HB

406

go0518hL
Ford
4/25/88

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 406 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to immunity for the decision to take or not to take an intoxicated or incapacitated person into protective custody; and providing for an effective date."

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

* Section 1. AS 47.37.170(g) is repealed and reenacted to read:

(g) A person may not bring a civil or criminal action against a peace officer or member of the emergency service patrol based on the decision of the peace officer or member of the emergency service patrol to take or not to take an intoxicated or incapacitated person into protective custody or to release a person from protective custody as provided in this section, unless the decision is made maliciously.

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

go0518hBa
Ford

A M E N D M E N T

Offered in the HOUSE

By Sund

TO: CSHB 406(HESS)

Page 1, line 16, after "maliciously":

Insert "or with gross negligence"

Offered: 4/7/88
Referred: Judiciary and Finance

go0518hB

For 2

Original sponsor: Rules/Governor

IN THE HOUSE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 406 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

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* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

Amdts:

① 'or gross negligence'

② May not bring a civil or criminal action against ~~a~~ Peace officer - based on the decision

Soldotna Police Department

P.O. Box 2499
Soldotna - Alaska 99669

APR 18 1988

Duane Udland
Chief of Police

Representative John Sund
Alaska State Legislature
Pouch V (MS 3100)
Juneau, AK 99811

Dear Representative Sund,

I am writing to you about two bills that are presently in House Judiciary, of which you are the Chairman. I would appreciate it if you would consider my thoughts on two bills.

House Bill 406. This bill has come to your committee with some amendments to it, that were made in House HESS. The amended version is acceptable to my City. We urge you to move this bill as quickly as possible. It is an important bill to every municipality in the State of Alaska, in that Cities need relief from the Busby decision. Time is short, and the bill is scheduled to go to another committee in the House, before it moves on to the Senate.

Senate Bill 37. This relates to the Fingerprinting of Juveniles. Hopefully, it will come to your committe from House HESS in the near future. It is my opinion, that SB 37, if enacted, would provide law enforcement a very important tool for investigating crimes. It is well documented that a large percentage of crime in Alaska is committed by Juveniles. By allowing the taking of fingerprints under the guidelines of SB 37, the ability of law enforcement to solve crime committed by juveniles would be greatly enhanced. We in law enforcement do not see SB 37 as an unreasonable intrusion of privacy, since the fingerprinting would be done only after juveniles of a certain age are arrested for felonies. We also do not feel that fingerprinting a juvenile is inconsistent with rehabilitation of youthful offenders.

Thank you for your time on these issues. If you or your staff have any questions that I may answer, please contact me.

Sincerely,

Duane S. Udland

Duane S. Udland
Chief of Police

cc: Representative Navarre

CITY OF CRAIG ALASKA

P.O. Box 23, Craig, Alaska 99921 (907) 826-3275

April 14, 1988

APR 18 1988

Representative John Sund
State Capitol
Juneau, Ak 99801

Re: HB406

Dear John,

It is my understanding that HB 406 is in your committee. I am writing to ask that you schedule it for a hearing and move it out with a recommendation to pass it.

The bill will relieve the City from the duty to incarcarate each person observed in an intoxicated state, or at least, as I understand it, allow the officer some professional discretion in the decision. As our officers make bar checks, they encounter many intoxicated persons, most in the care of companions or friends. If our officers follow the present policy as outlined in the Busby case, they are negligent in their duties if they allow intoxicated or incapacitated people to leave the premises. We are presently expanding our jail, but as you know, the summer population of fishermen is no match for our police force or our facilities.

Officers should have the ability to escort drunks to their boats, to their homes, or to release them to their friends. At the time Busby was being litigated, the City of Craig was sued by a person who was arrested because he was intoxicated; it seems that we can't win, we are sued if we arrest drunks, and we are liable if we do not.

Alaskan municipalities and professional police officers need the protection of HB406. You and the House and Senate majority are the key, please help us by passing this bill this session!

Sincerely,

David Palmer
Executive Assistant to the Mayor

cc: Rep. Peter Goll
Sen. Dick Eliason

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

- Main Office (907) 224-3331
- Police (907) 224-3338
- Harbor (907) 224-3138
- Fire (907) 224-3445
- Telecopier (907) 224-3248

April 14, 1988

The Honorable John Sund, Chairman, Judiciary Committee
House of Representatives
P.O. Box V, Mail Stop 3100
Juneau, Alaska 99811

Dear Sir:

This is to request that you lend your support to the passage of House Bill No. 406, regarding protective custody. The recent amendment to the bill makes it a good bill that needs to be enacted quickly.

The burden that has been set upon law enforcement since the Busby decision has been detrimental to the safety of the public. Police Officers have been forced to detain incapacitated persons who did not need it, to protect themselves, wasting time that could have been better spent protecting the general public.

The "malicious" addendum to the bill will protect those incapacitated persons who really need to be placed into protective custody. Removing the financial burden from the municipalities will further push the State into establishing systems to help alleviate the problem we are having in our streets. Our agency has begun billing protective custody prisoners, and placing the money into a trust fund. We hope that this will place some of the burden on the drinking public, thereby making them think about saving money for a cab, or getting a ride home and not collapsing in the streets. More must be done.

This bill is a good step in the right direction. I would hope that you would use your good office to move this bill along.

Sincerely,

Louis A. Bencardino
Chief of Police
Seward Police Department

LAB/dra

(7)

HOUSE COMMITTEE REPORT

Date referred: 1/27/88 FURTHER REFERRALS: Judiciary
Finance

DATE: April 6, 1988

The Health, Education and Social Services Committee has considered HB 406

"An Act relating to the responsibility for the treatment and care of - intoxicated and incapacitated persons taken into protective custody; and providing for an effective date."

RECOMMENDS:

[X] replace with CS HB 406 (HESS) [ ] the same title
[X] a new title

[ ] attached amendment(s)

[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis
[ ] same as previous fiscal note published _____
[X] same as previous zero fiscal note published 1/27/88

SIGNING DO PASS:

Mary Hanley
Bill Wade
Willa Kozma
Bruce Hanley
Robert Reed
Jay Ellis

SIGNING OTHER RECOMMENDATIONS:

Jay Ellis
Chairman's signature
Willa Kozma

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 27, 1988

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the responsibility for the treatment and care of intoxicated and incapacitated persons taken into protective custody.

The bill is intended to address an existing crisis relating to the placement of intoxicated and incapacitated persons in state correctional facilities. As applied in the recent decision of the Alaska Supreme Court in Busby v. Municipality of Anchorage, 741 P.2d 230 (Alaska 1987), AS 47.37.170(b) creates an actionable duty to take into protective custody persons who are incapacitated by alcohol. According to the court, failure to take an incapacitated person into protective custody creates a cause of action against a peace officer (or member of an emergency service patrol) who exercises the discretion not to do so, for any damages or injuries that occur as a result of the officer's (or member's) decision. The Busby decision has resulted in a tremendous increase in the number of persons being taken into protective custody under AS 47.37.170 by law enforcement agencies due to the agencies' fear of potential liability. Because of the lack of adequate alternative placements, most of these persons end up being detained in state correctional facilities.

Section 2 of this bill addresses this problem by making clear that, while the duty to provide for the safety of incapacitated persons exists, the decision to take a person into protective custody or to release a person in protective custody is a discretionary function under AS 09.50.250(1) (for state employees) and AS 09.65.070(d)(2) (for municipal employees), and no cause of action may be brought based upon such a decision. In other words, this bill would have the effect of countering the decision in Busby, and is supported by the municipalities in Alaska as well as the Department of Corrections, Department of Health and Social Services, Department of Law, and Department of Public Safety. In addi-

tion, by making clear not only that this is a discretionary function but that it is the sort of discretionary function that does not give rise to liability, this bill avoids the problem created by Neakok v. Division of Corrections, 721 P.2d 1121 (Alaska 1986). The decision in Neakok virtually eliminated any effect remaining in the legislature's phrase "discretionary function" in AS 09.50.250(1).

Section 1 of the bill addresses a related problem. AS 33.-30.071(a) presently requires municipalities to be responsible for the cost of care for incapacitated persons placed in municipal detention facilities, while the state is responsible when such persons are placed in state correctional facilities. Nearly all incapacitated persons are taken into protective custody by municipal peace officers or emergency service patrols, but municipalities in which a state correctional facility exists have little incentive to identify and use alternative placements for incapacitated persons since it costs them nothing to place those persons in a state correctional facility. The amendments in sec. 1 of the bill require the appropriate municipality to pay the costs of protective custody in a state facility, regardless of who placed the incapacitated person in custody.

Municipalities in which a state correctional facility does not exist are fully responsible for the care and placement of incapacitated persons under AS 33.30.071(a), and thus have substantial incentive to identify and use placements less costly than prison cells.

The problem of crowding in Alaska's prison system is well known, and is exacerbated by the large numbers of incapacitated persons who are admitted under AS 47.37.170. Section 1 of this bill would equalize the burden for the cost of care of incapacitated persons between all Alaskan communities, and help address the serious crowding problem in state correctional facilities. It will also provide incentive for municipalities to identify and use placements for incapacitated persons that are less costly than prison beds and more treatment oriented, as intended by Alaska's Uniform Alcoholism and Intoxication Treatment Act (AS 47.37).

Finally, due to the crisis that this bill is intended to address, the bill contains an immediate effective date.

Sincerely,

Steve Cowper
Governor

KENAI POLICE DEPT.

107 SOUTH WILLOW ST., KENAI, ALASKA 99611

TELEPHONE 283-7879

February 12, 1988

Honorable Michael Navarre
House of Representatives
Box V
Juneau, Alaska 99811

RE: House Bill 406
Protective Custody

Dear Representative Navarre,

Section 1 of this bill that amends AS 33.30.071(a) is unacceptable. It would require municipalities to now absorb the cost of protective custody detentions made within their jurisdiction. Those detentions made in the Borough would still be at State expense. The municipal taxpayer is being asked to absorb a cost for a service that is provided without taxpayers cost outside the municipality. As protective custody under Title 47 is not a violation or criminal offense there is no means by which the municipality can recoup the expense incurred. In the City of Kenai almost all protective custody detentions involve transients or other non-city residents where no other disposition is available.

Section 2 of this bill is much needed in order to protect the State and municipality from excessive liability exposure over an area of limited control. Changing the protective custody from a ministerial to a discretionary function as provided by this bill will accomplish that.

Your time and consideration of this input is appreciated.

Respectfully,

Richard A. Ross
Chief of Police

RAR/tc

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 406
PUBLISH DATE: 1/27/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Agency Affected: Dept. Corrections
Title: "An Act relating to the treatment and care of intoxicated and incapacitated persons."
BRU: _____
Sponsor: _____
Components: _____
Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This legislation will have no fiscal impact on the Department of Corrections. There will be increased costs for the Department of Public Safety. Projected program receipts from municipalities, based on current bookings, are $550,000.00.

Susan E. Knighton

Prepared by: Susan Knighton, Director — Phone: 465-3376
Division: Administrative Services — Date: 1-19-88

Susan Humphrey-Barnett

Approved by Commissioner: Susan Humphrey-Barnett — Date: 1-19-88
Agency: Department of Corrections

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: HB 406
Publish Date: 1/27/88

FISCAL NOTE

REQUEST
Revision Date:
Title: Relating to the responsibility for treatment and care of intoxicated...
Sponsor: Rules Committee
Requestor: Governor's Office

Agency Affected: Public Safety
BRU: DPS Administration
Components: Contract Jails

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Fiscal Note continuation page for analysis.

Prepared by: Gayle Horetski, Deputy Commissioner
Phone: 465-4322
Division: Commissioner's Office
Date:

Approved by Commissioner: Cynthia Engle
Date: 1-21-88
Agency: Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

FISCAL NOTE ANALYSIS

"An act relating to the responsibility for treatment and care of intoxicated and incapacitated persons taken into protective custody; and providing for an effective date."

Under this bill, the municipality in which an intoxicated person was taken into protective custody under AS 47.37.170 is responsible for the cost of care of that person while he or she is incapacitated. This would have no effect on the Department of Public Safety, as we do not pay the costs of care for these persons now, nor would we under this bill.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

February 3, 1988

Honorable Niilo Koponen
Honorable Johnny Ellis
Co-Chairs
House Health, Education, and
Social Services Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 406, treatment and care of intoxicated and incapacitated persons
Our file no. 773-88-0051

Dear Representatives Koponen and Ellis;

I let an error in this bill slip by. On page 1, line 27, the word "readopted" should, of course, read "reenacted." Assuming that the bill will be reported out of your committee, I would appreciate your making this correction in a committee substitute. (The "readopt" language comes from regulations work, whereas the "reenact" is appropriate for legislation.)

We have been advised by Revisor of Statutes David Dierdorff that, with the computerization of bill processing, the effect of this error is to have the section "read" by the SIRS program in BASIS as simply "repealing" the provision. SIRS is programmed to read "repealed and reenacted" as equivalent to "amending," but if the words "and reenacted" do not appear after "repealed," it assumes that the section cited in the lead-in is repealed. David also advises that it is not possible to manually override the entry and correct it until a new document, such as a committee substitute, is actually entered into the system.

Sorry to have let this slip by. Thanks for taking care of it.

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Art Peterson
Arthur H. Peterson
Assistant Attorney General

GBS:AHP:cb

cc: Bob Evans
Legislative Liaison
Office of the Governor

imposes upon a municipality an actionable duty to take persons incapacitated by alcohol in a public place into protective custody. We determine that it does and thus reverse the judgment of the trial court and remand for further proceedings.

I

On May 1, 1980, Thomas Busby was walking about two feet into the traffic lane on East Fifth Avenue in Anchorage.[3] Officer Foster was on patrol and spotted Busby, stopped him, moved him off to the side of the road, talked with him and determined that Busby was intoxicated. Officer Foster then ran a warrant check on Busby but did not place him into protective custody. Apparently finding no outstanding warrants, Officer Foster then reentered her vehicle and proceeded on her way. Shortly after Officer Foster left, Busby was struck by a car and suffered injuries as a result.

In his suit against the Municipality, Busby alleged that the Municipality was negligent and/or reckless in failing to take him into protective custody and that the Municipality's omission was the direct and proximate cause of his injuries. After hearing was held on Busby's and the Municipality's cross-motions for summary judgment, the trial court determined that the Municipality owed Busby no affirmative duty to take him into protective custody and that, therefore, the Municipality could not have been negligent in failing to do so. Accordingly, the trial court granted summary judgment in favor of the Municipality. This appeal followed.

ferred to another health facility, and has no funds, may be taken to the person's home, if any. If the person has no home, the approved public treatment facility shall assist the person in obtaining shelter.

. . . .

(g) Peace officers or members of the emergency service patrol who comply with this section are acting in the course of their official duty and are not criminally or civilly liable for it.

. . . .

(j) For purposes of (b) of this section, "incapacitated by alcohol" means a person who, as the result of consumption of alcohol, is rendered unconscious or has judgment or physical mobility so impaired that the person cannot readily recognize or escape conditions of apparent or imminent danger to personal health or safety. The definition in AS 47.37.270(8) applies to other portions of this chapter.

3. Because this appeal comes to us on summary judgment, our obligation is to draw all inferences of fact in favor of appellant Busby and against appellee Municipality. *See, e.g., Alaska Rent-a-Car v. Ford Motor Co.*, 526 P.2d 1136, 1139 (Alaska 1974).

II

[1] In the recent case of *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985), we unequivocally reaffirmed our rejection of the so-called "public duty doctrine" as an unnecessary and unjustified expansion of the state's statutorily limited immunity. *Id.* at 1311–12; *see also Adams v. State*, 555 P.2d 235, 241–43 (Alaska 1976). In place of that doctrine, we indicated that the liability of a municipality for the negligent acts and omissions of its representatives will be governed by traditional tort principles. As we stated in *McLean*:

> In practice, the public duty doctrine is an injunction against imposing liability on a government without first deciding what the government's duty is. While the public duty doctrine does protect the state from becoming the insurer of all private activity and from undue interference with its ability to govern, we believe that these concerns are better addressed by the tort concept of duty, which limits the class of people which may seek to hold the state responsible for negligent action, and by AS 09.50.250.

702 P.2d at 1313 (citation and footnote omitted). Thus, our determination here must be made with recourse to the principles embodied by the tort concept of duty.

[2, 3] As we have noted, " '[d]uty' is not sacrosanct in itself but [is] only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* (quoting W. Prosser, *Handbook of the Law of Torts* § 53, at 325 (4th ed. 1971)). Thus stated, the process of finding that a defendant owes a duty to a

plaintiff is one which involves a fine balancing of conflicting policies; it is in essence an attempt to determine whether it would be fair and equitable to require an individual to act, or to refrain from acting, in a specified manner so as to avoid undue risk of harm to third persons. *See generally* W. Keeton, D. Dobbs, R. Keeton, and G. Owen, *The Law of Torts* § 53, at 356–58 (5th ed. 1984) (hereinafter *Prosser*). Recognizing the difficulty of this task, we have delineated a number of factors which should be considered to provide greater predictability in the decision-making process. These factors include the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community in imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved. *McLean*, 702 P.2d at 1314 (quoting *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981)).

[4] These independent considerations, however, may sometimes be superseded by the legislature. For example, where the legislature has considered and resolved conflicting policies by clearly enunciating a duty in a statute, the relevant statute should be considered and, in a proper case, adopted as the appropriate standard of care. *See Metcalf v. Wilbur, Inc.*, 645 P.2d 163, 167–68 (Alaska 1982); *Bachner v. Rich*, 554 P.2d 430, 440–42 (Alaska 1976); *Breitkreutz v. Baker*, 514 P.2d 17, 20–21 (Alaska 1973); *Ferrell v. Baxter*, 484 P.2d 250, 263–65 (Alaska 1971); *see generally Prosser*, *supra* p. 6, § 36, at 220–29; Restatement (Second) of Torts § 285 (1965) (hereinafter Restatement). A statute enunciates the appropriate duty when it is found that (1) the plaintiff is within the class protected by the statute, (2) the harm/injury which occurred was of the type which the statute was intended to protect against, (3) the statute prescribes specific conduct rather than merely a general or abstract duty of care, (4) the defendant was a party charged with observing the statute, (5) the defendant can be fairly charged with being aware of the applicability of the statute, and (6) the statute is not so outdated or arbitrary as to make inequitable the statute's adoption as the standard of care. *E.g., State Mechanical v. Liquid Air*, 665 P.2d 15, 18–19 (Alaska 1983); *Grothe v. Olafson*, 659 P.2d 602, 607 (Alaska 1983); *see also* Restatement § 286.[4]

[5, 6] Busby argues that AS 47.37.170(b) articulates the appropriate duty in this case. We agree. As the statute explicitly states, and as the trial court itself noted, AS 47.37.170(b)[5] is intended to benefit and protect the health and well being of persons who are incapacitated by alcohol and imposes a mandatory duty upon law enforcement personnel to place such persons into protective custody. *Cf. Peter v. State*, 531 P.2d 1263, 1268 (Alaska 1975) (quoting House Concurrent Resolution No. 36 (1969) on treatment of problem drinkers and alcoholics); AS 47.37.010.[6] In addition, accepting as true Busby's assertions[7] that

4. Section 286 of the Restatement (Second) of Torts (1965) provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

5. *See supra* note 2.

6. AS 47.37.010 provides:

> It is the policy of the state that alcoholics and intoxicated persons should not be criminally prosecuted for their consumption of alcoholic beverages and that they should be afforded a continuum of treatment so they may lead normal lives as productive members of society.

7. *See supra* note 3.

he was a person incapacitated by alcohol in a public place, he was clearly a member of the protected class and his accident was of the type against which the statute was designed to protect. Finally, it cannot be doubted that the statute prescribes specific conduct rather than merely states some general or abstract duty of care; Officer Foster was within that class of persons charged with observing the statute; as a municipal police officer, she can fairly be charged with awareness that the statute applied; and the statute can hardly be considered so outdated or arbitrary as to make inequitable its application as the appropriate standard of care.

[7] The Municipality cites a number of cases which, it argues, mandate a different conclusion. Only two, however, require discussion. In *Stout v. City of Porterville*, 148 Cal.App.3d 937, 196 Cal.Rptr. 301 (1983), a California court refused to find that California Penal Code § 647(ff) set out an appropriate legislative standard of care in circumstances similar to those at issue here. *Id.* 196 Cal.Rptr. at 306–08. The statute in *Stout*, however, provided that an intoxicated person could only be taken to a voluntarily maintained public treatment facility. *Id.* The California court was therefore concerned that imposing a mandatory duty would cause counties participating in the voluntary treatment program to withdraw their support and thus cause the treatment program to collapse. *Id.* We have no similar concern in the present action.[8] In addition, Penal Code § 647, unlike AS 47.37.170(b), was not intended to minimize the dangers faced by the inebriate, but simply to end the "revolving door" policy of jail and street, street and jail. *Id.* We thus decline to adopt *Stout*'s analysis.

Marshall v. Ellison, 132 Ill.App.3d 732, 87 Ill.Dec. 704, 477 N.E.2d 830 (1985), also involves an analogous factual situation and statute.[9] Nevertheless, this case is also unpersuasive for at least two reasons. First, the court in *Marshall* apparently refused to find that the relevant statute imposed upon the state any mandatory duty on the basis of the state's sovereign immunity. *Id.* at 835. Relying upon *Rodriguez v. City of Cape Coral*, 451 So.2d 513 (Fla. App.1984), *affirmed*, 468 So.2d 963 (Fla. 1985), the *Marshall* court stated:

> Like the Florida statute [in *Rodriguez*], section 15(b) requires an officer to exercise his professional judgment in determi. ; whether an individual appears to be incapacitated. We do not believe the public interest would be served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess a policeman's decision.

87 Ill.Dec. at 709, 477 N.E.2d at 835. Second, we find the *Marshall* court's statutory analysis questionable. Despite the unambiguous mandatory language in the Illinois statute and without citation to legislative history or any other authority, the court simply concluded that the legislature did not intend to create a cause of action under the statute for failure to take a person into protective custody. *Id.* Whatever the merits of the *Marshall* court's conclusion with respect to interpretation of the Illinois statute, we decline to apply its reasoning here.

We conclude then that AS 47.37.170(b) articulates an appropriate standard of care and thus hold that the Municipality has an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to an appropriate treatment facility.[10]

III

Busby's cross-motion and appeal seeking summary judgment in his favor are without merit. For the reasons discussed above, we REVERSE the judgment of the

8. *See* AS 47.37.170(b), (c), *supra* note 2.

9. *See* Ill.Ann.Stat. ch. 111½, ¶ 6315(b) (Smith-Hurd Supp.1986).

10. Our decision today is expressly limited to a discussion of duty. Because the trial court's judgment was based solely upon this issue, we need not, and do not, consider any question regarding alleged breach and express no opinion as to the factual merits of Busby's claim. Similarly, we express no opinion regarding any claims of municipal immunity under AS 09.65.070.

trial court and REMAND for further proceedings consistent with this opinion.

STATE of Alaska, Appellant,

v.

NORTHWESTERN CONSTRUCTION, INC., Appellee.

No. S-1141.

Supreme Court of Alaska.

Aug. 7, 1987.

Contractor which was required to do more work than indicated in its contract with State brought action to recover damages. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., entered judgment in favor of contractor, and State appealed amount of damages. The Supreme Court, Compton, J., held that: (1) use of blue book rental rates for construction equipment to calculate damages was proper; (2) State's claim that blue book overtime equipment hours should have been reduced by 50 percent could not be considered for first time on appeal; (3) addition of 15 percent profit to blue book rates was not double recovery; (4) addition of ten percent to costs for overhead was reasonable; and (5) contractor should have allocated part of its grader time to less expensive grader in calculating damages.

