the power to hear and decide a particular case;
- (4) "objection" means a submission by the respondent, in response to a notice of intent, which raises any matter specified in sec. 20(c) of this chapter;
- (5) "party" means the respondent and the prosecuting office;
- (6) "prosecuting office" means the division or regional office of the department primarily responsible for prosecution of a case;
- (7) "reasonable assurance" means that, after taking into account predictable natural or human intervention, the remaining risk of violation is negligible, and the costs of further reducing the negligible risk are disproportionate to the remaining risk itself; a lowering of the risk beyond that level is not a "reasonable assurance";
- (8) "report" means a detailed submission by the respondent, in response to a notice of intent, which specifies what measures have been or are being taken, or are proposed to be taken to correct or prevent the violation;
- (9) "threatened violation" means that it is more likely than not that, unless corrective or preventive measures are taken, a violation will occur in the foreseeable future; and
- (10) "violation" includes a violation of a provision of AS 46.03 or AS 30.25, or of a regulation, permit, certificate, order or term or condition of a permit, certificate or order issued or promulgated by the department under authority of AS 46.03 or AS 30.25. (Eff. 7/24/77, Register 63)

AUTHORITY: AS 46.03.020(10)  
AS 46.03.850

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - HB 588

Opposed

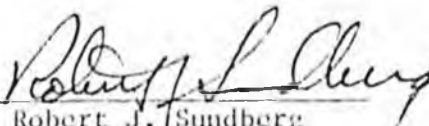
February 17, 1984

HB 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.

The Department is opposed to this piece of legislation. There are too many questionable areas as to when costs would have to be paid, such as the following examples:

- 1) A number of motor vehicle hearings are held at the request of a citizen who is disputing another's right to a motor vehicle or title. The department acts as the hearing officer to determine the facts and decide the proper owner. This is classified as a departmental hearing so the question arises, is the department liable for the fees of the winner?
- 2) If the driver's license suspension is under the financial responsibility law, and the citizen complies with the law prior to the hearing, such as entering into a settlement agreement with the injured party and buying insurance, the hearing officer does not sustain the department's action (in actuality the action would be withdrawn), does this mean the respondent "prevails"?
- 3) If the driver's license revocation is as a result of a DWI arrest in which the citizen took the breath test and the results were above .10; and the citizen asks for an administrative review to obtain a limited license; and the hearing officer grants the limited license; does this mean the respondent "prevails"?

Another item of concern is that most hearing officers are department employees. Although they always attempt to be completely unbiased, the subconscious realization that an adverse decision will cost the State money may have an influence. Even if it didn't, and I'm sure it wouldn't, the respondent's attorney could so claim in challenging the decision.

  
Robert J. Sundberg  
Commissioner