Affirmed in part, reversed in part, and remanded.

Matthews, J., dissented and filed an opinion in which Rabinowitz, C.J., joined.

1. Damages ⇐189

Plaintiff in contract action need only prove its damages to "reasonable certainty."

2. Appeal and Error ⇐1008.1(5)

On appeal, Supreme Court will intervene only when convinced that trial court's findings of fact are clearly erroneous. Rules Civ.Proc., Rule 52(a).

3. States ⇐104

Use of construction equipment rental blue book rates to calculate damages was not clearly erroneous where state contract provided that payment for extra work would be calculated using blue book and blue book rates were commonly relied upon in state.

4. Appeal and Error ⇐169, 176

Issue raised for first time on appeal may be considered if issue is not dependent on any new or controverted facts, is closely related to appellant's trial court arguments, and could have been gleaned from pleadings, or if issue constitutes "plain error."

5. States ⇐214

State's argument that contractor's construction equipment rental blue book rate damages for extra work performed should have been reduced by 50 percent was dependent on new or controverted facts, was not closely related to State's trial court arguments, and could not have been gleaned from pleadings, and State was not entitled to argue that issue, which was raised for first time on appeal.

6. Appeal and Error ⇐169

Under "plain error" doctrine, issue not raised at trial may nonetheless be considered by Supreme Court if it appears that obvious mistake has been made which creates high likelihood that injustice has resulted.

See publication Words and Phrases for other judicial constructions and definitions.

7. States ⇐214

State was not allowed to raise for first time on appeal, under plain error doctrine, issue of whether contractor's damages, caused by extra work required and calculated using construction equipment rental rate blue book, should have been reduced by 50 percent, as there was no evidence that any state representative used 50 per-

relies on *Nugent v. Iowa Department of Transportation*, 390 N.W.2d 125 (Iowa 1986), in which the court held:

> [D]ifferent concerns are addressed in civil administrative proceedings. Thus, the criminal cases cited by plaintiff are not controlling in this situation.

Id. at 128.

We also have recognized the substantive differences between the criminal DWI prosecutions and license revocation proceedings, but nonetheless determined in *Champion* that any differences did not warrant lower procedural safeguards in the civil revocation proceeding. *Champion*, 721 P.2d at 133.

[3] The state also argues that the legislature presumably was aware of the margin of error in the test but nonetheless created a presumption of intoxication based on a particular test result. There are flaws in this argument. First, the legislature did not approve the Intoximeter 3000 test, it authorized the Alaska Department of Health and Social Services "to approve satisfactory techniques, methods and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis." AS 28.35.033(d). Second, *Champion* mandates that the defendant in a license revocation proceeding has the constitutionally guaranteed right to challenge the accuracy of the breath test independently. We have thus concluded that due process will not allow the results of a chemical test authorized under AS 28.35.031(a) to be conclusively presumed accurate.[5]

Our decision in *Champion* is controlling and mandates consideration of the inherent margin of error in any blood alcohol testing procedure which is to serve as the basis for driver's license revocation. Since both the department's own control sample test and the Intoximeter 3000's specifications showed a sufficient discrepancy to bring Barcott's test results below the legal limit, the license revocation pursuant to AS 28.15.166(g) cannot stand. The decision of the hearing officer is REVERSED and the case is REMANDED to the department for further proceedings consistent with this opinion.

5. *Hrncir v. Commissioner*, 370 N.W.2d 444 (Minn.App.1985), relied on by the state, is likewise distinguishable. In *Hrncir*, the court refused to require consideration of test margin of error because "[t]he statute refers to test results showing a blood alcohol concentration of .10 or more, not .10 plus or minus a margin of error." *Id.* at 445. *See also Holstein v. Commissioner*, 392 N.W.2d 577, 580–81 (Minn.App.1986) (following *Hrncir*). Minnesota has no *Champion* rule equivalent.

Thomas BUSBY, Appellant,

v.

MUNICIPALITY OF ANCHORAGE, Municipality of Anchorage Police Department, and Officer Mary Lou Foster, jointly and severally, Appellees.

No. S–1586.

Supreme Court of Alaska.

Aug. 21, 1987.

Citizen brought suit against municipality for negligence in failing to take citizen into protective custody when he was intoxicated, and the Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., granted summary judgment for municipality. The citizen appealed. The Supreme Court, Burke, J., held that statute requiring persons incapacitated by alcohol to be taken into protective custody was intended to benefit and protect the health of such persons and imposed mandatory duty on law enforcement to place persons in protective custody.

Reversed and remanded.

1. Municipal Corporations ⇐745

Liability of municipality for negligent acts and omissions of its representatives

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2. Torts ⇐3

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3. Negligence ⇐2

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4. Torts ⇐3

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will be governed by traditional tort principles, and not public duty doctrine.

2. Torts ⇐3

Process of finding that defendant owes duty to plaintiff in tort involves fine balancing of conflicting policies, and is, in essence, attempt to determine whether it would be fair and equitable to require individual to act, or refrain from acting, in specified manner as to avoid undue risk of harm to third person.

3. Negligence ⇐2

Factors to be considered in determining if defendant owes duty to plaintiff include foreseeability of harm, degree of certainty of injury, closeness of connection between defendant's conduct and injury suffered, moral blame attached to defendant's conduct, policy preventing future harm and cost and prevalence of insurance for risk involved.

4. Torts ⇐3

Statute enunciates appropriate duty for tort liability purposes when it is found that plaintiff is within class protected by statute, harm which occurred was of type which statute was intended to protect against, statute proscribes specific conduct rather than abstract duty, defendant was party charged with observing statute, defendant can be fairly charged with being aware of applicability of statute, and statute is not outdated or arbitrary.

5. Chemical Dependents ⇐1

Statute intended to benefit and protect health and well being of persons incapacitated by alcohol imposes mandatory duty upon law enforcement personnel to place such persons into protective custody. AS 47.37.170.

6. Chemical Dependents ⇐1
Municipal Corporations ⇐747(3)

Person incapacitated by alcohol who was walking two feet into traffic was within protection of statute designed to protect persons incapacitated by alcohol and in a public place, and municipal police officer was charged with observing statute and was required to take person into protective custody, and thus statute defined duty toward such person, violation of which could support tort liability when person was later struck by car. AS 47.37.170.

7. Chemical Dependents ⇐1

Statute requiring person who appears to be incapacitated by alcohol in a public place to be taken into protective custody by peace officer articulates appropriate standard of care and municipality, under statute, has affirmative duty to take persons incapacitated in public place into protective custody and transport them to appropriate treatment facility. AS 47.37.170(b).

Michael W. Flanigan, William Soule, Clark, Walther & Flanigan, Anchorage, for appellant.

James M. Bendell, James M. Bendell & Associates, Anchorage, for appellees.

Before RABINOWITZ, C.J., BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

This is an appeal from a summary judgment in favor of the Municipality of Anchorage (Municipality)[1] in which we are asked to determine whether AS 47.37.170[2]

1. Because it does not appear that Officer Foster has been sued in her individual capacity but only as a municipal police officer, the discussion which follows applies equally to all named appellees.

2. AS 47.37.170 provides in part:

(b) A person who appears to be incapacitated by alcohol in a public place shall be taken into protective custody by a peace officer or a member of the emergency service patrol and immediately brought to an approved public treatment facility, an approved private treatment facility, or another appropriate health facility or service for emergency medical treatment. If no treatment facility or emergency medical service is available, a person who appears to be incapacitated by alcohol in a public place shall be taken to a state or municipal detention facility in the area, if that appears necessary for the protection of the person's health or safety.

....

(e) A person who is not admitted to an approved public treatment facility, is not re-

CITY OF DILLINGHAM

Dillingham, Alaska

RESOLUTION NO. 88-19

A RESOLUTION OF THE COUNCIL OF THE CITY OF DILLINGHAM, ALASKA, SUPPORTING THE COMMITTEE SUBSTITUTE OF HOUSE BILL 406, DATED APRIL 5TH, 1988, AN ACT RELATING TO INTOXICATED OR INCAPACITATED PERSONS IN PROTECTIVE CUSTODY.

WHEREAS, the City Council of Dillingham is aware of the problems of alcoholism not only statewide but to it's own community and region, and

WHEREAS, the City Council of Dillingham has promoted a policy of diligent care for those people incapacitated by alcohol and subject to detention by police, and

WHEREAS, the City Council of Dillingham feels that the adverse reaction to the Busby vs. Anchorage case involving community liability in protective custody cases under Alaska Statute Title 47 is not in the best interest of the City of Dillingham, the Bristol Bay region nor the State of Alaska, now

THEREFORE, BE IT RESOLVED by the Dillingham City Council that they support the House Committee on Health, Education and Social Services substitute to House Bill 406, changing Section (g) of AS 47.37.170, to reduce the liability of communities in their dealings with alcohol incapacitated persons detained or released from protective custody.

APPROVED AND ADOPTED this 8th day of April, 1988.

SEAL:

Neil C. Armstrong
LEON C. BRASWELL, Mayor

ATTEST:

Vivian M Braswell
Vivian M. Braswell, City Clerk

Dillingham is not unlike many rural Alaskan communities in that it has it's share of alcohol abuse. A large portion of the visible abuse is that of the public inebriate. The Dillingham police have over the past 5 years has placed emphasis on the procetion of the public inebriate through protective custody detention. This has been accomplished through a cooperative program with the Bristol Bay Area Hospital.

The resources necessary for this have been borne soley by the community and region, without aid from the State office of Alcoholism and drug abuse.

The committee substitute for HB 406 is a reasonable aaddition to our current statute and provides some degree of protection to communities as a result of the ruling by the Alaska Supreme court in the BUSBY case.

If the law were to remain as it is in light of this recent ruling, we would be fostering an attitude within our police to turn their heads rather than extend a helping hand to these victims of alcoholism.

The enabling of alcoholics to shirk their responsibility by placing the liability on local communities will do more to detract from the efforts to treat the problem than help it. We need to once again renew our efforts in a positive way in dealing with this problem and to give our support to those who are out there on the streets dealing with this problem on a daily basis.

Our police throughout the state have hundreds of contacts daily with people in varying stages of intoxication, without this substitute the ability to effectively deal with them is greatly hampered. As the statute now stands police will be in a position to abuse

Alcohol Abuse and the Police In Rural Alaska

The North Slope Borough and City of Barrow Experience

Kim L. Moeller

Second Edition
January 1979

North Slope Borough
Department of Public Safety

FOREWORD

This monograph will consider not only the results of a specific program of alcohol abuse intervention such as demographic age distribution, male/female incidents, and how the intervention affects the incidence of crime and types affected, but also how the process is set up, how it functions, what the risks are, the legal basis for such a program, costs, operational evaluations, and how it was implemented. This can be made concrete by showing how it was accomplished by the North Slope Borough Department of Public Safety. It does not represent universal answers; however, it can illustrate a type of solution to a particular problem: alcohol abuse and its effects on crime and public safety. The last section contains suggestions on how it can be designed, initiated, and locally evaluated. Modifications to the whole program or parts of it may also be useful to administrators of rural police departments and can act as a guide to a new systems approach to the problems of alcohol abuse in rural Alaska.

This program could not have been completed without the valuable assistance and support of a number of key individuals. In Barrow, the continual support and recommendations of the Task Force on Alcoholism in early December of 1976, more especially the aid and encouragement of the Magistrate, Mrs. Sadie Neakok, and the Assistant Magistrate, Mrs. Charlotte Brower. Magistrate Brower assisted with the data on death records as well as influenced the continuation of the program when others faltered. Data collection was critical to evaluating the program, and its consistent and careful preparation was accomplished monthly by Records and Identification Clerk, Becky Farmer. Assistance in editing is also acknowledged through the time consuming efforts of Dawn Wilson.

Similar acknowledgements are due Mayor Eben Hopson, who sustained the program and supported other critical efforts of this department and the recommendations of the Task Force on Alcoholism. In the ordinary line of command in any police or public safety agency, there are critical personnel who will make a policy or program designed by administrative directive either work or fail to work. Officer in Charge of the Barrow Division, Lt. James Christensen, was the officer who both pushed and administered the program throughout 1977.

PREFACE

Since the Department of Public Safety was established by Borough Code in July of 1976, a large part of its time has been devoted to changing the images of the police, to the role of police in rural Alaska, and to developing new programs and solutions to old and long-identified problems. The department has concentrated on developing its own resources and new solutions while the State has decreased its resource people and levels of service to outlying areas of the bush. This concentration on local resource development has led to whole new approaches to old problems.

In late 1975 the State of Alaska, Criminal Justice Planning Agency began looking into common reports that alcohol abuse and crime were indelibly linked to one another; however, no subsequent records or data specifically identified what that relationship was. All law enforcement agencies in the state, and more particularly the rural areas, were asked and encouraged to keep data on alcohol abuse and its effects on rates and types of crimes. The formal procedure for this program was established by Public Safety late in 1976 when Barrow, after being dry for a full year, had voted to sell liquor at a community-owned liquor store. The process was a reaction to events of 1975 when the city had an abnormally high incidence of abnormal deaths related to alcohol, an abnormal number of suicides, and an incidence of crime that was not characteristic of past years.

This monograph and others will be published to illustrate the experience of Public Safety in Barrow and the North Slope and hopefully to delineate new programs and methods tried and tested. These ideas afford other rural areas of Alaska the opportunity to change and/or increase efforts at reducing crime.

Kim L. Moeller
Director

CONTENTS

I

WHY HAVE A DETENTION PROGRAM?

In late 1975, G.U., a 55-year-old alcoholic, who had been treated several times within a month for alcohol overdoses and drinking Lysol, was found by his grandmother locked in her home after she had come home from the Post Office. Barrow Police responded to her call and found that G.U. had committed suicide after nonchalantly saying goodbye to his grandmother as she left to check the mail. He was a likeable and affable person in the community until delerium tremens drove him to suicide.

A short time later, E.T., a 25-year-old female, could not be awakened by a friend at whose home she had been drinking the night before. Again, Barrow Police responded and found E.T. on the floor next to her bed, apparently dead without any trauma. Autopsy later showed that she had drunk so much and so fast the night before that she died from a massive overdose of alcohol. (Her blood alcohol content was .39%). She had never been an alcoholic.

Within weeks of the above reports, E.K., a male, was reported to have frozen to death a short distance from Barrow after drinking all the previous day. It was later determined that E.K. had purposely committed suicide by freezing as a result of severe alcoholic depression.

At the end of 1976, a dry year for Barrow, R.S., a three-month-old boy was reported not breathing by a highly intoxicated mother. Investigation of R.S.'s death showed that the mother had passed out from the effects of alcohol, fallen on her baby and smothered him to death. For many in the community of Barrow this incident represented the last straw of complacent acceptance.

Each anecdote illustrates only a small aspect of the problem of alcohol abuse as seen from year to year. The connections between each began to reach several important people concerned with public safety in Barrow. The result was a Task Force on Alcoholism which met on December 7, 1976. The task force began the job of identifying those common factors that led to these deaths.

Several years ago the Barrow Volunteer Fire Department began to see an emerging pattern of fire deaths. From three to eight people per year were dying in home fires. Causes were examined, and it was found that most home fires were caused by an intoxicated person smoking and passing out from the effects of alcohol. They also discovered that no home fire resulting in deaths of occupants was caused by purely mechanical faults which prohibited occupants from escaping early enough to save their lives.

In combination with the above findings, the police found through experience that most crimes were committed by persons at various levels of intoxication. It was rare indeed to have any type of serious crime committed by someone who was stone cold sober. In fact all serious personal crimes had been committed by people who either were drunk or had

been drinking shortly before. Resolution of these crimes was easy, but the problem increased year after year. It was time to document the facts relating to crime and alcohol.

A Composite Contemporary View of the Alcohol Abuse Problem

Today, the analysis of facts, collection of statistics, and reviews of every unnatural death and major crime have produced a conclusion which others have hinted at or stated without documentary support. The scene was set for some solutions when unnatural deaths began to reach the level of natural deaths--a potentially socially repulsive situation. The composite was produced by combining fire deaths, suicides, and crime data into a cause and effect relationship. The cause--alcohol abuse. The effect--fire deaths, suicides, and crime. A very pragmatic approach led to a very simple principle.

The department determined that a significant reduction in all three above areas might be accomplished if intervention between alcohol abuse and its ultimate effects could be accomplished. Intervention is the key principle. The work of the task force did not center around treatment of alcoholism nor rehabilitation. It was almost unanimously agreed that any effort to reduce problems identified by those means could and probably would bog down both the program and personnel resources. The resources were not present nor likely to be funded by any state or local agency. The solution must be simple, cost effective, and not require new resources. The police were the only available agency which had the existing resources. Only the police had 24-hour community coverage, facilities that could conceivably be used, and funding that was not dependent upon any outside agency or shaky cycle. However, a major problem had occurred just previous to initiating such a program.

Police and the Legal Problem

In 1974 a case involving statutory laws of arrest in incidents of Drunk on a Public Highway (DOPH) and Drunk in Public (DIP) came to the attention of the Alaska Supreme Court. The decision illustrated a case in which an individual had been arrested for Drunk in Public, was searched before being placed in detention, and subsequently charged with a felony crime as a result of stolen property being found on his person. The result of that court review struck down both DOPH and DIP as infringements upon the right of the individual and treating an intoxicated person as someone who had committed a crime by being drunk. The landmark case originated on the streets of Barrow.

Police departments throughout the State cheered the decision because it took the huge burden of managing drunk tanks, with its personnel and costly paperwork, off them and placed it elsewhere. It was placed in the medical community, as a medical rather than a police problem.

While urban police cheered, rural police were puzzled. What were they going to do about intoxicated persons, especially those incapacitated, when no sophisticated medical facilities (nor willing medical personnel) were available? People in the Arctic, incapacitated ten steps from their front door, let alone out on the streets, would quickly

freeze to death. The urban police cheered and sighed with relief while rural police had to find another answer.

Legislation was almost immediately responsive with Alaska Statute AS 47.37 and an amendment that allowed for the public inebriate to be taken into protective custody and, as a last resort, held involuntarily for up to twelve hours in a "state or municipal detention facility", i.e. jail. The only major difference from prior law was the complete decriminalization of public intoxication. Hence, public drunks were not "arrested" and formally charged, with attendant booking, etc. They were detained for their own protection. A great distinction has now been made between "arrest" and "detention".

> The 1976 amendment stated: If no treatment facility or emergency medical service is available, a person who appears to be incapacitated by alcohol in a public place shall be taken to a state or municipal detention facility in the area, if that appears necessary for the protection of the person's health or safety.

The Basis for Initiating a Detention Program

The detention program, by its title and statutory requirements, represents a new term for police custody that must be categorically separated from "arrest". The new term is "detention". With the legal problem not only solved but showing in its content a method by which a program could legally be initiated, the answer appeared and was clearly defined. The burdens of paperwork (case reports), mugging and booking, and other associated ills of the old system of DOPH and DIP were eliminated. The principle was then reasonably sound, and the method was opened through legislation--particularly in the rural areas of Alaska.

With community support and work by the task force, the North Slope Borough initiated a program in January of 1977. The department wanted to push its program, gain community support, and obtain a specific data base from which to evaluate the results. The following premises were used as a basis for the detention program:

1. If alcohol abuse is intercepted during its initial course, there should be a reduction in the commission of crimes by intoxicated persons.
2. Interception, although not necessarily decreasing suicide attempts, should effect a reduction in successful suicides.
3. With interception, there should be a reduction in residential fires and resultant fatalities.

The program is described in detail in the next chapter.

Why Treatment Was Not Considered in the Program

It has been generally agreed that alcoholism is a disease that cannot be completely cured by any method known to science except complete abstention. Even abstention must be supervised and rigidly enforced.

In addition to the a above-stated problem, composite evaluation of past incidents showed that almost all crimes, suicides and fire deaths were caused by alcohol abuse and not alcoholism. The alcoholic was not part of the overall problem to be addressed. The alcohol abuser made up 95% of the public problem.

Very few, if any, police departments wish to get involved in the medical, psychological, and physiological aspects of alcoholism treatment. It simply takes too much secondary effort by an agency that has a more primary responsibility to the public--that of dealing with crime. Hence, the program began with no intention of dealing with treatment nor becoming involved in rehabilitation. If there was an existing agency to deal with treatment, certainly referrals would be made. If not, treatment and rehabilitation were not even considered. The primary principle of the program was intervention.

The Dittman Survey and Alcohol/Crime Perceptions

The Dittman survey had some interesting findings which are highly applicable to a drunk-detention program in rural areas of Alaska. Some of the findings support both the concept of the program and also the connections between alcohol abuse and crime. In the report,

> "The most striking regional difference was found in the area of alcohol use as the basic cause of crime. Respondents in the Northwest, but not in other areas, saw it as a cause of both crimes against people (22% of respondents) and against property (13% respondents). At the other extreme not one respondent in Anchorage saw alcohol alone as the basic cause of crime".

The reports statement that "Alcohol is seen as a basic factor only in rural Alaska..." not only reflects the perceptions of rural Alaskans, but also is representative of facts not yet measured properly by agencies and police departments in those areas. With a consistent effort at data collection there will be a core of facts which will support the people's perceptions and also show the need for a drunk-detention program until such time as State programs/agencies initiate facilities for Sleep-Off Centers and Detoxification programs through Public Health Service Hospitals serving rural areas.

Another section of interest in the Dittman report concerns police issues. Again, a shift in attitude between urban and rural areas is indicated from the public survey. Response to the survey's question regarding where the emphasis of police activities should be placed showed that "In rural....Alaska, a majority of the public favored emphasizing innovative preventive activities over traditional patrol and arrest activities". The rural prevalence of traditional life styles would also indicate that police procedures which are standard for urban areas are not necessarily useful nor preferred over altered methods of patrol and prevention.

II

THE DETENTION PROGRAM: AN OVERVIEW

For our purposes, a Detention Program is an administrative policy initiated by the community and police-agency head to control the problems related to alcohol abuse. All of the elements can be found in any police agency of almost any size. It is specifically designed for those rural areas of Alaska which have neither medical delivery systems directed to alcoholism or alcohol abuse nor the attendant facilities.

The police administrator, either through research in existing records or through personal knowledge, must identify characteristics found in unnatural deaths, suicides, and crime. Certainly if the result of research were the finding that less than a fourth of the problems or causes were related to alcohol abuse, then such a major effort as the detention program of the North Slope Borough's Department of Public Safety might not be all that viable. Yet, clearly, if one-half or more can be attributed to alcohol abuse, then a detention program should be given major attention and concern. A considerable number of conditions must be examined before such a program is initiated. For example:

1. Does a rural police department have time to accomplish the program?
2. Does the rural police department have relatively decent facilities for the program?
3. Is alcohol abuse identified by others in the community as a major problem, or is it so minor as to be the last of their concerns?
4. Is there overall commitment of the department to make it work?
5. After examining the risks involved, does there still remain a commitment to a detention program?
6. How can attendant medical problems or even life-threatening alcoholic trauma be provided for if it becomes necessary?

There are, of course, many more detailed questions about the functional aspects of such a detention program that also have to be answered. A careful and considerate approach must be maintained for the sake of the department and the community.

The North Slope Borough Department of Public Safety

Created in July of 1976, the department had been given the responsibility of delivering public safety service throughout the 88,000-square-mile, seven-village North Slope. The primary concern is delivery of law enforcement, fire protection, and emergency medical services to villages, including Barrow.

The present personnel level for Barrow and the Village Division is nineteen sworn personnel and seven support civilian personnel. The facility for detentions was built in late 1975 as a modification to an old fire station originally built in 1954. The facilities are certainly not modern and are probably representative of most rural areas in Alaska. The extent of available facilities for the detention program is four detention cells, a bathroom separating one cell from the others, and video monitoring equipment.

Present operational levels in Barrow provide for two primary one-man vehicles on patrol. Extensive medical kits are found in each of the primary patrol vehicles. Each Public Safety Officer is required by department policy to obtain Registered Emergency Medical Technician status. The same applies for communications personnel.

The Old Method of Daily Operations

Evaluating operations in terms of actual patrol experience and daily levels of service demands showed that service requests consumed the smallest amount of time. The majority of time was actually used in "driving around" and doing security checks. Several years of review showed that there was no deterrent to crime, including burglaries, by this use of patrol. The department had settled into a response-and-reaction method of operations. Virtually all work was accomplished solely upon reaction to service requests and citizen complaints. It was not unusual to find two officers responding to a single complaint for an eight-hour work shift. The entire operations of the department were reaction oriented.

In dealing with intoxicated persons, most often the officers on duty would stop, pick up the intoxicated or incapacitated person take him or her home. Twenty minutes later a family member would call and complain that A) they want him out; B) he is fighting; or C) he is beating his wife or kids. The patrol would respond, say "stop that", and leave. A recurrent cycle of behavior would be established by taking the intoxicated person home or to a friend's house. It was not unusual to have the person taken home and then found dead from fire or suicide a few hours later.

Another method used in dealing with intoxicated persons was to charge them with Disorderly Conduct, the most abused statutory law on the books. It required the drunk's taking a lazy swing at an officer or cussing one out to justify arrest, booking, and court prosecution. Both methods were exercises in futility. A more positive approach was needed.

The Detention Program Initiated

Two weeks of advance work initiated the program. The first week was spent in giving both written and oral directions to all Public Safety Officers. Staff meetings were formalized to deal with questions about how the program was to be accomplished. Meetings with health personnel and community health providers identified anticipated medical problems. The second week was spent in public explanation of the policy and program through the radio and television. The task force assisted with this phase of the program so that virtually every resident of Barrow would be aware of the program and how it would work in advance of its actual initiation on the streets, in the homes, and in public places.

The Barrow Experience

The first three months (January, February, March) presented a problem with the program that was not anticipated at first. It was found that few of the duty officers were excited about or interested in this program. Little progress was made and only a very slow increase was shown in detentions. With supervisory guidance, departmental meetings, and further convincing, the program began to take off in the proper direction. There was a great deal of confusion about the difference between "arrest" and detention. That confusion led Public Safety Officers to conflicts over the role that they were to take and their personal relationships to the treatment of those detained for public intoxication. It was found that officers were taking intoxicated members of families from their own homes and detaining them, under the assumption that they had the authority to do so. Booking forms were mislabeled as "arrests" rather than "detention only". Fingerprints and mug photos were being taken. A major confusion over the purpose and intent of the detention program existed.

A major complaint of experienced police officers was their reluctance to deal personally with people solely because they were intoxicated. They found it reprehensible and unprofessional to accomplish such mundane tasks as dealing with a person who was slobbering drunk. It did not tax their resources, but it certainly taxed their personal attitudes about the worth of someone very drunk. Another complaint about officers dealing with the program was their intransigence in identifying their role as police who dealt with crime and not the social ills of a community. They simply could not identify the cause-and-effect relationship of alcohol abuse to levels of crime.

However, with training sessions on the causes and processes of alcohol abuse, there came about a complete change in attitude and approach to the overall problem. The program began to work as detentions began to climb month by month. With this type of change, another interesting problem, not anticipated by supervisors and administrators arose.

After six months of experience and monthly charting of detentions, it was found that no one had anticipated answering the question: Where would it stop or level off? The surprising answer at the end of the year is that it never did level off or stop at any particular point. The result was the continuing overloading of facilities and extremely crowded conditions at the jail. On one occasion seventeen persons were detained in a six-hour period in a facility designed for a maximum single occupancy of four. The facility is simply not large enough to handle actual need. In any event, it was decided to continue the program in spite of the overloading, as its effectiveness at reducing crime, suicides, and unnatural deaths was becoming self-evident. At this point even community support grew for its continuance, with frequent calls from the general public asking that persons they had seen intoxicated on the streets be picked up and detained.

The highest level of detentions for intoxication was reached during the last month of the "wet" year, at one-hundred fifteen (115) persons detained for the month of December. It was also discovered that the most consistent average time required for an intoxicated person to sober up completely was between five and seven hours. Of those hours, the first was generally an excitement stage, and the remainder were occupied by sleeping. After the

mandatory eight hours from time of detention was reached, those still sleeping were allowed to sleep until they awoke and then were immediately released. Those awake at eight hours were immediately released.

Recidivism was obviously very high; however, it was soon discovered that those who had completed the process rarely, if ever, committed any crime or attempts at suicide within 72 hours of being released. In addition, it was also discovered that most of the crime that continued during the program was committed by individuals intoxicated but missed by the efforts of the program. Crimes occurring on the streets became nonexistent; most were committed in the offender's own home.

Actual Costs Evaluated for Continuing Impact

Initially, the only cost associated with start-up of the program was installation of a TV-monitor system. This system was installed with two separate goals in mind. First, direct observation by communications personnel to assist in identifying medical problems and abnormal activity (attempts at suicide, DT's, etc.). The second purpose was to reduce any cost impact by eliminating the necessity for hiring guards and providing around-the-clock observation (which would greatly increase actual dollars expended in the program). This simple, one-time cost alleviated a particular threat to the well-being of detainees--suicide attempts in the cells. As a matter of procedure, all property was removed and inventoried in the same manner as for criminal arrestees. Belts and shoes, as well as parkas and coats, were also removed. There were fifteen (15) actual suicide attempts within the cells. Fourteen were immediately prevented by duty personnel. One actually succeeded. (See Section IV: Problems, Costs and Evaluation).

The Results of the Drunk Detention Program in 1977

At the end of the first year, evaluation produced some unusual results. Some were planned as objectives while others were surprise results. The first surprise was the net total of detainees (664) which indicated a huge number of persons processed through the program. Certainly the total number was not indicative of the actual number of individuals detained in the program. Returnees were very common and probably comprise about one-half of the total. Hence, the actual number of individuals may well be closer to 330 $\pm$ 5 to 10. This figure represents well over twelve percent of the total population of the City of Barrow.

Another result was the discovery that the ceiling, or maximum level of detentions per month, was never actually reached during any time of the program. Appendix A shows that the single highest month of detentions was the last month of the year, December. The only interruption in steady monthly increases was September and October which reflected a diversion from the effort to the management of an unusual incidence of very serious crimes during those two months. Aside from that single influence, the chart demonstrates a steady upward trend--allowing only speculation on what the peak actually could have been. Also, there could possibly be an artificial limit in terms of man hours applied to the program.

Some of the major effects of the program were:

1. No deaths occurred by freezing.
2. Two suicides occurred as compared to an annual average of five to seven.

3. Service requests doubled, yet there was an overall decrease in reported crime.
4. Arrests, specifically the need for arrests, decreased by 35%.
5. A significant decrease in crimes against persons resulted.
6. A signigicant decrease in misdemeanor crimes resulted.
7. Two deaths by fire occurred, each alcohol related, and each in the victim's own home, compared to an annual average of five.
8. A significant reduction in investigative case work occurred, allowing for a huge increase in time available for the detention program.

With a continuance of the program throughout 1978, a complete data base will be available for detailed analysis, resulting from 1976 dry (no detentions), 1977 wet (detentions) through 1978 dry (detentions). A complete three-year data base analyzing alcohol abuse as it relates to the incidence of crime will be available by January of 1979.

III

NEEDS ANALYSIS, SYSTEM OBJECTIVES, AND APPROACH TO IMPLEMENTATION

Needs Analysis

Barrow. A city with a population of approximately 2600 has stabilized the number of personnel considered necessary for Public Safety Services at eleven officers, taking into account the seasonal peaks and declines in criminal activity, most officers had a great deal of time on their hands in which to take a more positive and preventive role in the community. Personal experience showed clearly that Barrow suffered from an abnormally high abuse of alcohol; however, there were no detailed records to back up the personal knowledge. When compared with other agency data and more especially sociological studies by the University of Alaska, Barrow was typical of native rural populations throughout the State of Alaska. When compared with the urban areas of Alaska, Barrow still displays some anomalies in the area of crime and alcohol abuse. Barrow and the North Slope Borough identified four problem areas. They were suicides, incidence of homicide, fire deaths, incidence of alcohol abuse. The Criminal Justice Planning Agency, through studies of the Uniform Crime statistics, showed a higher rate of incidence for all four areas in native rural Alaska. Barrow is considered to be typical of the norm in those statistics.

Because of its size, job availability, social and economic factors, and seasonal trade-offs in activity levels, Barrow is not representative of most other villages within the North Slope. Barrow is viewed as "the city" by such villages as Wainwright, Pt. Hope, Kaktovik, Nuiqsut, and Atkasook. These villages range in population from 150 up to 450. Barrow and these sister villages have similar problems of alcohol abuse and its results.

The North Slope Borough. Seven villages within the borough have slightly different community natures, but the problems of alcohol abuse and crime are even more accentuated in their life styles. What, in Barrow, is viewed as a minor incident will be perceived as a major problem in the village. This emphasis is the result of a lack of resources for dealing with the problem there. Hence, all the available data applicable to Barrow would be magnified in smaller communities lacking the facilities and personnel to manage them. Very little village data is available; however, personal experience again dictates that the same detention program would have an even greater effect in smaller communities. While the villages outside of Barrow are always "dry", what happens in Barrow has a direct influence on village life. A logical assumption is that the same is true of other regions of rural Alaska. The needs are interrelated and inseparable.

System Objectives

While the principle behind a drunk-detention program is simple, it must reflect specific objectives related to actual occurrences which point out the need for the program. If the objectives are not identified by detailed research it will be very difficult to attempt the introduction of the program to personnel in one's own department. Identifying specific objectives makes implementation much easier to push--both to the community at large and to the local police department. In developing these objectives, there are some hurdles to overcome that will reflect upon both the need and the methods used to implement the program. Several questions must be answered to implement the program.

Several questions must be answered to the general public's satisfaction:

1. Assuming widely accepted justification for such a program, how willing is the community to accept existing facility conditions?
2. What exactly is the objective and goal of the program? Can it be articulated clearly?
3. To what degree will the community continue to support the initial effort?
4. Should it make a difference in program implementation if the community is wet or dry?
5. If something goes wrong (such as suicide in a cell of someone detained) can the program survive criticism and continue?
6. Is there an adequate, trained staff attending the facilities? If not, are the community and the police agency willing to support training?
7. What modifications to facilities and assignment of personnel will the community support? How much will it cost?
8. Can the program demonstrate cost-effective management?

The pattern of research may be evident to the police administrator; however, it must also be shown to community leaders without bias and with a commitment of real concern over possible effects of the program.

The objectives for the Barrow drunk-detention program were identified by both the local task force and managers of the department. The "Task Force on Alcoholism Report" filed in December of 1976 identified the objectives and consolidated ideas from key agencies/personnel. They are:

A. Death rates increase with the greatest impact on the younger people of the community.

B. Adult and juvenile crime greatly increases.

C. Family problems greatly increase with impact from the very young through young adults.

D. Related medical problems greatly increase.

E. Property damage increases.

F. Family life structures are detrimentively influenced by alcohol abuse.

Research indicated that there were four goals to establish for the program to actually demonstrate that it worked. The first was a clear reduction in suicides since all suicides in the past were directly linked to high intoxication. The second was reduction in the number of house fires and individual death rates from fires directly caused by intoxication. The third was a clear decrease in crimes (initially unspecified by type). And the fourth was to remove "the drunks from our streets" since this was seen as a very negative community image. An adjunct to these goals was the elimination of deaths by freezing in the streets and byways of Barrow proper.

The latter goal was, by far, the easiest goal to initiate since it did not reflect upo any individual's social stature or standing in the community, but was clearly life-saving activity. This single goal was clearly directed towards the officers who would be responsible for the success or failure of the program. Normally being held publicly responsible for individual protection of life, the officer was individually instructed that common occurrences of freezing deaths resulted from intoxicated and incapacitated persons walking to and from parties and/or homes. This single goal reinforced the officer's feeling of responsibility towards intoxicated persons, and, at the same time, increased his motivation to stop and detain rather than "pass by the incapacitated". As a result, not a single person died of exposure in Barrow during 1977.

Approach to Implementation

Implementation was begun by the distribution of a written policy and description of the program to all department personnal as well as all task force members. Only tenacity kept the program from suffering collapse after the first few months when alcohol-related deaths continued to occur. The initial difficulty was the failure to adequately explain it to working personnel and measure what was asked of them against their own private attitudes towards this kind of program. It must be set in the mind of the police administrator that the program will be continued for at least a full year. It can then, and only then, be adequately and intelligently analyzed for results. After the first year it will be time to determine whether or not the program is of such value as to continue it indefinitely or for another trial period.

IV

PROBLEMS, COSTS, AND EVALUATIONS

Data analysis and records kept by the department during calendar year 1977 have identified several specific problems that require not only mention but detailed explanation. They are critical to both the results and the continuance of the program. The most important problems are:

* Officer personnel attitudes and demeanor in handling intoxicated persons.
* Knowledge of alcohol abuse and stages of alcoholic influence.
* Identification of procedures separating "arrest" from "detention".
* Guarding against medical and mental problems occurring in the facility.
* Handling suicide attempts in the facility.
* Officer knowledge of Delerium Tremens.
* Typical cycle of detainees' behavior and signs of critical events.
* TV monitoring versus jail guards.
* Present resource and emergency resource reactions.
* Publicizing fully the operation of the program.
* Officer risks and the use of physical restraint.
* Length of needed detention time.

Identification of all the above areas is the result of an exhaustive study and evaluation of data, personal knowledge and observation, and feedback from both operational personnel and the community at large.

Attitudes

Critical to the program is a whole melange of psychological attitudes found in officer personnel. For many officers who have had little formal training and very negative experiences with intoxicated persons, the handling of drunks reflects the acting out of oftentimes very negative personal habits and attitudes. If an attitude is demonstrated that intoxicated people should be treated as less than normal, or as less than full human beings, the program will accentuate it. Officers will become extremely cynical, an attitude often causing verbal abuse and jeering, and frequently leading to fights between detainee and officer. Another more critical contact-related problem is lack of simple knowledge of the physical influences of alcohol on the body. This is especially important when an intoxicated person becomes combative. The restraint necessary is often very little, but only if knowledge of non-injurious methods are available; when they are not, it is quite possible to break a detainee's arm by using a come-along hold meant for sober persons--simply because the detainees ability to feel pain is extremely reduced.

Knowledge of Alcohol's Influence on Behavior

It is also important that officers be trained in understanding alcohol's effects, both physical and mental, upon the intoxicated person. It will be reflected in behavior ranging from frivolous to boisterous and extremely combative. Officers with full knowledge will immediately understand that intoxi-

criminal or the mental case in a manic state. If treated properly and carefully, with a measure of respect, the drunk will later frequently thank officers for their assistance and apologize for uncontrolled behavior. It is very important to the individual detainee that he not be treated as a child nor suffer "loss of face" or a feeling of loss of self-respect. Often, these attitudes and feelings will remain even after the alcoholic haze has completely left. Contrary to popular belief, intoxicated persons more often than not remember how they have been treated and will not likely forget mistreatment and belittlement.

Identification Procedures in Arrest Versus Detention

This problem can easily be eliminated from the very beginning if more time is spent in preparing officers and encouraging their participation in the program--assumptions at the beginning frequently turn out to be completely wrong, sometimes to a fault. This area actually represents the detailed operational processes for the program. It should be gone over with officers of the line in advance of starting the program so a clear definition and a clear distinction is made between a person who is detained in a non-criminal manner and a person who is arrested in the normal criminal process. This department, with a full year of experience, has completely overcome this initial problem; however, the experience can benefit others who may want to initiate a similar program and prevent breakdowns in the initial stages which may threaten its continuation.

Medical and Mental Problems

Both problems must be addressed in advance and very carefully if disasters are to be prevented. There must be identified resource people who are immediately available for medical treatment. Also essential is the training of line officers to insure recognition of critical clues to oncoming medical trauma. Officers must understand that at the time a detainee is originally picked up he will be at a certain stage in his consumption and intoxication. There is a clear and critical difference. That difference can frequently make the difference between life and death. Hence, the detainee, for at least the first hour or so, must be watched very carefully for signs of the following physical trauma:

1. Severe depression and suicide attempts.
2. Severe physical depression leading to slow collapse of the central nervous system, i.e., breathing and heart dysfunction.
3. Severe manic behavior that will cause self injury in almost any facility or situation.
4. Aspiration, e.g., choking on own vomit, either while awake or asleep.

Virtually all of the above represent life-threatening situations which almost any detainee can experience. A key check-point principle in observation is any sudden change in behavior. If boisterous and loud, a sudden change to very calm, quiet behavior should be immediately checked in person. It is a common signal of either mental or physical behavior changes. If a subject suddenly goes to sleep and is not checked personally by someone, he or she could aspirate without moving a visible inch, causing death unobserved and unknown to those responsible for his care. Sudden calm also reflects a signal of impending suicide attempts. Attempts are limited only by the material and resources available and sheer imagination. Imagination is never lacking in those intent upon suicide. Pain thresholds are so high as to make the inconceivable a practical reality.

Depression of the central nervous system may occur an hour or more after an intoxicated person is detained, simply because his body and system have not, at the time of interception, completely absorbed the alcohol into the body. He could conceivable die from alcohol overdose an hour after being placed in detention.

Since this area was well planned and response systems were lined up in advance, such occurrences were fully prevented with the exception of a single suicide which occurred in a cell. The suicide occurred within five minutes of the time a highly boisterous, intoxicated female suddenly quieted down--medical aid was immediate; however, it was also too late. The system of safeguards worked fine, but was not fast enough to prevent her death.

It should be a warning, not only to this department but others who detain intoxicated persons for any reason, that constant watchfulness and knowledge of the signals is critical.

Handling Suicide Attempts in the Detention Facility

As related above, during the report period fifteen recorded attempts at suicide occurred within the detention facility. Over 600 detainees were processed prior to a single successful attempt. While the occurrence was singularly tragic in and of itself, only one other suicide occurred in the Barrow population unattended and undiscovered. The normal attempts and actual successes for the year were prevented by the program since no other influencing factor can account for such positive results. It would be logical to deduce that attempts made in detention could and probably would have occurred outside the facility with a greater chance of success and complete anonimity. As it was, fifteen attempts were attended, stopped, and provided treatment.

A system was established to identify each person who attempted suicide at any time, resulting in special attention for those detained another time. Card index files were made (commonly called Field Interview or FI cards) and green notes were attached to the FI of anyone attempting suicide so that screening against such cards alerted communications and officer personnel to pay particular attention to them. Such attention to detail in all probability saved several lives during the course of the program.

Officer Knowledge of DT's

Erratic behavior by detainees frequently demonstrated the effects of Delerium Tremens. Locally, such medical terms are labeled the "snakes"--one manifestation of the hallucinations suffered by those going through DT's. Such erratic behavior can be very dangerous if not understood and treated by proper medical authorities. Oftentimes a demented paranoia occurs that can be transferred onto officers and/or facility personnel. This sometimes leads to attacks, escape attempts, bizarre behavior, and suicide attempts. Personnel were instructed that should any of this special type of behavior occur, the detainee was to be immediately transported to the local hospital and admitted for treatment.

Typical Behavior Cycles of Detainees

No single cycle of behavior is typical of all cases. Most often a detainee was brought in, inventory searched, identified by name only, screened against FI cards, hat coat, belt and shoes removed, and was placed in a detention cell that is always lighted, cleaned daily, and has bedding available. Requests for coffee or water were always filled, and the detainee generally

went to sleep a short time later. Sleeping is common, but also dangerous if not properly observed. A simple procedure for observation is to stand outside the cell and count respirations--it is a good indication of the physical condition in which the intoxicated person is found. This cannot be done over a television monitor. It must be done in person with full knowledge of what signs respiration signals. It demonstrates a clear airway, normal breathing and normal sleep. It will immediately show problems with breathing, airway obstructions, and pre-comatose depression.

Another observation can be made in the same manner--that of uncontrolled urination or bowel movements. Such occurrences are a clear danger signal that requires immediate response and attention.

Frequently detainees will exhibit self-destructive behavior by beating their fists, feet, or heads against the walls of the cell. When this occurred, measures for first aid were carried out and a short waiting period was initiated. If absolutely necessary, detainees were physically restrained until the behavior ended.

TV Monitoring Versus Jail Guards

TV monitoring is a static method of observation that is dangerous for several reasons. It often can create false reliance upon mechanical means of observation. It is also not sufficiently clear enough to make visual checks of critical factors. It will not show breathing difficulties, potential aspiration, pre-comatose conditions, and other signals critical to detainee medical needs. On the other hand, it does provide a safe means to observe manic and erratic behavior; it insulates the observer from becoming a source for the venting of frustrations and potential attacks. The most significant method for calming the intoxicated person is leaving him or her alone, but discreetly observed. The best solution to observation and care is a combination of both. However neither should be relied upon alone to solve the problem of observation.

Emergency Resource Reactions

The Department of Public Safety is the center for all emergency communications in Barrow and the North Slope--including direct radio alerting of medical personnel at the PHS Hospital. Such communications, in addition to direct and immediate ambulance alerts, establishes the foundation for emergency resource reactions. In addition, trained emergency medical personnel are supplemented by department personnel in line officers as well as communications personnel. The result is an almost immediate response to any medical crisis within the facility. This resource must be initially evaluated and provided before such a program of drunk detentions is initiated. It serves to protect all parties concerned. It also prevents gross mismanagement of detainees in the program.

Publicity

The department insured that, with the cooperation of the task force, the whole community was informed about the program, how it would actually work and the potential benefits and risks involved. The public's complete awareness and support of the program saved it from complete destruction when the suicide occurred in December of 1977, the last month of the community-wide effort. Weekly and monthly the public was informed about its progress with radio announcements. Virtually all feedback from the general community was of a positive nature. The program could not be accomplished without full parti-

Officer Risk

It was found that officer risk was actually very small. There was greater risk to the intoxicated person than to officers. Intoxicated persons were found to be uncoordinated and unable, for the most part, to be successful in attacks on officers. Very few attacks occurred, and all were very minor. A primary reason for this was the publicity which informed not only the general public but detainees as well. Intoxicated persons knew in advance what was going to happen, and as a result there was no fear nor mystery associated with it.

Detention Time

Detention time is defined as the length of time necessary to hold the intoxicated person until complete remission of the effects. Initially the time was set at a maximum of eight hours. While only an unproven estimate, the eight hours' maximum time proved to be sufficient. Certainly any longer period of time would have caused a strain on facilities and cost overhead. A minimum was set at four hours. This also proved to be very valuable for those less intoxicated than others. No allowance should be made for more than a twelve-hour limit. An extention of this type would cause a breakdown in operations of the facility, disruption of detainees' time, considered valuable for family and job related needs, and an unncessary burden upon program personnel and officers. The 4 to 8 hour limit proved to be very practical as well as acceptable to officers and the general public. It also prevented any misuse of the program by unnecessary detaining. It acted as one of many checks and balances.

Program Costs

Evaluation consisted of monthly data on the number of persons detained in the program and a comparison with prior years' incidence of crimes, fire deaths, and suicides. A monthly analysis also tells the administrator whether or not modifications are needed in the program as well as performance results by line officers in developing the program objectives. This can only be accomplished if a system of monthly data reporting has already been established. The department's experience illustrates that the ceiling of detainee pickups never was reached for the year 1977, as the last month of the year was the highest. The progression of numbers will act as anchors to the evaluative picture formed after the first few months. Community feedback is also an anchor to the evaluation process, in that negative feedback will indicate changes, modifications, or failure of the program. Such feedback represents a form of reality testing critical to its continuance

Data for the previous year must also be handy for comparison on a month-to-month basis. If it is seen as effecting the reduction of the number of necessary arrests, reduction in misdemeanor complaints filed with the local court, and an overall reduction in the number of crimes reported, the administrator may want a certain part of the program reinforced and other parts de-emphasized. If, after three or four months, there is no difference in activity levels, there will have to be a reevaluation of the program and its effectiveness

V

IMPLEMENTATION STEPS

Identify and Evaluate Effects of Alcohol Abuse

It is the police administrator's role to accomplish this task through available records of police, fire, and medical activities within his own community. Screening these results through local leaders who may well be aware of the impact of alcohol abuse will result in the formulation of cooperative efforts towards implementation of a drunk-detention program. The effort at identifying effects and causes will dictate the need for the program and a group of concerned and cooperative citizens and police personnel.

Short-Term Group Organization

The organizing of a short-term group will serve to initiate the program since it cannot be developed in a vacuum. The task force may be small in number but represent a group of community leaders. It certainly will not work on a principle of "white hat missionary zeal", nor a one-man showmanship project. Several meetings in a short period of time will effectively bring out identified needs and anticipated impacts. The work of this group is to act as an advisory council to the police administrator in formulating the program and the mechanics that fit the local situation. The group will also identify what facilities are available to select from or determine that a single facility will have to be upgraded with minor additions and used regardless of its inherent faults. Such was the case with the City of Barrow--a facility obviously not designed for such a program, but the only one available, was used.

The group will also tend to establish requirements for care and resources that need to be directed at the program. Those especially important will be medical resource persons, voluntary aides, or personnel training needed prior to program initiation. In addition, all of the necessary functional parts identified in this monograph will have to be addressed in advance. At the end of the group's short life, a decision will have to be made by them and the administrator as to whether to go ahead with the program, or that it is not feasible.

Once the program is actually initiated, the need for the group's existence will diminish, and the responsibility for the program will fall upon the police administrator.

The Police Administrator Evaluates Internal Resources

It becomes incumbent upon the administrator to evaluate several aspects of his own departmental resources before deciding to go ahead. They are the following:

* Train department personnel in advanced first aid at the least, and preferably to the EMT level.
* Check personnel attitudes towards the program after training them in aspects of alcohol abuse and the preventative concerns of the program.
* Evaluate, correct, or modify existing facilities for the function they will serve in the program.

* Insure public information about the nature of the program, how it will function, and when, where and under what circumstances it will be initiated.

* Establish close and permanent relationships with medical facilities and personnel.

After the first three or four months of careful observations any modifications needed should become evident. It is important that the commitment to the program be for at least one full year in order to provide any real and significant effects. Decisions for continuation or elimination of the program altogether will also tend to be self evident at the conclusion of a full years efforts.

Personal involvement of the police administrator during the initial stages will also be very important, simply to insure that his own information is consistent with what may be reported to him by staff and line officers. A breakdown in that information and sharing process will add great risks to the program if the administrator fails to take a personal interest in how it is initially developed. His own personal evaluation is likely to be more objective than those of line officers or staff officers, who may be the recipients of officer complaints and feel obligated to pass them on.

Program Initiated After Public is Informed

With prior public education, one of the most common results to be expected is that some of the informed public will also be those detained. Their prior knowledge of how the program works, that it is completely decriminalized and humanly safe, will prevent stiff opposition to its implementation during the first few weeks or months. There will also be feedback from those actually detained in terms of their expressed feelings about the program and how they were treated. This too, should be considered as valid as other forms of input.

VI

PROGRAM MODEL EVALUATION

Evaluative Methods and Criteria

An evaluation of the Detention Program includes a three-year data base and application of the standard scientific statistical analysis processes. Rather than applying only the "dry" statistical method the author intends to develop and use transliteration into humanistic terms to illustrate what the raw data may not clearly show. This will be accomplished using a comparative method of human activities along with controlled and uncontrolled variables. The uncontrolled variables will be identified and will include such influences as seasonal variations, seasonal community activities, employment rates, raw data on availability of increased or decreased income, and some attempts at relatively viable psychological foundations for alcohol consumption.

The base-line group for all statistical and sociological evaluation will be the Barrow population figures as of July 1978. With this base-line group it will be possible to identify, within reasonable limits, the entire pathology of alcohol use in the City of Barrow for a three-year period. While some statistical charting may tend to speak for itself it does not, however, deliniate precisely the extent nor the effect of the whole realm of alcohol abuse in human terms.

The social pathology of crime and its commission can be laid squarely upon alcohol abuse. No other influence, no matter how apparently valid or significant can begin to match the straight line influence of alcohol abuse and crime in Barrow. Raw data results clearly develop specific pathologies and trends in sociological terms.

Interpretation of Raw Data

Some generalizations are clear when viewing the results of the Detention Program for Barrow. The following statements are deduced from raw data as no other variable can account for the net results shown to date:

- Suicide and alcohol abuse are not only linked but pathologically related. As an axiom, suicidal behavior requires a breakdown in inhabitions against such an act and therefore, in the Barrow population at least, requires intoxication. Hence, zero success inclusive of at least twenty-five attempts in the population for a full calendar year is strong support for such a statement. To effectively support the zero suicide-success rate, it is necessary to maintain a 90 to 95% efficiency rate of detentions.
- The incidents of home fires and fire deaths are directly related to alcohol incapacitation. No other influence nor outside variable can be used to explain the zero fire-related death rate.

Interpretation of Raw Data

- Incidents of accidental death have been reduced by an actual 90%. The implications for the population of Barrow are fantastic. It has been 18 months since an accidental freezing death has occurred. The Detention Program has come very close to completely zeroing out accidental deaths.

- Crime reduction, caused by interception of alcohol abusers, is close to 60% in a two-year time frame. Only the efficiency of the program model enforcement dictates the level of crime. Therefore, crime can be, and is, controlled with an iron hand by high levels of detention efficiency. Serious crimes against persons and property have been reduced by nearly 40% in one year.

Conclusions and Implications for Rural Alaska

Since indisputable proof is now available for what was unsupported contentions of rural communities' crime and abnormally high death rates, the only serious question remaining is not if other rural communities should follow suit, but when they should begin their own detention programs. The model results coming from a detention program will no doubt come as a shock to the criminal justice system. Fighting the root cause of crime is far more profitable to communities than the actual investigation and resolution of crimes after the fact.

It is a radical departure for any police agency to examine root cause and effect relationships and decide to attack the cause and not the effect. However, for rural Alaska communities there can be no remaining doubt that attacking alcohol abuse is far more rewarding and profitable in terms of success rates than any other known approach to date. In the savings of life alone, the value of the Detention Program is unquestionable. If a police agencies highest goal is not the saving of life, it certainly ought to be in light of this programs' ability to accomplish just such a goal.

Admittedly, the approach is contrary to the TV and general publics' perception of cops and robbers. There is little glitter and glory in tangent approaches to traditional crime problems but when seen as a wholistic framework, the success can be just as rewarding in the eyes of the community. The basis for such a tangent approach is the early recognition that traditional ways of solving the crime problem do not work. It is a nonproductive exercise in futility to maintain traditional approaches with a proven failure rate. Drastic and experimental methods result in success rates far exceeding those of any known past methods when applied to today's communities.

Controlled Variables in the Detention Model

Controlled variables are those which include facets of the model design during the early stages and any modifications that were made in the process of the two-year development. Early stage controlled variables included:

A. Detention of intoxicated persons in public places and streets.

B. Maximum detention time of 8 hours.

C. Some allowance for transfers of intoxicated persons to their homes and/or release to sober adult care.

D. Minor allowance for removal and detention of those intoxicated in their own homes.

E. Detention considered a secondary patrol strategy by managers.

The above listed variables were not rigidly enforced nor pushed by the staff responsible for patrol strategies. This slow process of enforcement continued for the first 8 months of the detention program model. Only after 8 months was a significant change initiated and added control variables considered. The information feed-back as a result of immediately visible successes resulted in added modifications and a more rigid management of the program.

Later controlled variables, initiated only after approximately 8 months of experience, resulted in the following:

A. Maximum detention time was increased to the statutory limit of 12 hours.

B. Transference of intoxicated persons to homes was absolutely forbidden - enforcement was specific and direct.

C. Complaints from household members about family/relatives being intoxicated resulted in direct removal to detention facility with no exceptions.

D. Detention considered as a primary patrol strategy by managers and adopted by line patrol officers.

Any person intoxicated, anywhere, anytime, was detained without exception and provisions for release to home and/or sober adults was discontinued. Hence, the effeciency of finding and detaining intoxicated persons drastically increase finally leveling off at approximately 90 to 95%. It soon became apparent that any person who was drunk had a 1 in 10 chance of being missed by patrol and placed in the detention program.

Uncontrolled Variables and Potential Effects

Not all uncontrolled variables can be accurately identified nor accurately measured. Among those outside influences were:

A. High employment rate and high availability of jobs throughout 1978 due in large part to Borough construction (major) projects continuing throughout the winter with no let-up.

B. Wein Air Alaska's half fare round trip plan between Fairbanks (the source of supply for Barrow alcohol) and Barrow. The cost of travel on weekends was cut in half. From date of initiation detentions increased by 40%.

C. During 1978 the Whaling Controversy lead to a low success rate and angry social feelings about outside restrictions resulting in higher incidents of detentions and arrests than is normally found during the whaling season (the lowest crime and drinking period in Barrow for the last three years).

D. Seasonal variations on community activity (specifically local native subsistence, fishing, etc.) anticipated and relatively accurate. Cultural community activities cause a significant reduction in alcohol abuse and crime.

E. Cause and effect of major social engineering resulting from massive use of apartment living for a large portion of the elderly population and the division of expanded family units into smaller disassociated ones resulted in increases of alcohol abuse in the Fall of 1978.

F. Increased income availability due to employment opportunities resulted in more money, hence increase in alcohol consumption.

G. Initial drive against bootlegging resulted in eight arrests during a two week period, one conviction, and seven aquittals. Barrow juries would not convict local bootleggers even with substantial proof. Those pleading guilty received meaningless sentences. Deterrence was non-existent.

H. Intelligence collection on bootleggers indicated that a massive number of individuals found it socially acceptable to make a "little money on the side". Nearly fifty persons were identified as illegal sellers of alcohol as oppossed to a relatively few individuals operating on a large scale. There are no large scale bootlegging operations in Barrow during 1978.

I. Present data indicates that one out of every two adults in Barrow purchase and consume bootleg alcohol. Chances are two to one that a juror buys and consumes bootleg alcohol.

Averaging as a False Indicator

During calendar year 1977 the average detention counts per month was 55. However, the charting of detention incidents was highly skewed with the base line year showing a 45 degree increase throughout the year and no sign of reaching any maximum number per month. While 1978 showed a marked flattening of monthly averages (93) the same effect hold true for this recent year. End of year averages are again skewed and increasing.

When the monthly average for 1977 (at 55) is compared to the 1978 average (93) a false impression is apparently shown by the almost double monthly average. The explanation is relatively simple to understand. During 1977 the effeciency of the detention patrol stragety for the first eight months was weak. The late addition or modification of controlled variables easily accounts for this percentage discrepancy.

Averaging detentions by month for the 1978 year is also a false method of determining realistic measures since, once again, the late year increases defy the averages. Only uncontrolled variables can account for a second level increase for 1978. The author can think of only one conclusion to draw from the steady rate of increases over this two-year period.

Aside from the fact that averaging becomes a false indicator, as long as annual increases continue towards the end of each calendar year the only conclusion that can be drawn is the existence of a frighteningly steady increase of alcohol abuse throughout the entire population. The author cannot even begin to determine when and where that steady increase will stop or level off. The implications of this conclusion are terrifying to contemplate in terms of the heart and soul of the community of Barrow.

At the present time data already analysed indicates that fully one-half of the adult population is carrying the other half of the population on their collective backs. The capacity for collective community participation in any activity and/or problem-solving framework is not only hampered by this conclusion but such efforts would be crippled before they began. The problem of escalating alcohol abuse must be attacked with an all-out effort by the few who still can meet the challenge. Failure means total collapse of this communities ability to direct their own destiny.

The Social Aspects of Data Analysis

Translating numbers into human terms the following is offered as demonstrative proof of conclusion drawn by the author:

- The approximate adult population of Barrow is 900.
- The total number of individual adults detained is 450.
- 50% of the adult population of Barrow has been detained for alcohol abuse at least once during 1978.

- The average numbers of times for an adult detention during 1978 is three.

- 131 adult females were detained for intoxication in 1978.

- 319 adult males were detained for intoxication in 1978.

- The detention of 450 individuals resulted in 1180 total detentions for 1978.

- The approximate population of Barrow is 2700. 450 separate persons detained represent 1/5th or 20% of the entire population.

- 150 days or 5 months of adult time was spent in jail for detoxification. (Based on an average of 8 hours).

- The youngest adult detained (defined by statutory law) was 19.

- The oldest adult detained was 73 years old.

- The ratio of male to female detentions is 3.38 to 1.

- In a two year time frame there were 1884 detentions.

- From examination of all data for a two-year period one can only conclude that bootlegging is a socially acceptable pastime.

- At the very least, through interpretive statistics, there is absolutely no difference between a "wet" year and a "dry" year as far as alcohol consumption is concerned.

- The only redeeming value of Barrow being "dry" as opposed to being "wet" is the reduction in juvenile alcohol abuse.

- All data strongly indicates that all money, manpower, and equipment applied to Public Safety concerns in Barrow is, in actuality, being spent (at about 80%) on alcohol abuse problems.

- Crime in Barrow is controlled at acceptable levels specifically by the control of alcohol abuse.

- Of the 450 separate people detained at least once, a total of 87 were arrested for some type of crime either before or after their detention.

- Of 131 adult females detained, 16 were arrested either before or after detention.

- Of 319 adult males detained, 71 were arrested either before or after detention.

- 68% of all detainees are between 19 and 35 years of age.

VII

CONCLUSIONS

The basis for the following conclusions are found in the raw data and analysed data preceeding this chapter. Some of the conclusions are those of the author and do not necessarily reflect specific proof through interpretation of data since all data can be interpreted in various ways. Others, with far more experience in statistical analysis may find conclusions that will be different than the author's. While continued attention to data and records will be maintained for several more years, this effort is the last that will be formally published by the North Slope Borough Department of Public Safety. Others who are interested are more than welcome to use the data and future records for definitive research.

The program approach has been one of providing data that can be used in future program developments and extensions of principles found in this research. Modifications of controlled variables may continue to be made and refined. There are, of course, some precautions that should be noted for the benefit of any other agency who may attempt this type of program in their communities.

A Word of Caution

This program could not have been as effective as it has demonstrated without complete community knowledge and support. In order to illustrate this requirement let me say that working in a vacuum of secrecy (failure to inform) and gross assumptions about community attitudes and opinions (the demigod approach) will result in disaster and grief. The program design and development began on certain assumptions that were not validated in advance but were as reasonable as could be expected with experience. From that point on, community reactions and individual concerns were foremost in determining controlled variables. If even ten individual community members had made formal, or even informal complaints about the enforcement of the program it would have been stopped.

The program began through the efforts of the Department of Public Safety and health professionals taking the risk of public outcry against such policies and lead to institutionalized programs with full community knowledge and support. The intake procedures were a one-way street in the beginning. The careful use of the word "imposed" is not without basis in fact at the start. However, shortly thereafter a complete transference occurred when efforts were made to close the program down. Public Safety no longer needs to seek and find persons intoxicated. The members of the community call and expect this type of programmed service. It is no longer a program wholey owned and claimed by Public Safety - it is now a community based and supported program that cannot be stopped with the stroke of the Director's pen upon an order.

Program Failures

The program is a major social order and maintenance tool that has some great failures (as well as successes). The policy of detention for the public inebriant and the discovery of the overwhelming degree of alcohol influence in the communities daily life only serves to illustrate the next point. The community of Barrow has been given a highly effective anesthetic that results in removing community members from harms way. The disease still remains. The problem of alcohol abuse has not been solved nor even treated. It continues to grow at an alarming rate and infects almost every household in Barrow.

With a justifiable degree of anger the author feels what has been accomplished is not enough. Not nearly enough. Now that the community is anesthesized the disease requires removal by some type of specialized surgery. Without that surgery the community (patient) can still die! The Department of Public Safety does not have the skills nor required knowledge to perform the necessary operation. The overwhelming problem of alcohol abuse has not been solved. Only the effects of the disease have been blunted and prevented.

In terms of the Barrow community as a whole, any potential for self-determination and the building of skills for directing their own destiny is being blunted and misdirected by alcohol abuse. Barrow may now be number one in crime reduction, but at the same time Barrow may also be number one in the process of self-destruction. With one-half of the adult population directly affected by alcohol who is to say that three-fourths of that same population two years from now will not also be affected. The trends that data now prove must be stopped and reversal begun. Otherwise there is no hope for the people of Barrow to ever have control over their own destiny.

The above serves to illustrate that solving the problem of the effects of alcohol abuse does not solve the real critical issue, it only makes it less painful and harder to recognize by the community.

REFERENCES

1. Criminal Justice Planning Agency, 1978 Alaska Criminal Justice Plan, "Alcohol Abuse and Alcoholism", 1978, 246-256.

2. Dittman Research Associates, Public Opinions About Crime and Criminal Justice in Alaska, 1976, Ed. Criminal Justice Planning Agency.

3. Magistrate Court, Barrow Judicial Service District, Death Certificates Record, 1973-1977, Charlotte Brower, Magistrate.

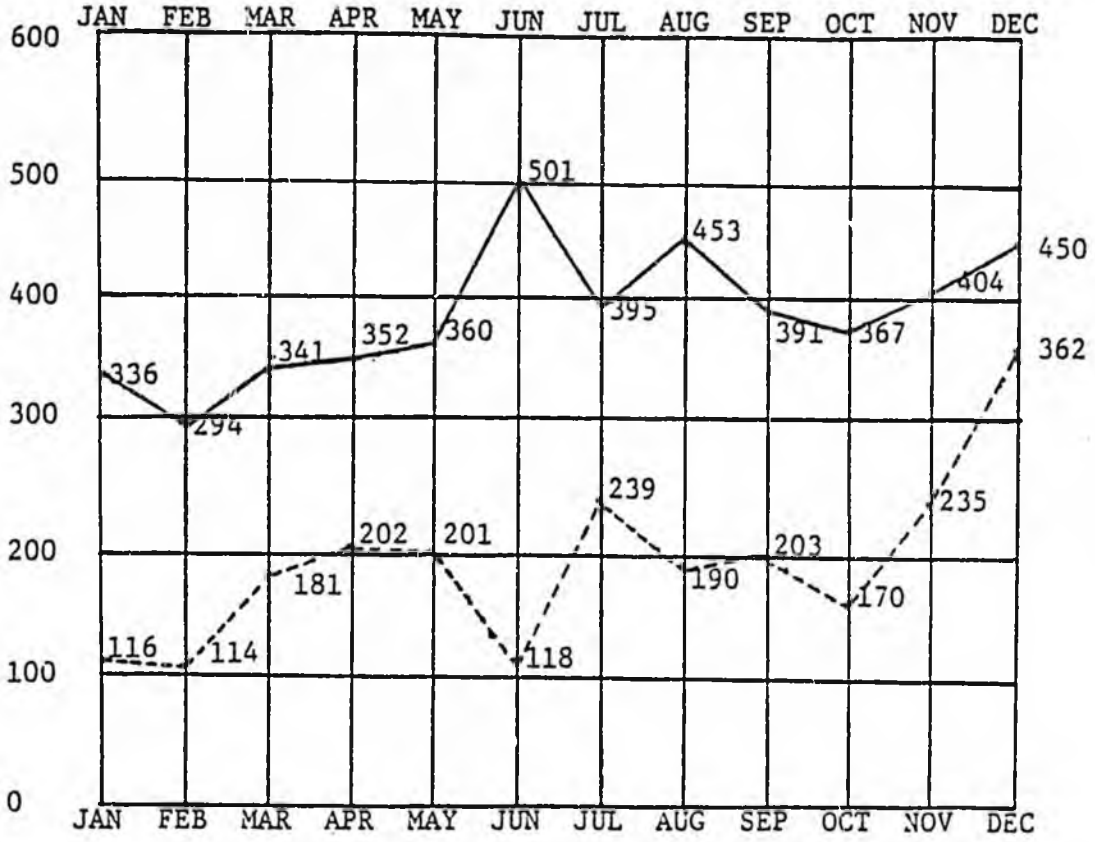
4. North Slope Borough, Annual Report 1977, Department of Public Safety, Projects and Program - Statistics and Analysis, 48-68; 162-170.

5. The State of Alaska, Alaska Statutes, Title 47 Chapter 37, "Uniform Alcoholism and Intoxication Treatment Act, December 1976 Cumulative Supplement.

Appendix A

Service Request Comparison Chart

SERVICE REQUESTS - 1976 & 1977



* Service requests indicate the number of calls received by Public Safety and responded to by Public Safety Officers.

1976 - Total Service requests = 2331 Symbol ----------

1977 - Total Service Requests = 4644 Symbol ——————

1976 - Monthly Average = 194

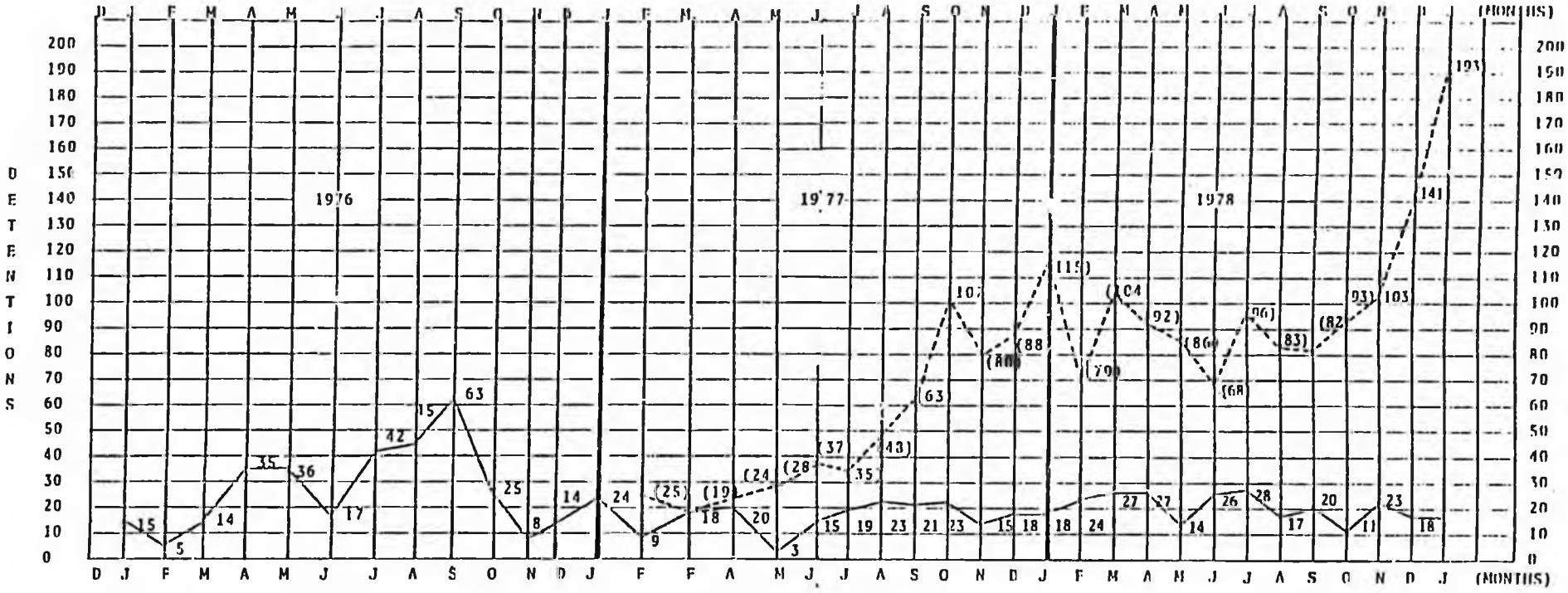
1977 - Monthly Average = 387

Appendix B

Annual Arrest and Detention Data 1976/77 Comparisons

DETENTIONS VS ARRESTS

-ADULTS ONLY-



Total Adult Arrests For 1976 319

Total Adult Detentions 1976 0

COMMUNITY VOTED "DRY YEAR"

Detention (Drunk) --------

Criminal Arrests ——— —

Total Adult Arrests For 1977 208

Total Adult Detentions 1977 664*

COMMUNITY VOTED "WET YEAR"

Total Adult Arrests For 1978 253

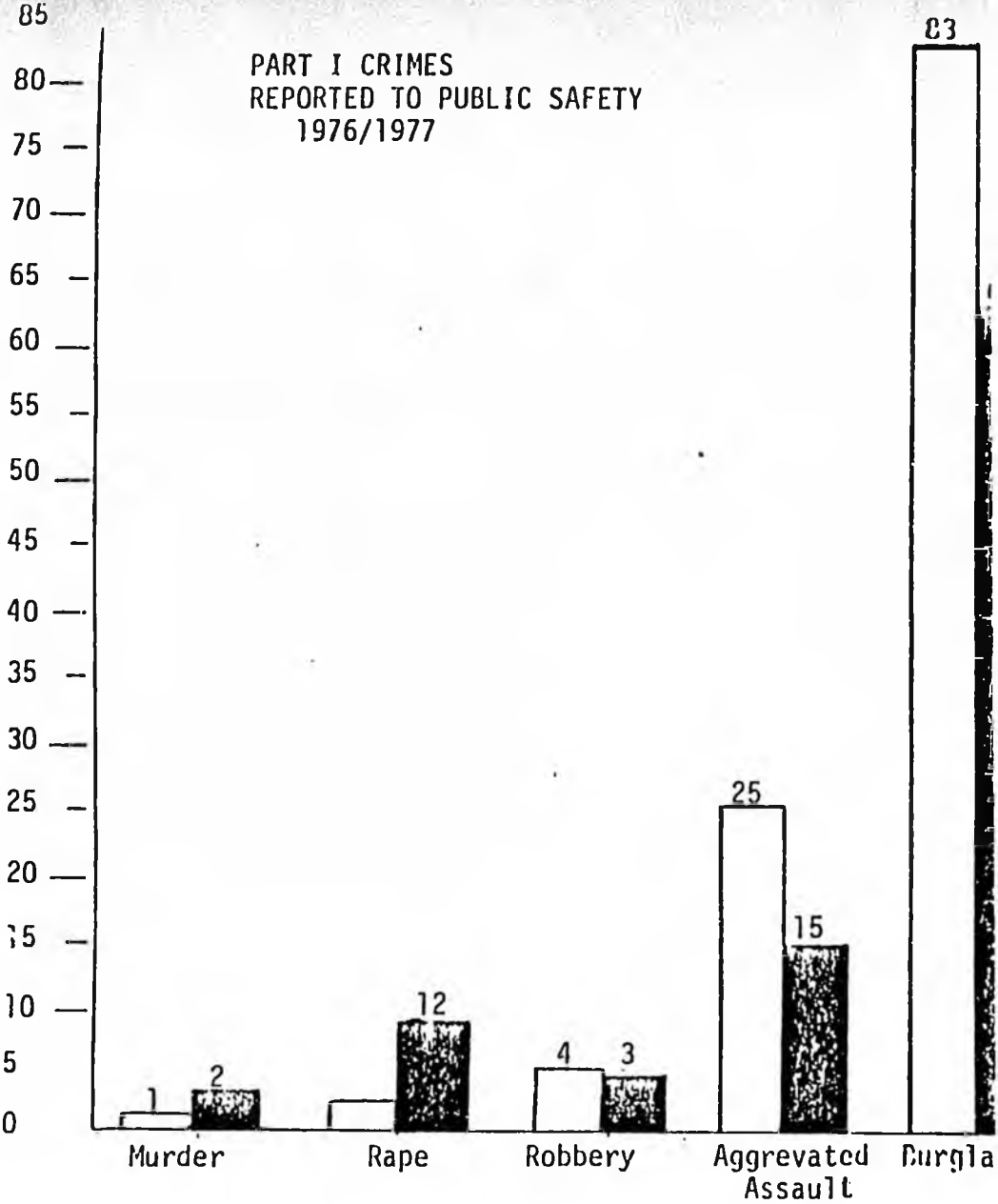
Total Adult Detentions 1978 1,211*

COMMUNITY VOTED "DRY YEAR"

*Two-Year Combined Detentions (1977,78) 1,875

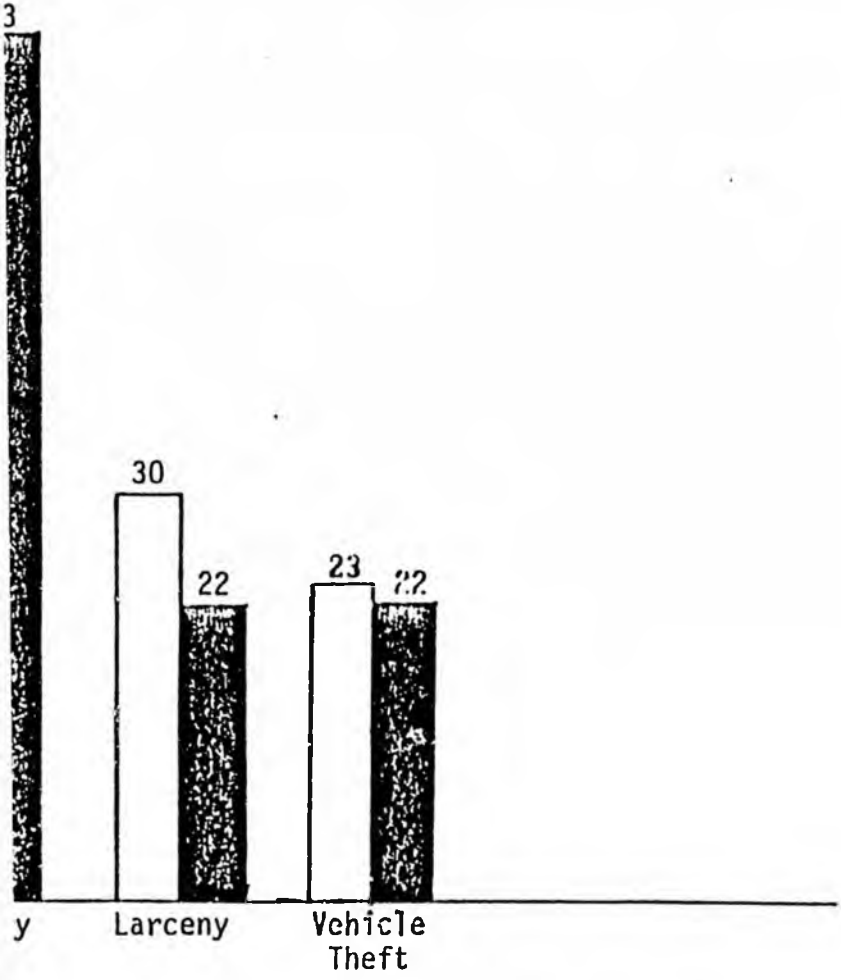
Appendix C

Uniform Crime Statistics
Comparison 1976/77



PART ONE CRIMES COMPARISON

COMPARISON CHART



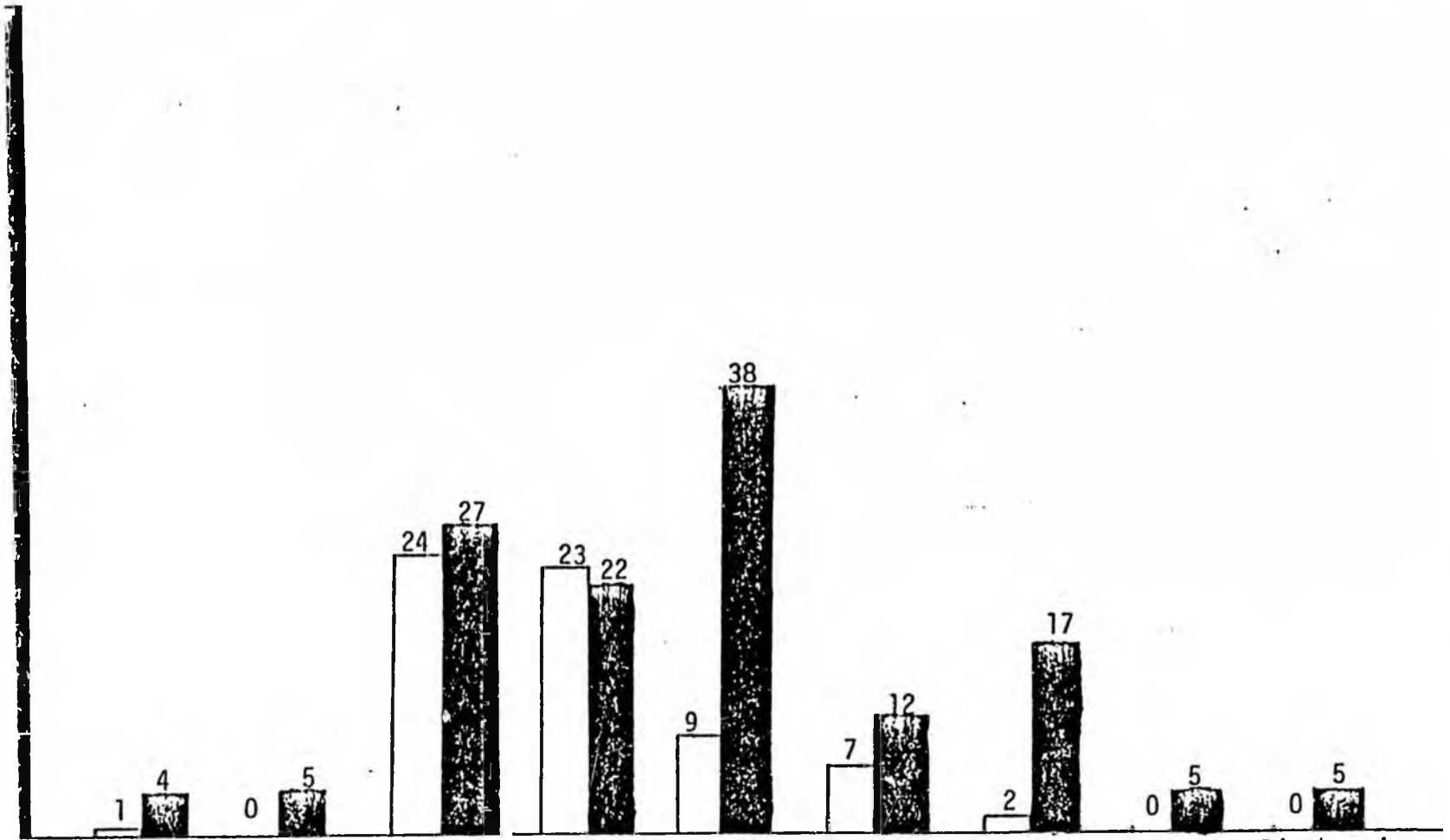
CHART

1976

1977

PART II CRIMES
REPORTED TO PUBLIC SAFETY
1976/1977

COMPARISON CHART

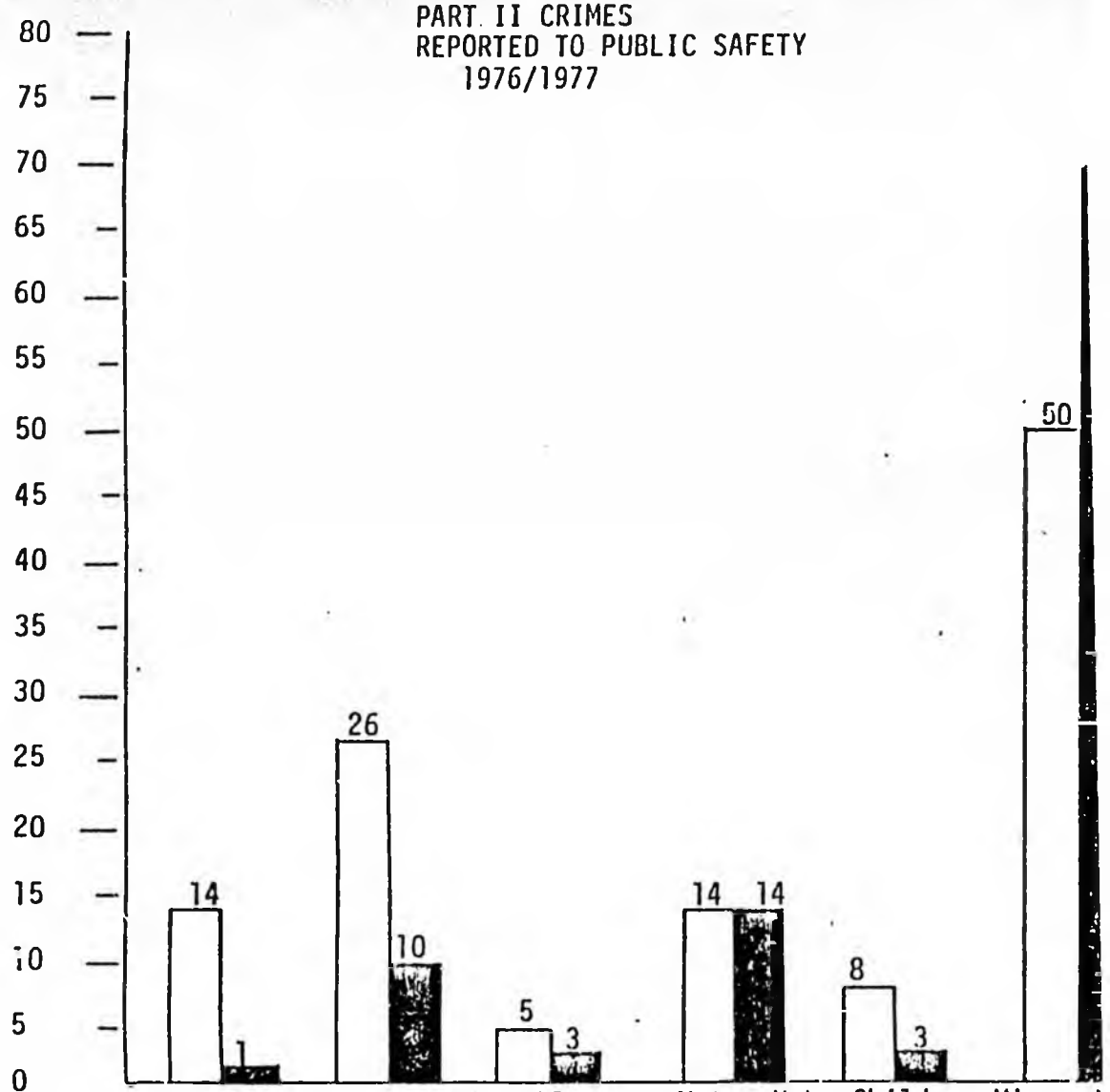


PART TWO CRIMES COMPARISON CHART

ing Motor Vehicle
Under Influence

ous Destruction of
l Property

ing Liquor to a Minor



PART TWO CRIMES COMPARISON CHART

Appendix D

Deaths Reported to Public Safety - Barrow

1977 and 1978

Death Reports - 1977

1-11-77

Alcohol Related: Yes

Officers responded to a call of someone down and bleeding badly in Barrow. Officers arrived at scene and observed a male holding the head of a female. Victim's age 19-21. Ascertained that a snowmachine accident had occurred, that the driver had fled the scene on a black snowmachine leaving victim injured. Victim transported to hospital and pronounced dead on arrival. Both victim and driver of snowmachine had been drinking earlier. 77-0127.

1-28-77

Alcohol Related: Yes

Initial call was received from one of the doctors at the hospital stating that there was a death at the hospital under unusual circumstances. In doctor's opinion death was by aspiration. Patient admitted to hospital due to overdose of pills and alcohol. Female 30-35.

2-25-77

Alcohol Related: Yes

A fire was reported by duty officer. Fire Chief indicated that at least one person was in the building when it was fully involved in flame. The fire department removed the body of a male 25-30 years old. Investigation showed victim was highly intoxicated just prior to the fire. 77-0605

4-9-77

Alcohol Related: Yes

Female victim approximately 15 years old died of pheumonia, overdose of medication, and alcohol. 77-1095

7-5-77

Alcohol Related: Yes

Medical call revealed a female 25-30 years old had stopped breathing and mother had reported her condition. Cause of death was acute overdose of alcohol. 77-2263

8-11-77

Alcohol Related: Yes

Male 22-26 years of age reported suicide by hanging. Investigation and autopsy revealed victim extremely intoxicated at time of death. 77-2766

Death Reports - 1977 (Con't)

8-28-77

Alcohol Related: Yes

Approximately 1:30AM received information that a man was laying on the ground by the Old Post Office injured and bleeding. Officers responding found male 21 years old face up bleeding from visible chest wounds. Cousin arrested for homicide. Defendant extremely intoxicated and argued over a bottle of calverts whiskey. 77-3029

8-29-77

Alcohol Related: No

Two bodies, male and female, found at Shooting Station shot to death. Male defendant arrested, charged, and convicted of 1st degree murder. Homicide was not alcohol-related. 77-3051

8-28-77

Alcohol Related: Yes

Motor vehicle accident in 3/4 ton military pick-up fuel truck. Rand off road and burst into flames. Driver died from result of fire and autopsy showed male victim was intoxicated at time of accident. 77-3031

9-21-77

Alcohol Related: Yes

Report of mother leaving baby on beach to die of exposure. Homicide investigation showed baby died of hypothermia. Mother was intoxicated at time of abandonment. 77-3332

10-15-77

Alcohol Related: Yes

A house fire reported at small private dwelling. Informed that there was one or more individuals in burning building. One male victim age 19 was recovered after fire. Victim's autopsy indicated he was intoxicated prior to fire. 77-3619

12-20-77

Alcohol Related: Yes

Victim, 32-38 year old female, placed in detention for acute intoxication. Victim depressed and worried about children. Hung herself in cell #1 using her t-shirt. CPR attempted, however victim was pronounced dead on arrival at the hospital.

Death Reports - 1978

1-24-78

Alcohol Related: Yes

At approximately 11:35 AM, 1/24/78, officer received information from his supervisor that he had received word that a male victim, 41 years of age, had died in Fairbanks, and that there may have been questionable circumstances surrounding his death. Victim died of hematoma, prior to death was previously admitted to the Public Health Service Hospital in Barrow appearing "beat up", and intoxicated. Subsequent investigation could reveal no foul play surrounding victim's death. 78-0074.

3-20-78

Alcohol Related: Yes

Received information of snowmachine accident at approximately 9:50 PM, 3-20-78. Two adult male victims, one fatally injured. Both had been drinking prior to accident, travelling at a faster rate of speed than was safe and hit a parked truck. 78-0967

6-4-78

Alcohol Related: Yes

Received request for ambulance 6-4-78 for a two month old infant. Infant was pronounced DOA at Public Health Service Hospital. Investigation revealed parents had been "partying" prior to infant's death. Father was convicted of manslaughter. 78-1907.

6-30-78

Alcohol Related: Yes

6-30-78 patrol observed objects lying in roadway towards Freshwater Lake. Found objects to be one adult male and a motorcycle. Victim pronounced dead 6-30-78. Hematoma was suspected cause of death. Blood alcohol content was .114%. 78-2286.

10-22-78

Alcohol Related: Yes

10-22-78 at 3:56 PM received call that there was a woman not breathing. Female, adult victim, age 47 years, was observed by responding officers lying face down on the living room floor. Victim pronounced dead at the Public Health Service Hospital at 4:20 PM. Blook alcohol content .465%. Cause of death determined to be alcohol poisoning. 78-3804.

Appendix E

Policy Guide - Drunk Release Program

MAYOR'S OFFICE
EXT. 211

ADMINISTRATION AND FINANCE
EXT. 210

PUBLIC WORKS DEPARTMENT
EXT. 249

PLANNING DEPARTMENT
EXT. 245

ACCOUNTING
EXT. 239

NORTH SLOPE BOROUGH
P. O. BOX 69
BARROW, ALASKA 99723
(907) 852-2611
DEPARTMENT OF PUBLIC SAFETY

ASSESSING
EXT. 263

TREASURY
EXT. 237

HOUSING AGENCY
EXT. 243

HEALTH AGENCY
EXT. 255

GENERAL ORDER #2

POLICY GUIDE

Operating Procedures Manual Reference: Chap. 214 and 301

A. "Drunk Release Program"

A major part of our crime-prevention program is the detention of those persons so intoxicated as to represent a definate threat to themselves and a lesser threat to others. Of the following purposes behind this program one additional feature will be added:

1. Protection of the person intoxicated.
2. Protection of others from intoxicated persons.
3. Non-criminal detention, processing, and release.

The additional feature will be an attempt to reduce "returnees" to this system by making referrals to the Barrow Council on Alcoholism for interviews, counseling, and treatment. While it is assumed that no enforcement of this diversion method can be made, there is room for a very light push in the general direction - that push being in the form of "voluntary referrals" directly from their release. These referrals will be a consistant part of this program.

The method of "voluntary referrals" will be as follows:

A. At time of release by any officer, the person detained will receive a direct invitation (with officer assistance) to meet with personnel of the Barrow Council on Alcoholism presently located in the Youth Center. They are to be encouraged to go directly from release to BCA for initial intake.

B. Since there is no legal provision for enforcement of referrals, a strong recommendation by the officer releasing will be encouraged.

C. An alternative method is to call up the BCA and ask for a staff person to come to the station and make the request and invitation directly to the person released from detention.

B. "Diversion from Criminal Justice System"

It has been an operational policy in the past supported by a traditional approach to law enforcement, that misdemeanor cases be handled consistantly in the same manner as felony cases. It is also a matter of enforcement tradition to have a rigid and sole source method of handling minor misdemeanors. That tradition acts as a plug into the criminal justice system from which no one ever escapes from at least a permanent criminal record.

Even those who are arrested for a misdemeanor, booked, fingerprinted, arraigned, and tried may find that after the courts have found them Not Guilty, there still exists a permanent record of arrest. Should they be dismissed before trial by the District Attorney, or the case dismissed for other reasons, the record of arrest remains to taint and tarnish a persons past. While other states have questioned the FBI's policy of never removing a criminal record (even of arrest when person is found not guilty) there is nothing to prevent our Department of Public Safety from initiating a clear policy that will correct an obvious injustice to an individual.

1. INTENT OF DIVERSION

a. It is the intent of this policy to initiate a diversion from traditional procedures of arrest and criminal prosecution when and where possible.

b. It is the intent of this policy to eliminate the filing of fingerprint and arrest records on first offenders normally processed to State and Federal computerized files.

c. It is the intent of this policy to restrict the filing of criminal records on repeat offenders for minor misdemeanors primarily between the ages of 18 through 25. Local records only will be kept on most misdemeanors.

d. All first offense minor misdemeanors will be "carded" only - no fingerprints will be recorded. No photos will be taken.

2. METHOD OF DIVERSION ON CERTAIN MINOR CRIMES

a. Where crimes against property are charged, whether first offense or not, an effort by the officer investigating will be made to settle the dispute directly between the two

2. a. of any criminal complaints. This is especially true of family matters.

b. If a person who does damage to property is drunk (they almost always are) that person may be held under the provisions of Chap. 214 and this order. Upon his release (hopefully to BCA) a settlement will be worked out between the complainant and the person who could normally be charged.

c. The alternative should be explained to the person detained - that alternative being the settlement between the parties OR, the complainant may file a citizens complaint at District Court.

d. Where crimes against the person may be charged certain considerations must be reviewed prior to filing criminal actions:

1. Are both parties related?

2. Are both parties intoxicated?

3. Are both parties friends normally?

4. Are the parties involved total strangers to one another?

Only the last item above should be restricted to the normal arrest and criminal complaint procedures. If a simple assault and battery occurs (as opposed to Agrevated Assault or other forms) between family members and/or friends particularly between the ages of 18 and 25, then detention is to be the primary consideration and criminal complaints the last resort.

3. <u>REDUCTION AND DIVERSION</u>

a. The purpose is specifically to reduce unnecessary involvement with the court system, reduce unnecessary paperwork and processing, reduce injustice to individuals having contact with Public Safety, and reduce dismissals of "petty" cases and complaints.

b. An additional benefit will be to serve individual justice much more fairly. It serves no ones idea of justice to attach a criminal record onto a first offender who gets drunk, makes a mistake (minor misdemeanor) and must suffer permanent tarnishment on his past, most especially those between the ages of 18 and 25.

3. c. Those whom, in the past, have had to face criminal records, the court system, and a certain type of "branding" usually results in a "set" against the standards of a community and public safety and responsibility in general. That must change with some good common sense used to discriminate between the young who test themselves against society and find themselves initiated into the adult world.

C. DIVERTING FROM ARREST AND JAIL

It does not serve the interests of the public nor Public Safety to insist that all persons who commit minor misdemeanors (those to which all of the above do not apply) must go to jail. Traditionally, those who violate traffic rules and regulations are not hauled out of vehicles, taken to jail, booked, and bailed out. Why should it be the case in most misdemeanor cases?. Henceforth, the same rule of traffic offenses will be applied to misdemeanors not included in A and B above. A SUMMONS will be used when and where practical, (in cases of continued threats to public peace or safety this does not apply). When and if practical, the officer having violator contact will fill out and give to the offender, a SUMMONS to District Court. This will include most misdemeanors.

Misdemeanor Offense ---------Officer Contact --------

Determination Made ----------Summons Given ----------

Officer types up criminal complaint or assists citizen in doing so.--------Citizen instructed to be present at arraignment and sign complaint.

D. REPORTS BY OFFICERS

Reports will continue to remain basically the same, except that when a "DIVERSION" is successfully used, the officer will indicate it at the end of his report and indicate the type of diversion.

E. COURT RECOMMENDATIONS ON PLEA OF GUILTY TO MISDEMEANORS

Since diversion will be a major part of "prevention" in all misdemeanor cases, it is officially recommend that officers at arraignments on misdemeanors who know that it is a alcohol related offense - suggest that sentences be directed towards immediate rehabilitation by court-ordered "involuntary referrals" to Barrow Council on Alcoholism. Such sentence referrals may include up to six months of weekly counseling session at BCA.

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
TELEPHONE 465-4922

Senate

SENATOR
Bill Ray
CHAIRMAN
COMMITTEE ON TRANSPORTATION

March 29, 1977

Mr. Kim L. Moeller, Director
Department of Public Safety
North Slope Borough
P. O. Box 69
Barrow, Alaska 99723

Dear Mr. Moeller:

This is to acknowledge receipt of your letter concerning Senate Bill 167, the excise tax on alcohol.

Thank you for sharing with me the horrible statistics you attribute to a "wet" period in Barrow. You may be assured I will take your remarks into consideration when we are working on the Governor's alcohol package.

Sincerely,

Bill Ray

Appendix F

Correspondance 1976/77
State of Alaska
Alaska State Legislature
Senate Special Committee on Alcoholism

Matanuska-Susitna Borough

BOX B, PALMER, ALASKA 99645 • PHONE 745-9687

BOROUGH ATTORNEY'S OFFICE

April 21, 1988

Representative John Sund, Chairman
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

RE: Public Opinion Message

Dear Representative Sund and Judiciary Committee Members:

As the attorney for the Matanuska-Susitna Borough, I would like to express my support for CS for House Bill 406 (Hess) which provides immunity to municipalities based upon a decision of public safety personnel to take an incapacitated person into protective custody or release or fail to release a person from protective custody. As you know, a recent Alaska Supreme Court Case, Busby v. The Municipality of Anchorage, Op. No. 3214 (August 1987) has left open the question of whether municipalities are immune from liability for the actions of their municipal safety personnel when they decide to take, fail to take, release or fail to release, a person from protective custody. If municipalities are held liable for this activity, the cost of any damages arising therefrom must be spread throughout society and borne by taxpayers. The payment of damages resulting from this activity could be raised through a tax mill levy increase or a reduction or elimination of essential services. In a time of substantially declining revenue municipalities are already struggling to provide essential services to their citizens and should not be confronted with unforeseen fiscal contingencies arising from potential Busby liability. One method to protect municipalities is to provide them with immunity from liability. CS for House Bill 406 provides this protection.

Please feel free to contact me should you have any questions relative to this matter.

Very truly yours,

Michael Gatti
Borough Attorney

MG:mlm
(mlm:misc.0009)
cc: Representatives Fran Ulmer, Sam Cotten, Max Gruenberg, Mike Navarre and Robin Taylor

seek treatment in the same manner as he would for any other health problem or illness. The Act encourages voluntary treatment by not requiring the patient to agree to "voluntarily" commit himself for a specified length of time or to accept any of the other restrictions that apply to involuntarily committed patients. Section 11 does not require either a predetermined minimum voluntary stay or a specified number of days of notice prior to seeking discharge. Such provisions would discourage treatment and would subject patients to restrictions that do not apply to patients with other medical problems.

Section 11 also requires the division to provide coordinated services (see also Sections 1, 8(a), and 10(e)) and to assist the patient in getting from one service to another, including the arranging of transportation if necessary. Section 11(d) expressly provides that the division must make such provision even if the patient leaves the treatment facility against medical advice.

Action in Adopting Jurisdictions

Variations from Official Text:

Alaska. Omits subsec. (d).

Colorado. In subsec. (b), omits "subject to rules adopted by the director" in second sentence.

Omits subsec. (d).

Georgia. In subsec. (a), substitutes "treatment program or facility" for "public treatment facility".

Subsec. (b) reads: "(b) A person who appears to be incapacitated by alcohol may be taken into protective custody by the police, other law enforcement officer or the emergency service patrol and forthwith brought to an approved treatment facility for emergency treatment. If no approved treatment facility is readily available, he may be taken to an emergency medical service customarily used for incapacitated persons. When no emergency medical services are available, a person who appears to be incapacitated by alcohol may be taken into protective custody for not more than 12 hours and detained in such facilities as may be available. Policemen and other law enforcement officers or the emergency service patrol, in detaining the person and in taking him to a facility approved for detention under this Chapter, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. Taking into protective custody under this section is not an arrest. No other criminal record shall be made to indicate that the person has been arrested and charged with a crime. Nothing in this Chapter shall be construed to prevent the prosecution of a person for any other crime with which he may be charged."

In subsec. (c), omits "public", wherever appearing.

In subsec. (d), inserts "written" preceding "request", and omits "public", "or against" and sentence beginning "If he has no home".

Rhode Island. In subsec. (b), provides that a person so admitted may be held by the department for at least thirty (30) days and that said person shall be released at the end of thirty days upon written request to the administrator in charge of the treatment facility.

Washington. In subsecs. (a), (b), (c) and (d), substitutes "approved treatment facility" for "approved public treatment facility".

In subsec. (c), substitutes "may arrange" for "shall arrange".

In subsec. (d), substitutes "may make reasonable provisions" for "shall make reasonable provisions" and "less than fourteen years of age" for "a minor".

Library References

Drunkards ⇐4. C.J.S. Drunkards § 7.

§ 12. [Treatment and Services for Intoxicated Persons and Persons Incapacitated by Alcohol]

(a) An intoxicated person may come voluntarily to an approved public treatment facility for emergency treatment. A person who appears to be intoxicated in a public place and to be in need of help, if he consents to the proffered help, may be assisted to his home, an approved public treatment facility, an approved private treatment facility, or other health facility by the police or the emergency service patrol.

(b) A person who appears to be incapacitated by alcohol shall be taken into protective custody by the police or the emergency service patrol and forthwith brought to an approved public treatment facility for emergency treatment. [If no approved public treatment facility is readily available he shall be taken to an emergency medical service customarily used for incapacitated persons.] The police or the emergency service patrol, in detaining the person and in taking him to an approved public treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

(c) A person who comes voluntarily or is brought to an approved public treatment facility shall be examined by a licensed physician as soon as possible. He may then be admitted as a patient or referred to another health facility. The referring approved public treatment facility shall arrange for his transportation.

(d) A person who by medical examination is found to be incapacitated by alcohol at the time of his admission or to have become incapacitated at any time after his admission, may not be detained at the facility (1) once he is no longer incapacitated by alcohol, or (2) if he remains incapacitated by alcohol for more than 48 hours after admission as a patient, unless he is commit-

ted under Section 13. A person may consent to remain in the facility as long as the physician in charge believes appropriate.

(e) A person who is not admitted to an approved public treatment facility, is not referred to another health facility, and has no funds, may be taken to his home, if any. If he has no home, the approved public treatment facility shall assist him in obtaining shelter.

(f) If a patient is admitted to an approved public treatment facility, his family or next of kin shall be notified as promptly as possible. If an adult patient who is not incapacitated requests that there be no notification, his request shall be respected.

(g) The police or members of the emergency service patrol who act in compliance with this section are acting in the course of their official duty and are not criminally or civilly liable therefor.

(h) If the physician in charge of the approved public treatment facility determines it is for the patient's benefit, the patient shall be encouraged to agree to further diagnosis and appropriate voluntary treatment.

Commissioners' Note

A small minority of intoxicated persons are "incapacitated" in that they are unconscious or incoherent or similarly so impaired in judgment that they cannot make a rational decision with regard to their need for treatment. Section 12(b) authorizes the police or emergency service patrol to take such individuals into protective custody and to a public treatment facility for emergency care. This is intended to assure that those most seriously in need of care will get it.

Protective custody under (b) is similar to the way in which the police provide emergency assistance to other ill people, such as those in accidents or those who have sudden heart attacks. It is a civil procedure, and no arrest record or record which implies a criminal charge is to be made. Since the police officer may sometimes have to decide whether a man who refuses help appears to be incapacitated by alcohol or because of some other reason, Section 12(g) protects the policeman should his conclusion, made in good faith, be incorrect. It provides that he cannot be held criminally or civilly liabld for false arrest or imprisonment as long as he is acting in compliance with this section. Willful malice or abuse, however, would not be considered to be in compliance with this section of the Act.

Section 12(d) provides that an incapacitated person can be held at a treatment facility without consent or further civil procedures for not longer than 48 hours. By the end of 48 hours

most persons who have been incapacitated by alcohol will be sufficiently detoxified to be able to make a rational decision about their need for further treatment. To provide for those very few individuals who may still be incapacitated (perhaps even unconscious) at the end of 48 hours, Section 12 provides for an emergency commitment procedure based on a written application and a certificate from a physician who is not employed by the division.

Other provisions of Section 12 provide that the individual in a public treatment facility must be examined by a licensed physician as soon as possible. This is to ensure, in accordance with Section 8(b), that these facilities will provide the necessary medical services.

Action in Adopting Jurisdictions

Variations from Official Text:

Alaska. Subsec. (a) reads: "An intoxicated person may come voluntarily to an approved public treatment facility for emergency treatment. A person who appears to be intoxicated in a public place and to be in need of help or a person who appears to be intoxicated in or upon a licensed premise where intoxicating liquors are sold or consumed who refuses to leave upon being requested to leave by the owner, an employee or a peace officer may be taken into protective custody and assisted by a peace officer or a member of the emergency service patrol to his home, an approved public treatment facility, an approved private treatment facility, or another appropriate health facility. If all the preceding facilities, including the person's home, are determined to be unavailable, a person taken into protective custody and assisted under this subsection may be taken to a state or municipal detention facility in the area."

Subsec. (b) reads: "A person who appears to be incapacitated by alcohol in a public place shall be taken into protective custody by a peace officer or a member of the emergency service patrol and immediately brought to an approved public treatment facility, an approved private treatment facility, or another appropriate health facility or service for emergency medical treatment. If no treatment facility or emergency medical service is available, a person who appears to be incapacitated by alcohol in a public place shall be taken to a state or municipal detention facility in the area, if that appears necessary for the protection of the person's health or safety."

Adds subsecs. (i) and (j) as follows: "(i) A person taken to a detention facility under (a) or (b) of this section may be detained only (1) until a treatment facility or emergency medical service is made available, or (2) until he is no longer intoxicated or incapacitated by alcohol, or (3) for a maximum period of 12 hours, whichever occurs first. A detaining officer or a detention facility official may release a person who is detained under (a) or (b) of this section at any time to the custody of a responsible adult. A peace officer or a member of the emergency service patrol, in detaining a person under (a) or (b) of this section and in taking him to a treatment facility, an emergency medical service or a detention facility, is taking him into protective custody and he shall make reasonable efforts to provide for and protect the health and safety of the detainee. In taking a person into protective custody under (a) and (b) of this section, a detaining officer, a member of the emergency service patrol or a detention facility official may take reasonable steps to protect himself, including a full protective search of the person of a detainee. Protective custody under (a) and (b) of this section does not constitute an arrest and

no entry or other record may be made to indicate that the person detained has been arrested or charged with a crime, except that a confidential record may be made which is necessary for the administrative purposes of the facility to which the person has been taken or which is necessary for statistical purposes where the person's name may not be disclosed.

"(j) For purposes of (b) of this section, 'incapacitated by alcohol' means a person who, as the result of consumption of alcohol, is rendered unconscious or has his judgment or physical mobility so impaired that he cannot readily recognize or extricate himself from conditions of apparent or imminent danger to his health or safety. The definition in AS 47.37.-270(8) applies to other portions of this chapter."

Colorado. Subsec. (a) reads: "When any person appears to be intoxicated or incapacitated, and in imminent danger to the health and safety of himself or others, he shall, when practicable, be taken into protective custody by law enforcement authorities and placed in an approved treatment facility. If no such facility or service is available, he may be detained in a jail or similar facility, but only for so long as may be necessary to prevent injury to himself or others or to prevent a breach of the peace. The law enforcement officer, in detaining the person, is taking him into protective custody. In so doing, the detaining officer may protect himself by reasonable methods while making every reasonable effort to protect the detainee's health and safety. A taking into protective custody under this section is not an arrest, and no entry or other record shall be made to indicate that the person has been arrested or charged with a crime. Law enforcement personnel who act in compliance with this part 3 are acting in the course of their official duty and are not criminally or civilly liable therefor. Nothing in this subsection (1) shall preclude an intoxicated or incapacitated person who is not in imminent danger to his or others' health or safety from being assisted to an approved treatment facility, his home, or like location by the law enforcement officer."

In subsec. (b), inserts "or such other facility as may be necessary to protect his health and safety" following "emergency medical service", and inserts sentence which reads as follows: "If neither an approved public treatment facility nor an emergency medical service is available, he may be detained in a jail or similar facility, but only for so long as may be necessary to prevent injury to himself or others or to prevent a breach of the peace."

Subsec. (c) reads: "A person who comes voluntarily or is brought to an approved treatment facility shall be evaluated by the administrator thereof or by his designee as soon as possible. He may then be admitted as a patient or referred to another health facility."

In subsec. (d), substitutes "on evaluation" for "by medical examination", "one hundred twenty hours" for "48 hours" and "administrator" for "physician".

In subsec. (e), substitutes "may" for "shall" preceding "assist him".

Georgia. Omits "public" preceding "treatment" wherever appearing in section.

Subsec. (b) reads: "(b) A person who appears to be incapacitated by alcohol shall be taken into protective custody by the police, other law enforcement officer or the emergency service patrol and forthwith brought to an approved treatment facility for emergency treatment. If no approved treatment facility is readily available, he shall be taken to an emergency medical service customarily used for incapacitated persons. When no emergency medical services are available, a person who appears to be incapacitated, by alcohol may be taken into protective custody for not more than 12 hours and detained in such facilities as may be available. The policeman, other law enforcement officer, or the emergency service patrol, in detaining the person and in taking him to a facility approved for detention under this Chapter, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No other criminal record shall be made to indicate that the person has been arrested or charged with a crime."

In subsec. (c), provides that a person shall be examined by either a licensed physician or a trained alcohol services worker under direct medical supervision.

In subsec. (d), provides that if a person remains incapacitated by alcohol he may be detained for no longer than five days or 120 hours excluding Saturdays, Sundays and legal holidays.

In subsec. (f), omits sentence beginning "If an adult", and provides for notification by telephone if the family resides in Georgia or within 100 miles of the facility, and otherwise by mail.

In subsec. (h), substitutes "attending physician or administrator" for "physician".

Maine. In subsec. (a), omits "in a public place".

In subsec. (c), substitutes "forthwith" for "as soon as possible".

In subsec. (h), substitutes "administrator" for "physician".

Rhode Island. In subsecs. (a), (b) and (g), omits references to the emergency service patrol.

In subsec. (b), adds sentence as follows: "If it is impracticable to take a person to an approved facility, the police may take him into protective custody in the police station in suitable quarters, for a reasonable time."

In subsec. (d), substitutes "five (5) days" for "48 hours".

Washington. Subsec. (b) reads: "Except for a person who may be apprehended for possible violation of laws not relating to alcoholism or intoxication and except for a person who may be apprehended for possible violation of laws relating to driving or being in physical control of a vehicle while intoxicated and except for a person who may wish to avail himself of the provisions of RCW 46.-20.308, a person who appears to be incapacitated by alcohol and who is in a public place or who has threatened, attempted, or inflicted physical harm on another, shall be taken into protective custody by the police or the emergency service patrol and as soon as practicable, but in no event beyond eight hours brought to an approved treatment facility for treatment. If no approved treatment facility is readily available he shall be taken to an emergency medical service customarily used for incapacitated persons. The police or the emergency service patrol, in detaining the person and in taking him to an approved treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer or member of an emergency patrol may take reasonable steps including reasonable force if necessary to protect himself or effect the custody. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime."

Subsec. (c) reads: "A person who comes voluntarily or is brought to an approved treatment facility shall be examined by a qualified person. He may then be admitted as a patient or referred to another health facility, which provides emergency medical treatment, where it appears that such treatment may be necessary. The referring approved treatment facility shall arrange for his transportation."

In subsec. (d), substitutes "a petition is filed under RCW 70.96A.140, as now or hereafter amended: Provided, That the treatment personnel at the facility are authorized to use such reasonable physical restraint as may be necessary to retain a person incapacitated by alcohol at such fa-

Municipality of Anchorage

Municipal Health & Human Services Commission

825 "L" Street

P.O. Box 196650 • Anchorage, Alaska 99519-6650

Tom Fink, Mayor

Telephone: (907) 343-4674

April 13, 1988

APR 21 1988

Representative John Sund
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Sund,

The Municipal Health and Human Services Commission was asked by Representatives Ellis and Boyer to review HB 406 which we understand has been referred to the House Judiciary Committee. We recently reviewed the Committee Substitute for House Bill No. 406 (HESS).

The Commission understands that CS for HB No. 406 provides immunity from prosecution for peace officers and emergency service patrols in all cases involving intoxicated or incapacitated persons except in cases of malice. The Commission is very concerned about this committee substitute and urges you to oppose it. We believe it will, even under the best circumstances, be to the detriment of the intoxicated or incapacitated person as well as the entire community.

Sincerely,

Linda Langston

Linda Langston
Chair

cc: Representative Ulmer
Representative Barnes
Representative Boyer
Representative Cotten
Representative Ellis
Representative Gruenberg
Representative Navarre
Representative Robin Taylor
Anchorage Assembly
Mayor Tom Fink
Ron Garzini, Municipal Manager
Bert Hall, DHHS Director

LL6/dPD21

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: OLIVER BURRIS
TITLE:
ADDRESS: 2108 TALKEETNA
CITY: FAIRBANKS ZIP: 99709
PHONE: 474-0437
BILL NO: SB 397
SUBJECT: OBSTRUCTING OR HINDERING HUNTING/FISHING
MESSAGE: THE TANANA VALLEY SPORTSMEN'S ASSOC WOULD LIKE TO SEE SB 397, THE ANTI-HARASSMENT BILL, PASS THE HOUSE AND BE SIGNED INTO LAW BY THE GOVERNOR.
EOM-FZ

POMID: 07152523
DATE: 04/07/88
TIME: 15:25:23
LIONAME: FAIRBANKS LIO

COPIES: REPRESENTATIVES REPRESENTATIVES

ADAMS	BARNES
BOUCHER	BOYER
BROWN	CATO
COLLINS	COTTEN
DAVIDSON	DAVIS
DONLEY	ELLIS
FRANK	FURNACE
GOLL	GRUENBERG
GRUSSENDORF	HANLEY
HERRMANN	HOFFMAN
HUDSON	KOPONEN
LARSON	MARTIN
MENARD	MILLER
NAVARRE	PEARCE
PETTYJOHN	PHILLIPS
POURCHOT	RIEGER
SHULTZ	SPRINGER
SWACKHAMMER	TAYLOR
ULMER	WALLIS
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: VALERIE THERRIEN
TITLE: BOROUGH ASSEMBLY WOMAN
ADDRESS: 779 8TH AVE.
CITY: FAIRBANKS ZIP: 99701
PHONE: 452-6194
BILL NO: HB 406
SUBJECT: CARE OF PERSONS IN PROTECTIVE CUSTODY
MESSAGE: PLEASE REFER THIS BILL OUT OF YOUR COMMITTEE FOR A HOUSE VOTE. IT IS VERY IMPORTANT THAT THIS BILL RECEIVE A DECISION THIS YEAR. AS A MEMEBER OF THE BOROUGH ASSEMBLY IN FAIRBANKS AND A MEMBER OF THE ALASKA MUNICIPAL LEAGUE, I BELIEVE THE NEED FOR IMMUNITY FOR POLICE IS VERY IMPORTANT.
EOM-FZ

POMID: 07161341
DATE: 04/07/88
TIME: 16:13:41
LIONAME: FAIRBANKS LIO

COPIES: REPRESENTATIVES

BARNES
COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

HB406

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

TELECOPY COVER SHEET

KENAI PENINSULA INFORMATION OFFICE

(SOLDOTNA)

TO: HJUD FOR: _____ PHONE: _____

FROM: Tim Rogers City of Kenai PHONE: 283-3441

ADDITIONAL INSTRUCTIONS: Please deliver to HJUD per their request from 4/22 - HJUD TC on HB406

DATE/TIME SENT: _____ PLEASE ACKNOWLEDGE RECEIPT: _____

DISPOSAL OF ORIGINAL: _____ THROW AWAY

_____ HOLD FOR PICK UP

NUMBER OF PAGES: 13 (NOT COUNTING COVER SHEET)

BY: Arlene Murphy 262-9364

B. RULE 12(b)(6) AND THE LAW OF IMMUNITY FOR PUBLIC OFFICIALS

Again, a motion to dismiss for failure to state a claim upon which relief can be granted, tests the legal sufficiency of the complaint's allegations. *Dworkin.*

In this case, the complaint is not legally sufficient as to Richard Ross, because it names him as an individual party

defendant. The complaint prays for judgment against Richard Ross as an individual, complaint at 5 ("1. Judgment against defendants in an amount to be proven at trial;").

The law of official immunity in Alaska precludes an official from being named in their personal capacity in an instance as alleged in the complaint. When an affirmative defense such as immunity appears on the face of the complaint, the pleading is subject to dismissal under Rule 12(b)(6). *Aspen Exploration Corp. v. Sheffield, 739 P.2d 150 (Alaska 1987).*

Aspen Exploration provides an extensive discussion on the law of immunity for public officials. The case suggests that traditionally the common law did not distinguish between public officials and private individuals for purposes of personal tort liability. The trend is toward immunity. *Aspen Exploration at 157.* The case discusses qualified immunity and absolute immunity and decides that the appropriate standard to be adopted in Alaska involves a sliding scale between absolute and qualified.

Under an absolute immunity theory, the public official is immune from any prosecution for whatever reason. It is an all or nothing situation. As the *Aspen Exploration* court suggested, however, "we perceive no logical or compelling reason why a public official should always be entitled to absolute immunity." The Court went on to leave open the possibility that at times an official can claim absolute immunity.

Under a rule of qualified immunity, the public official faces liability only when committing "discretionary acts within the scope of the officials authority and when the acts are done in good faith and are not malicious or corrupt." *Aspen Exploration at 158, citing Trimble v. City and County of Denver, 697 P.2d 716, 729 (Colorado 1985).* Malicious or bad-faith or a corrupt motive acts to transform an otherwise immune act into an act to which liability may attach.

In order to determine which theory, absolute or qualified, to follow in this case, the Court needs to follow the objective test set out in *Aspen Exploration.* The test suggests that the Court first needs to consider various factors:

///

///

///

> "1. The nature and importance of the function that the officer performed to the administration of government (i.e., the importance to the public that this function be performed; that it be performed correctly; that it be performed according to the best judgment of the officer unimpaired by extraneous matters);
>
> 2. The likelihood that the officer will be subjected to frequent accusations of wrongful motives and how easily the officer can defend against these allegations; and
>
> 3. The availability to the injured party of other remedies or other forms of relief (i.e. whether the injured party can obtain some other kind of judicial review of the correctness or validity of the officer's action)." *Aspen Exploration at 160.*

The *Aspen Exploration* case then goes on to suggest that when applying the objective test to the facts of a particular case, no one factor controls. Rather, any decision must be grounded upon a balanced consideration of all the factors. If the trial court determines that immunity should be absolute, then allegations of improper motive become irrelevant and the case should be properly dismissed under Rule 12(b)(6).

C. DISCUSSION

In the instant case, this Court should adopt the standard of absolute immunity. In this case, the nature and importance of the function the officer performed (i.e., hiring a dispatcher), plays one of the most important functions to the public by a police force. The dispatcher is in charge of properly directing rescue vehicles, fire services, and the police themselves to

protect the public. Hiring is a basic function of government and the dispatcher is the key to its performance. Because this is an important function, it should be weighted as a factor in favor of absolute immunity.

If the officer is not given absolute immunity in this case, the officer could be subject to frequent accusations of wrongful motive every time he hires an employee. Defending against these allegations is no easy task. This factor also militates in favor of absolute immunity.

Finally, the plaintiff has other forms of relief available to her, i.e. she can sue the City itself. When all three of the factors enunciated by the *Aspen Exploration* court are taken into account, the balance tips in favor of an absolute immunity for the official in this case. Accordingly, Richard Ross should be dismissed as a party defendant.

If this Court is however inclined to rule that defendant Ross is only entitled to qualified immunity, the case should still be dismissed. For the complaint to be sufficient under a qualified immunity theory, there would have to be allegations of improper motive. Nowhere in the complaint are there any allegations of improper motive and accordingly, the complaint does not state a claim for relief. Dismissal is appropriate.

D. CONCLUSION

Under the test enunciated in *Aspen Exploration* the hiring of a dispatcher is an extremely sensitive matter and combined with the other factors, tilts the balance in favor of absolute immunity. Given the affirmative defense of absolute immunity, Rule 12(b)(6) requires a dismissal. If the Court rejects the absolute immunity argument of the City, then the defendant would be entitled to qualified immunity. However, the complaint nowhere alleges improper motive and accordingly, the complaint is deficient. The case should be dismissed as to Richard Ross.

DATED: This ____ day of April, 1988.

CITY OF KENAI

By: Timothy J. Rogers
City Attorney

ASPEN EXPLORATION CORPORATION and R.V. Bailey, Appellants,

v.

Bill SHEFFIELD, Appellee.

No. S-1277.

Supreme Court of Alaska.

June 19, 1987.

Rejected applicant for offshore prospecting permits sued governor, alleged he had wrongfully interfered with its prospective economic advantage, with its prospective and existing contractual relations, and with government process and had defamed it. Governor moved to dismiss. The Superior Court, Third Judicial District, Anchorage, Karen L. Hunt, J., granted motion. On appeal, the Supreme Court, Burke, J., held that: (1) doctrine of official immunity was applicable, as governor's actions were within scope of his authority and were discretionary in nature, and (2) under balanced consideration of relevant factors, governor was absolutely immune from wrongful interference claims but was only entitled to qualified immunity for his allegedly defamatory statements.

Affirmed in part, reversed in part, and remanded.

1. Pretrial Procedure ⇐661

Complaint which sufficiently states claim is nonetheless subject to dismissal when affirmative defense appears clearly on face of pleading. Rules Civ.Proc., Rules 8, 12(b)(6).

2. Officers and Public Employees ⇐114

In determining whether public official is entitled to official immunity, applicability of that doctrine to alleged conduct must first be determined and scope of immunity, if doctrine is applicable, must then be ascertained; determination of whether official is entitled to absolute or qualified immunity focuses on particular conduct and circumstances that gave rise to claim of liability.

3. States ⇐79

For purposes of determining applicability of doctrine of official immunity, governor's ordering of Commissioner of Department of Natural Resources to reject applications for offshore prospecting permits and making of allegedly defamatory statements concerning development of state's natural resources through its offshore mining programs were within scope of his authority and were discretionary in nature. Const. Art. 3, §§ 1, 24; AS 44.17.005(10), 46.40.010 et seq.

4. Municipal Corporations ⇐728
Officers and Public Employees ⇐114

Standards for determining what constitutes "discretionary function" for purposes of sovereign immunity and for purposes of official immunity are not the same; planning-operational test determines what type of actions are discretionary for purposes of former, whereas discretionary acts for purposes of official immunity involve those requiring personal deliberation, decision, and judgment.

See publication Words and Phrases for other judicial constructions and definitions.

5. Officers and Public Employees ⇐114

In determining scope of public official's immunity, best approach is to balance public's interest in efficient, unflinching leadership and interests of maliciously injured parties, with focus upon particular circumstances and conduct giving rise to claim of liability and careful consideration of nature and importance of function performed to administration of government, likelihood that performing officer will be subjected to frequent accusations of wrongful motives and ease with which officer can defend against those allegations, and availability to injured party of other remedies or other forms of relief; if immunity should be absolute then allegations of improper motive become irrelevant, where as if qualified immunity is appropriate then properly pled allegations of malice or corruption will generally be sufficient to withstand dismissal. Rules Civ.Proc., Rule 12(b)(6).

6. States ⇐79

Governor was absolutely immune from claims by rejected applicant for offshore prospecting permits for wrongful interference with prospective economic advantage, prospective and existing contractual relations, and government process, but was only entitled to qualified immunity from applicant's defamation claim. AS 38.05.035(e), 38.05.250.

Harris Saxon, Mark E. Wilkerson, Guess & Rudd, Anchorage, for appellants.

Theodora Acciardi, Olof K. Hellen, Hellen, Partnow & Condon, Anchorage, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

Aspen Exploration Corporation and its president, R.V. Bailey (hereinafter collectively referred to as Aspen), challenge the dismissal of their complaint against former Governor Bill Sheffield. Aspen contends that the trial court erred in three respects: first, by misapplying the standard for determining the sufficiency of its complaint; second, by holding that the doctrine of executive immunity justified dismissal of its action; and third, by awarding Governor Sheffield attorney's fees.

We conclude that the trial court applied the correct standard in determining the sufficiency of Aspen's complaint and correctly dismissed Aspen's four claims for "wrongful interference." As to these, Sheffield was absolutely immune. We further conclude, however, that Aspen's defamation claim was improperly dismissed. As to this cause of action, Sheffield is only entitled to qualified immunity. Thus, Aspen must be allowed the opportunity to prove its claim.

In June 1985 Aspen filed suit against Governor Sheffield in the latter's "individual capacity," seeking injunctive relief and $15 million in damages. Aspen's complaint alleged five separate causes of action, each one a common law tort:

(1) wrongful interference with prospective economic advantage;

(2) wrongful interference with prospective contractual relations;

(3) wrongful interference with existing contracts between the state and Aspen;

(4) wrongful interference with government process; and

(5) defamation.

The crux of Aspen's complaint was that Governor Sheffield was personally liable for these alleged torts, because he had acted outside the scope of his official duties and authority as governor, by "knowingly, intentionally and maliciously" ordering the Commissioner of the Department of Natural Resources (DNR) to reject Aspen's application for offshore prospecting permits (permit applications), and by intentionally defaming its business reputation.

Pursuant to Civil Rule 12(b)(6) Sheffield moved to dismiss Aspen's complaint on the grounds that actions for damages against the governor, personally, are barred by the doctrine of official immunity (referred to by the parties as executive immunity). Superior court judge Karen L. Hunt granted Sheffield's motion, severing Aspen's complaint dismissed with prejudice. In her oral findings, Judge Hunt found, as a matter of law, that Governor Sheffield's alleged actions were within the scope of the governor's authority and discretionary in nature. Based upon these determinations she held that the governor was immune from "personal suit seeking personal compensation."

Subsequently, Aspen filed a motion for reconsideration, to determine whether the trial court's decision was based on a defect in the complaint or solely upon the doctrine of official immunity. Aspen also requested leave to amend its complaint.[1] The trial

1. Aspen had informally requested that it be allowed to amend its complaint at the hearing on

court denied Aspen's motion without comment. Later, Governor Sheffield filed a motion for attorney's fees and costs, and the trial court awarded him costs and $12,232 for his attorney's fees. This appeal followed.

II

[1] Aspen first contends that the trial court misapplied the standard for determining the sufficiency of its complaint. Aspen argues that under Alaska's rule of permissive pleading their complaint is sufficient to state a claim.

Under the now well established standards for determining the sufficiency of a complaint,[1] it does not appear beyond doubt that the Aspen could prove no set of facts that would entitle it to relief.[2] Thus, its complaint should not, as Aspen contends, have been dismissed for insufficiency. Our reading of the trial court's decision, however convinces us that Aspen's complaint was not dismissed for this reason. Instead, the court dismissed Aspen's entire cause of action because it believed the action was barred by the affirmative defense of official immunity.

We have recognized that a complaint is subject to dismissal under Rule 12(b)(6) when an affirmative defense appears clearly on the face of the pleading. *Martin v. Moore*, 602 P.2d 421, 428 (Alaska 1979) (statute of frauds); *Mizusaki v. Carrington*, 517 P.2d 754, 757 n. 6 (Alaska 1974) (absolute privilege for defamatory testimony by a witness in a judicial proceeding). *Accord Shannon v. City of Anchorage*, 429 P.2d 17, 20 n. 10 (Alaska 1967) (Rabinowitz, J., concurring) (dismissal under Rule 12(b)(6) permitted where pleader makes allegations which show on the face of the complaint an insuperable bar to relief). In such situations, "the claim is adequately stated, but in addition to the claim the complaint includes matters of avoidance that effectively vitiate the pleader's ability to recover on the claim." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 606 (1969). In other words, the complaint has a built-in defense.

Aspen sued the Governor of Alaska for actions taken under the color of office. Merely because Governor Sheffield was sued in his individual capacity does not change the fact that he was acting as a state official when he engaged in the acts for which Aspen seeks relief. The trial court dismissed Aspen's complaint based upon its interpretation of this built-in defense. Consequently, resolution of the case is not found within the confines of Rule 12(b)(6) but rather in an analysis of the doctrine of official immunity.[3]

III

The trial court held that Governor Sheffield's actions were within the scope of his authority as governor and were discretionary in nature. Thus, it concluded that he was immune from personal tort liability. Aspen argues that the court's decision has two major flaws. First, Aspen contends that the doctrine of official immunity is not applicable, because Governor Sheffield's actions were beyond his authority as governor and were not discretionary in nature. Second, Aspen asserts that our prior decisions establish a rule of qualified, rather than absolute, immunity.

The ruling below was grounded upon the trial court's reading of our decisions in *Earthmovers of Fairbanks v. State*, 691 P.2d 281 (Alaska 1984); *State v. Stanley*, 506 P.2d 1284 (Alaska 1973); and *Bridges v. Alaska Housing Authority*, 375 P.2d 694 (Alaska 1962).[5]

In *Bridges*, we held that the officers of the Alaska Housing Authority were immune from personal liability for the destruction of the plaintiff's building under an illegal declaration of taking, because they were acting within the scope of their official duties and merely made a mistake in the exercise of a discretionary function. 375 P.2d at 702. We observed:

> [The Housing Authority officers] are immune from civil liability for this action under the well recognized rule that affords such protection to a public officer, acting within the scope of his official duties, for damages caused by a mistake by him in the exercise of judgment or discretion, or because of an erroneous interpretation and application of the law.

Id.

Seven years later in *State v. Stanley*, 506 P.2d at 1292, we held that an official of the Alaska Department of Fish and Game was not immune from personal liability for the negligent performance of a ministerial act. The *Stanley* court reasoned:

> While a public employee ... may not be held liable for acts done in line of official duty involving a mistake in judgment or discretion, or because of erroneous interpretation and application of law, it is well established that the immunity from suit *does not apply to the negligent performance of acts not involving such discretionary judgment-policy decisions.*

Id. at 1292 (emphasis added) (footnotes omitted).

Finally, in *Earthmovers*, we held that a state trooper who ordered the speed limit reduced on a road under construction, because of perceived hazardous conditions, was immune from personal liability. 691 P.2d at 283–84. Although *Earthmovers* refers to both statutory and common law immunity, a close reading of the case shows that we applied statutory (sovereign) immunity to the claims against the state, and common law (official) immunity to the claims against the individual officer. *Id.* at 285 (Rabinowitz, J. concurring).[6]

[2] In this appeal both sides argue that *Bridges*, *Stanley*, and *Earthmovers* establish a clear cut test for official immunity in Alaska. They differ, however, on what the test is. Aspen contends that in order to be entitled to immunity, a public official's actions must be (1) within the scope of his authority; (2) discretionary in nature; and (3) done in good faith. Governor Sheffield, on the other hand, argues that the governor is entitled to immunity if his actions (1) were not beyond the outer perimeter of his authority; and (2) involved an exercise of discretion. Motive, Governor Sheffield asserts, is totally irrelevant. We cannot agree with either party's position.[7]

Governor Sheffield's motion to dismiss. In its motion for reconsideration, Aspen set forth its proposed amendments.

1. *See* Alaska R.Civ.P. 8; *Knight v. American Guard & Alert*, 714 P.2d 788, 791 (Alaska 1986); *Morin v. Moore*, 602 P.2d 421, 427 (Alaska 1979); *Scarcella v. Fairbanks Medical & Surgical Clinic*, 531 P.2d 1252, 1255–57 (Alaska 1975); *Dworkin v. First National Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968). *Consequently* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 (1969) (hereinafter Wright & Miller); 2A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶12.07 [2-5] (2d ed. 1985).

2. It is true with or without Aspen's proposed amendments. Consequently, we need not determine whether the trial court erred by not allowing Aspen to amend its complaint.

3. Aspen argues that merely alleging that Sheffield's actions were not discretionary acts within the scope of his authority is sufficient to prevent its complaint from being dismissed. This argument is wholly without merit. Such allegations are mere conclusions of law, not factual admissions necessitating a Rule 12(b)(6) motion. *Dworkin*, 444 P.2d at 779. Thus, the trial court properly made its own determination as a matter of law on these questions.

4. We also considered the doctrine of official immunity in *State v. Maley*, 687 P.2d 305, 315–18 (Alaska 1984). In that case, however, we dealt solely with the immunity of public officials for unconstitutional torts, holding that two state officials were immune from liability for firing a state employee in violation of her constitutional rights. *Id.* at 315–18. *Applying federal law*, we reasoned that the officials were entitled to assert the defense of qualified immunity for the constitutional tort because they had acted in good faith in the performance of a discretionary duty. *Id.* at 316–17. Aspen raises no allegations of constitutional deprivations, thus *Maley* is inapposite here.

5. Justice Rabinowitz noted:

> We said in *Stanley* that State employees are immune, under the *common law*, for mistakes "discretionary judgment-policy decisions." ... Holding [the Trooper] personally liable ... would be inconsistent with *Stanley*.

Earthmovers, at 285. (Rabinowitz, J., concurring) (emphasis added) (citations omitted).

6. As used here, the term "public officials" is meant to refer only to administrative officials (i.e. members of the executive branch of government or members of bodies which do not belong strictly to any of the three traditional branches of government). It does not include judicial officers or legislators. For discussion of the immunity of these public servants, *see Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (judicial immunity);

We believe that the following two-step analysis is appropriate. First, it must be determined whether or not the doctrine of official immunity applies to the defendant's alleged conduct. If it does, the scope of that immunity must then be ascertained. That is, we must determine whether the official should be entitled to absolute or only qualified immunity. This requires us to focus on the particular conduct and circumstances that give rise to the claim of liability.[5]

The applicability and scope of official immunity raise only questions of law. Thus, in applying the above analysis we are free to substitute our own judgment for that of the trial court. With this in mind, we turn to the case at bar.

A

[3, 4] The trial court determined, as a matter of law, that Governor Sheffield was acting within the scope of his authority as governor. Aspen contests this determination. In effect, Aspen argues that any intentional, malicious act is *ipso facto* beyond the scope of the governor's authority. Therefore, Aspen contends, since its complaint alleged that Governor Sheffield's actions were "intentionally and maliciously" done he, thus, acted beyond the scope of his authority. We disagree.

The flaw in Aspen's argument is that it proves too much. As the United States Supreme Court has noted:

> it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Barr v. Matteo, 360 U.S. 564, 572, 79 S.Ct. 1335, 1340, 3 L.Ed.2d 1434, 1441–42 (1959) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir.1949)), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950)). Otherwise stated, as long as Governor Sheffield's actions were, on their face, within the scope of his authority, the fact that Aspen alleges that they were performed with unlawful intent is irrelevant to this part of our analysis.[6]

We know of few, if any, government officials who are authorized to commit torts as a part of their line of duty. But to separate the activity that constitutes the wrong from its surrounding context—an otherwise proper exercise of authority—would effectively emasculate the immunity defense. Once tortious acts are excluded from an exercise of authority, only innocuous activity remains to which immunity would be available. Thus, the defense would apply only to conduct for which it would not be needed.

Viewed in this light, it is clear that Sheffield's actions were within the scope of his authority as governor. The governor is the supervisor of all state executive departments. Alaska Const. art. III, § 24. The DNR is a department of the executive branch. AS 44.17.025(10). Thus, it naturally follows that the DNR and its department head, the Commissioner, are under the direct supervision of the governor. The governor is also empowered by statute and regulation to take an active role in matters relating to the disposal of state lands and resources. *See* AS 41.40; 6 AAC 50.010–.190. Consequently, it was well within the governor's supervisory authority for him to order his subordinates to reject Aspen's permit applications.

The same is true as to the allegedly defamatory statements made by Governor Sheffield. The governor is the chief executive officer of the state in whom the Alaska Constitution vests all executive powers. Alaska Const. art. III, § 1. Without doubt, the authority to speak out on matters of public interest or concern is part and parcel of this broad power. The development of Alaska's natural resources through the state's offshore mining program is a matter of considerable public interest. The economic, environmental and social impacts of allowing offshore prospecting in Cook Inlet was and continues to be a matter of great public debate.[10] We believe it would be an unduly restrictive view of the governor's scope of authority to hold that a statement in respect to a matter of such public interest and debate is not action in the line of duty. The critical inquiry is not whether the governor is authorized to make defamatory remarks, but whether he has the authority to engage in the underlying conduct out of which the alleged defamation arises. Such authority, without question, exists here.[11]

B

Aspen also contests the trial court's determination that Governor Sheffield's actions were discretionary in nature. Essentially, Aspen argues that Governor Sheffield's actions were not basic policy formulation but only the execution or implementation of a policy decision, and thus the actions are not immune.

Aspen's interpretation of what constitutes a discretionary function for the purpose of official immunity is too broad. Essentially, Aspen's position is that what constitutes a discretionary function for the purposes of sovereign immunity also constitutes a discretionary function for the purposes of official immunity. The two standards, however, are not the same.

We have adopted a "planning-operational" test for determining what type of actions are discretionary for the purposes of the sovereign immunity provisions of AS 09.50.250. *Division of Corrections v. Neakok*, 721 P.2d 1121, 1132–33 (Alaska 1986); *Japan Air Lines v. State*, 628 P.2d 924, 927 (Alaska 1981). Under this test, "only decisions that rise to the level of basic planning or policy formulation will be considered discretionary." *Neakok*, 721 P.2d at 1133. *See also Johnson v. State*, 536 P.2d 47, 64 (Alaska 1981); *State v. Abbott*, 498 P.2d 712, 717–22 (Alaska 1972).

When discussing official immunity, however, we have not relied upon this "operational-planning" distinction. Instead, we have spoken of discretionary acts as those involving a mistake in "judgment or discretion, or because of an erroneous interpretation and application of the law," *Bridges*, 576 P.2d at 702, or "discretionary judgment-policy decisions." *Stanley*, 506 P.2d at 1292. *See also Earthmovers*, 691 P.2d at 285 (Rabinowitz, J, concurring). Moreover, in *Haley* we defined discretionary acts as "those requiring 'personal deliberation, decision and judgment,'" while ministerial acts were described as acts amounting "'only to obedience of orders, or the performance of a duty in which the officer is left with no choice of his own.'" 687 P.2d 305, 316 (Alaska 1984) (quoting W. Prosser, *Handbook of The Law of Torts*, § 132 at 988–89 (4th ed. 1971)).

The difference is more than mere semantics; it reflects the differing policy considerations which underlie the two forms of immunity.[12]

Kerasotis v. Aboud, 626 P.2d 1197 (Alaska 1984) (legislative immunity); *State v. Dankworth*, 672 P.2d 140 (Alaska App. 1983) (legislative immunity); *see generally* J. Block, *Stump v. Sparkman and the History of Judicial Immunity* Duke L.J. 879 (1978); R. Gray, *Private Wrongs of Public Servants*, 47 Calif.L.Rev. 303, 319–32 (1959) (hereinafter Gray, *Private Wrongs*).

8. The trial court appears to have assumed that merely because it found that Governor Sheffield had acted within the scope of his authority in the performance of a discretionary function that immunity naturally followed.

9. Sheffield's intent becomes relevant only when determining the scope of the immunity, and even then, only under a rule of qualified immunity.

10. Aspen's complaint itself points out that in 1980 alone, there were eight public hearings held on the proposed offshore prospecting permitting out in Cook Inlet.

11. This is not to say that such remarks do not constitute an abuse of authority. However, an abuse of authority is not synonymous with a lack of authority.

12. As we have observed on prior occasions:

At issue here are two actions taken by Governor Sheffield, his ordering the rejection of Aspen's permits and the making of allegedly defamatory statements. While the trial court appears to have treated these actions collectively, we believe each must be examined in its own right.

The first action which Aspen contends was not discretionary in nature is Governor Sheffield's order that Aspen's permit applications be rejected. Aspen argues that "a specific decision rejecting [permit applications] is not a policy or discretionary action but a nondiscretionary action which must be implemented in accordance with the standards contained in the statutes and regulations."

Aspen mischaracterizes the action which is the actual subject of our inquiry: the issue to be determined here is not whether Aspen's permit applications were improperly rejected, but whether Governor Sheffield's actions in ordering their rejection was an act requiring "personal deliberation, decision and judgment." We conclude that it was.

The governor, as chief executive officer of the state, is vested with broad powers. With this power comes a wide array of responsibilities and duties. And, the "broader the range of responsibilities and duties ... the wider the scope of discretion it entails." *Barr*, 360 U.S. at 573, 79 S.Ct. at 1340, 3 L.Ed.2d at 1442. In ordering the rejection of Aspen's permit applications, Sheffield was engaged in an exercise of "supervisory authority" over his subordinates. When and whether to supervise subordinates, and how much supervision is required, are fundamental policy determinations that must be made by any governor. The exercise of such authority, by its very nature, involves personal deliberation and judgment. It is, therefore, discretionary in nature.

Aspen also contends that a defamatory statement can "at least [in] some instances ... be considered nondiscretionary action[ ]." It fails to specify, however, whether Governor Sheffield's remarks in this case constitute one of those instances. In fact, Aspen's entire argument on this question consists of a two sentence paragraph without reference to authority of any kind.

We have made it clear that arguments given no more than cursory treatment in the brief will not be considered on appeal. *See Craig Taylor Equipment v. Pettibone Corp.*, 659 P.2d 594, 596 n. 1 (Alaska 1983); *State v. O'Neill Investigations*, 609 P.2d 520, 528 (Alaska 1980); *Lewis v. State*, 469 P.2d 689, 691–92 n. 2 (Alaska 1970); *Pedersen v. State*, 420 P.2d 327, 332 n. 5 (Alaska 1966). Consequently, because we find no per se error in the trial court's determination, we decline to address this issue.[13]

In sum, we conclude that the trial court's determinations that Governor Sheffield's actions were within the scope of his authority and discretionary in nature are correct. Thus, the doctrine of official immunity is applicable to the facts of this case. Our analysis does not end here, however. We must now determine what the scope of immunity to be afforded Governor Sheffield should be. This, as previously noted, is an issue we have not fully considered in any of our prior decisions.

> We have declined to use a mechanical or semantic test in determining whether a particular function or duty is discretionary; instead we must weigh the policy considerations behind the labeling.

Adams v. State, 555 P.2d 235, 243 (Alaska 1976) (footnote omitted). *See also Urethane Specialties v. City of Valdez*, 620 P.2d 683, 688 (Alaska 1980) (quoting *Adams*).

13. We are not unmindful of our decision in *Urethane Specialties v. City of Valdez*, 620 P.2d 683 (Alaska 1980). In that case we held that, for the purposes of sovereign immunity, the decision by a city manager to issue an allegedly defamatory press release was an exercise of a discretionary function. *Id.* at 688. We further concluded, however, that:

> [T]he timing of any particular release, the content of any particular release, and the manner in which a release is made constitute the implementation of the policy, more properly described as the operational aspect of the policy, and are not entitled to the protection of the discretionary statute.

Id. at 689 (quoting *Tamy v. State*, 54 Cal.App.3d 779, 793, 126 Cal.Rptr. 869, 878 (Cal.App.1976)). Because of the different policy considerations underlying sovereign and official immunity, in the absence of any persuasive argument or compelling reason to the contrary, we are not inclined to extend the *Urethane Specialties* rationale to cover statements made by the state's chief executive officer.

IV

[6] The immunity of public officials is a relatively recent phenomenon. Traditionally, the common law did not distinguish between public officials and private individuals for purposes of personal tort liability.[14] 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 29.8 at 653–54 (2d ed. 1986) (hereinafter 5 Harper, James & Gray). In fact, courts often imposed a stricter standard of care on public officials, holding them personally liable not only for intentional torts but even for the consequences of simple non-negligent mistakes. *See e.g. Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891). *See generally* 5 Harper, James & Gray, § 29.8 at 654–55 & n. 4; E. Keefe, *Personal Tort Liability of Administrative Officials*, 12 Fordham L.Rev. 130, 130–31 (1943) (hereinafter Keefe, *Administrative Officials*) and cases cited therein.

Beginning with *Spalding v. Vilas*, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896), however, the federal courts began to afford absolute immunity from civil liability to public officials acting within the scope of their legal authority. *See, e.g., Cooper v. O'Connor*, 99 F.2d 135 (D.C.Cir.), *cert. denied*, 305 U.S. 642, 59 S.Ct. 146, 83 L.Ed. 414 (1938). *See generally* Gray, *Private Wrongs*, at 837 & nn. 216–21 and cases cited therein. At first limited only to high ranking officers, absolute immunity was subsequently expanded to cover the discretionary acts of lower echelon officials and assorted bureaucrats. *See, e.g. Barr*, 360 U.S. at 572 & n. 9, 79 S.Ct. at 1340, 3 L.Ed.2d at 1442 & n. 9 (1959); *Gregoire*, 177 F.2d at 581.

The federal court's abrogation of the traditional common law rule was grounded in considerations of public policy. For reasons not all together clear it became generally recognized that public officials would be unduly hampered, deterred and intimidated in the discharge of their duties if not protected from private liability. *See generally* Prosser, § 132 at 987; 63A Am.Jur.2d, § 358 at 924–25. Accordingly, the primary rationale for the rule of absolute immunity is "the promotion of fearless, vigorous and effective administration of government."[15] *E.g., Barr*, 360 U.S. at 571, 79 S.Ct. at 1339, 3 L.Ed.2d at 1441.

Thus, today the general rule in the federal courts, and a minority of states, is that a public official is absolutely immune from common law tort liability[16] for any discre-

14. This rule had its origin in the Anglo-American common law principle that "no man is above the law." As the eminent British constitutional scholar, A.V. Dicey boasted "[w]ith us every official from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." A.V. Dicey, *The Law of the Constitution*, 193 (10th ed. 1959).

15. Other policy considerations variously identified as justifying absolute immunity include (1) the injustice of subjecting to liability an officer who is required by the legal obligations of his position to exercise discretion; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions; (4) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office. *See Wood v. Strickland*, 420 U.S. 308, 320, 95 S.Ct. 992, 999, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 240, 94 S.Ct. 1683, 1688, 40 L.Ed.2d 90, 99 (1974); *Walker v. [illegible]*, 700 F.2d 124, 126 (4th Cir.1983). *See generally*, Prosser, § 132, at 987–92; 63A Am.Jur.2d, § 358 at 924–25; Keefe, *Administrative Officials*, at 131.

The arguments used by courts to justify absolute immunity have not gone uncriticized. Professor Gray calls them "a wry blend of fairy tale and horror story." Gray, *Private Wrongs*, at 339. Justice Brennan has referred to them as "grammatical web[s] of dogma without a scintilla of support to which one can point." *Barr*, 360 U.S. at 590, 79 S.Ct. at 1349, 3 L.Ed.2d at 1451 (Brennan, J., dissenting). We concede that this rule does seem to indicate a judicial preference for Joyce and Beckett over Lardner and Twain.

16. This rule pertains only to immunity from common law torts. The general rule for both federal and state officials as to constitutional torts is qualified immunity. *See e.g., [illegible]*, 667 F.2d at 315–18 (discussing federal law of immunity as applied to constitutional torts). *See generally* Comment, *Immunity: Eliminating the Subjective Element from the Qualified Immunity Standard in Actions Brought Against Government Officials*, 22 Washburn L.Rev. 577 (1983).

tionary act done within the scope of the official's authority without regard to motive. *See, e.g., Wallen v. Downs*, 701 F.2d 124, 126 (4th Cir.1983); *Lawrence v. Acree*, 665 F.2d 183, 1325 (D.C.Cir.1981). In other words, immunity applies whether the allegedly tortious conduct was done maliciously, corruptly or in bad faith.[17] *Id. See also Butz v. Economou*, 438 U.S. 478, 495, 98 S.Ct. 2894, 2905, 57 L.Ed.2d 895, 908–09 (1978); *Barr*, 360 U.S. at 575, 79 S.Ct. at 1341 3 L.Ed.2d at 1443; *Spalding*, 161 U.S. at 88, 16 S.Ct. at 637, 40 L.Ed. at 785–86; *Gregoire*, 177 F.2d at 581. *See generally* 6A Am.Jur.2d, § 330, at 226; Restatement (Second) of Torts, § 895D (1979). Courts applying this rule have determined that the proper and effective administration of public affairs simply outweighs redress of the occasional wrong caused by an official during activity otherwise within he official's authority.

Following he lead of the federal courts, state courts also begin to recognize common law immunity for public officials. *See, e.g., Wadsworth v. Town of Middletown*, 94 Conn. 416, 109 A. 246, 248 (1920); *Hedgepeth v. Swanson*, 223 N.C. 441, 27 S.E.2d 122, 123 (1943). *See generally* Gray, *Private Wrongs* at 342–47. However, in sharp contrast to the federal courts, the overwhelming majority of states adopted a rule of qualified immunity. *See generally* Gray, *Private Wrongs*, at 342 & n. 246 citing 29 state cases adopting a rule of qualified immunity). This rule remains the majority view among the states today.[18]

Under a rule of qualified immunity, a public official is shielded from liability only when discretionary acts within the scope of the official's authority are done in good faith and are not malicious or corrupt. *E.g., Trimble v. City and County of Denver*, 697 P.2d 716, 729 (Colo.1985). In other words, "malice, bad faith or corrupt motive transforms an otherwise immune act into one from which liability may ensue."[19] *Shellburne, Inc. v. Roberts*, 238 A.2d 331, 333 (Del.1968). Courts applying this rule reason that:

> qualified [immunity] is sufficient to protect the honest officer who tries to do his duty ... official immunity should not become a cloak for malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of intentional abuse of power with which they are entrusted by the people; and that the burden and inconvenience to the officer of an inquiry into his motives is far outweighed by the possible evils of the deliberate misconduct.

Prosser, § 132 at 989. *See also Grimm v. Arizona, Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227, 1231–33 (1977); *Medeiros v. Kondo*, 55 Hawaii 499, 522 P.2d 1269, 1271 (1974).

The split of authority among the various jurisdictions can be largely attributed to the conflicting policy considerations inherent in the doctrine.[20] On the one hand,

> The one exception established to that is the president, who is absolutely immune even from constitutional torts. *See Nixon v. Fitzgerald* 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

17. Absolute immunity has been described as "the right to be free, not only from the consequences of the litigation's results, but from the burden of defending oneself all together." 63A Am.Jur.2d § 30, at 926. Otherwise stated, absolute immunity immunizes an official from suit, as well as damages.

18. *See Hendrix v. City of Topeka*, 231 Kan. 113, 643 P.2d 12, 134–35 (1982); *Thompson v. Rencher*, 559 S.W.2d 488, 494–97 (Ky.App.1977); *Mackerron v. Nelson*, 474 A.2d 168, 167 (Me. 1984); *Koch v. Grimmelinger*, 192 Neb. 786, 223 N.W.2d 833, 34–35 (1974); *Neal v. Donahoe*, 611 P.2d 1125at 1129–31 (Okl.1980); *Doherty v.*

> *Commonwealth*, 393 A.2d 291, 293–96 (Pa.1978); *Sioux Falls Construction v. City of Sioux Falls*, 297 N.W.2d 454 458–59 (S.D.1980); *Chase v. Gibbs*, 20 Wash.App. 691, 582 P.2d 555, 557–58 (1978); *Lister v. Board of Regents of University of Wisconsin System*, 72 Wis.2d 282, 240 N.W.2d 610 at 620–22.

19. Thus, qualified immunity is said to extend "only to immunity from damages not from suit." 63A Am.Jur.2d § 348, at 926.

20. Official immunity stands at the crossroads of private and public law and thus requires the reconciliation of two separate legal traditions. For a discussion of the theoretical difficulties inherent in courts' attempts to reconcile these two legal traditions, *see* R. Epstein, *Private Law Models For Official Immunity*, 42 Law & Contemp. Probs. 53 (1978).

courts have recognized that the threat of personal liability may make public officials unduly fearful in exercising their authority and thus discourage them from taking the prompt, decisive action required for the public good.[21] On the other hand, there is a strong public policy of protecting citizens from oppressive and malicious acts.[22] The myriad of cases and commentaries on this subject indicate that whether a court adopts a rule of absolute or qualified immunity has depended primarily on which of these two conflicting policies it deemed worthy of the greater weight. *See* Restatement (Second) of Torts, Ch. 45A Immunities, introductory note at 394–95 (1979) (courts today regard the issue of immunity "not so much in terms of its historical background as in terms of a reasoned approach to the policies involved"). Whichever course is taken, however, most courts have adopted an all or nothing approach: they either recognize a general rule of absolute immunity or a general rule of qualified immunity for all officials for all torts.

As our prior decisions in this area indicate, we are of the opinion that some form of immunity for public officials is necessary simply to insure that government continues to function. Every day, public officials in this state make decisions which may adversely affect hundreds, even thousands, of people. Many of these decisions will be wrong, but it is not a tort for government to govern." *Dalehite v. United States*, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427, 1452 (1953) (Jackson, J., dissenting) Thus, we believe that enlightened public policy must ensure that public officials be free to fulfill their responsibilities with independence, vigor and a wide margin for error. Yet, we also agree with Justice Brennan that in a society as complex as ours, where we have seen burglary, eavesdropping, bribery and perjury committed at the highest levels, that:

> [C]ourts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of the public business. Such a burden is hardly one peculiar to public officers; citizens generally go through life subject to the risk that they may, though in the right, be subject to litigation and the possibilities of a miscarriage of justice ... [Absolute immunity can have] too much of a flavor of throwing out the baby with the bath.

Barr, 360 U.S. at 588–91, 79 S.Ct. at 1348–49, 3 L.Ed.2d at 1451 (Brennan, J., dissenting).

Thus, we are not inclined to adopt an all or nothing approach. We perceive no logical or compelling reason why a public official should always be entitled to absolute immunity. Conversely, there are times when a rule of qualified immunity will simply not protect public interests worthy of protection. Consequently, we believe that the best approach is to strike a balance between the public's interest in efficient, unflinching leadership and the interests of maliciously injured parties.

In order to achieve this balance, we need to focus upon the particular circumstances and conduct that give rise to the claim of liability, with careful consideration being given to each of the following factors:

> (1) The nature and importance of the function that the officer performed to the administration of government (i.e. the importance to the public that this function be performed; that it be performed correctly; that it be performed

21. *See generally* G. Hermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L.Rev. 1175, 1178–79 (1977) (hereinafter Hermann, *Officer Tort Liability*); M. Fox, *The King Must Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity*, 15 Wayne L.Rev. 177, 177–81 (1969) (hereinafter Fox, *No Wrong*); R. Cass, *Damage Suits Against Public Officers*, 129 U.Pa.L.Rev. 1110, 1119–25 (1981).

22. As one commentator has noted:

> [W]rongdoing seems worth deterring or punishing whatever that the wrongdoer happens to wear. Moreover, there is something anomalous about denying relief to a tort victim simply because he had the added misfortune of being injured by a public official rather than a private citizen.

Hermann, *Officer Tort Liability*, at 1178.

according to the best judgment of the officer unimpaired by extraneous matters;

(2) The likelihood that the officer will be subjected to frequent accusations of wrongful motives and how easily the officer can defend against these allegations; and

(3) The availability to the injured party of other remedies or other forms of relief (i.e. whether the injured party can obtain some other kind of judicial review of the correctness or validity of the officer's action).

When applying this objective test to the facts of any particular case no one factor is controlling. Any decision must be grounded upon a balanced consideration of all the factors.[23] If, as a matter of law, the court determines that immunity should be absolute, then allegations of improper motive become irrelevant and the case should properly be dismissed under Rule 12(b)(6). If, on the other hand, the court determines that based on these factors that qualified immunity is appropriate, inquiry into motive becomes relevant. In such situations properly pled allegations of malice or corruption should generally be sufficient to withstand a motion to dismiss for failure to state a claim.[24] With this in mind, we turn to the case at bar.

A

[6] The first factor we consider is the nature and importance of the function performed by the defendant to the administration of government.

It is undeniably of great importance that the governor engage in the supervision of his subordinates. The power of unelected administrators and bureaucrats is ever increasing. The governor and lieutenant governor are the only elected members of the executive branch. For the most part, it is the governor who must heed popular sentiment and public opinion in the making of government policy, since it is the governor who will pay the political price if his or her administration is unresponsive to the people's needs. Thus, while engaged in the supervision of cabinet and sub-cabinet officers, the governor must feel unimpaired to direct them in the way he determines best, since he is ultimately responsible for the actions of those he appoints.

This is particularly true where the state's natural resources are concerned. The importance of Alaska's natural resources to the health and welfare of its people is self-evident. To allow the governor's motives to be questioned at every turn, by every disappointed applicant for a mining lease, or a land grant, or oil rights, would effectively undermine the governor's ability to govern. It is to guard against this possibility that a rule of absolute immunity is designed.

The same is not true, however, for the allegedly defamatory statements made by Sheffield. Undoubtedly, the governor must feel free to speak out on matters of public interest without the apprehension of being unduly constrained or fettered in informing the people of his views. The importance to the public in allowing the governor *carte blanche* to intentionally defame a person or business cannot, however, be said to rise to the same level of importance as the exercise of supervisory authority over the development and exploitation of the state's natural resources.

Moreover, it does not appear that the effective administration of government would be unnecessarily impaired by holding the governor personally liable for intentionally or maliciously defaming citizens. Otherwise stated, holding the governor to a standard of good faith in his public statements more than adequately protects the

23. Our opinion is limited solely to situations where a plaintiff's common law rights are involved. We express no opinion as to situations where a public official violates clearly established statutory or constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

24. Of course, the plaintiff must still prove that the public official's actions were, in fact, done maliciously or corruptly. Moreover, although the existence or absence of malice is generally a question of fact for the jury, when this question has been removed from the case by uncontroverted affidavits and/or depositions, summary judgment may be granted.

(Cite as: 739 P.2d 721 (Alaska 1987))

public interest in undeterred leadership without exposing the governor to any particularly onerous burdens.

B

The likelihood that the officer will be subjected to frequent accusations and the ease with which the officer can defend against those accusations is the next factor we must consider.

The governor is, without question, the most visible and identifiable political figure in Alaska. Thus, it would seem that the very nature of this high office would make the governor a ready target for numerous lawsuits. History, however, does not bear out this assumption. The present appeal is the first case to reach this court in which the governor has been sued for personal tort liability. Neither party points to any recent, past or present, indicating that governors in general have been the target of a disproportionate number of lawsuits and our own research fails to denote any such phenomena. Furthermore, there is no evidence in the record to suggest that governors in jurisdictions that follow a rule of qualified immunity are any more subject to suit than their counterparts in states where absolute immunity is the rule.

The ease with which the officer can defend against the accusations, however, presents a different problem. The state of mind of a defendant is generally a question of fact for the jury. Thus, in most instances, allowing an inquiry into motive will require that a trial be held. The nature and complexity of such a trial will necessarily affect the public official's ability to meet the accusation of wrongful motive. The crucial inquiry for us then, is whether allowing an examination into motive would be more costly to the public good than the possibility of actual malice or wrongful motive on the part of the public official.

As to Aspen's four claims of wrongful interference we believe that it would. If inquiry into Governor Sheffield's motives in ordering the rejection of Aspen's permit applications were allowed, it is a near certainty that Governor Sheffield would have to testify, and probably a host of other public officials as well. Moreover, the complexity of Aspen's wrongful interference claims would undoubtedly require a lengthy trial, with a high likelihood that the court and jury would be asked to review what were essentially policy determinations for the executive branch. We perceive no good reason for requiring a governor to defend in a public trial his motivations for acts of the sort alleged here. To hold otherwise would subject every decision of a public official to post-hoc scrutiny by lay persons often not versed in the ways of government.

Inquiry into Governor Sheffield's alleged defamatory statements, on the other hand, presents no such problem; the issues in such a case are rather limited, so that the trial should not be excessively complex or lengthy. Thus, a rule of absolute privilege as to this cause of action would do little more than protect unprivileged defamatory statements, leaving a maliciously injured plaintiff without a remedy. A rule of qualified immunity, on the other hand, provides protection to both the honest or mistaken public official and the party injured by unprivileged defamatory statements.

C

The final factor we take into consideration is the availability of other remedies or other forms of relief. Where there is an adequate alternative remedy the need for common law tort liability as a remedy is reduced.

As to the rejection of Aspen's permits, an alternative remedy is readily available. As Aspen is well aware, a decision by the Commissioner of the DNR[25] granting or denying of offshore prospecting permit applications is "a final administrative order,"

25. The actual rejection of Aspen's permit applications was done by the Commissioner pursuant to a February 8, 1985 Commissioner's Decision on the Issuance of Offshore Prospecting Permits in Cook Inlet. In this decision, the Commissioner rejected all permit applications in Cook Inlet based on her finding that there was inadequate information to make a best interests determination.

subject to review by means of an administrative appeal to the superior court. *See* AS 44.62.560. In fact, Aspen availed itself of this remedy, even before filing the present suit.[26] The availability of this alternative weighs heavily in favor of granting absolute immunity, a conclusion bolstered by the fact that Aspen had no vested right to receipt of any permit in the first place.[27] At most, Aspen was entitled to a fair determination of their permit applications. Any wrongdoing that may have occurred during the course of this determination, we believe, is adequately redressed through the administrative appeals process.

No such alternative exists, however, for harm caused by the defendant's allegedly defamatory statements. The only means Aspen has to vindicate its rights is prosecution of this suit. To adopt a rule of absolute immunity would, therefore, leave Aspen without a remedy.

Were we to adopt a rule of absolute immunity for defamatory statements made by public officials, we would, in effect, sanction the ability of those officials to libel or slander at will. We believe that this possibility poses a much more serious danger than the possibility that an official might occasionally be called upon to defend his or her actions and respond in damages for a malicious defamation.

In sum, applying the balancing test we adopt today, we hold that Governor Sheffield is entitled to absolute immunity for the four alleged wrongful interference torts arising out of his order that Aspen's permit applications be rejected. However, we further hold that Governor Sheffield is only entitled to qualified immunity for his allegedly defamatory statements.[28] Under a rule of qualified immunity, Aspen's allegation of defamation should not have been dismissed. Thus, the trial court's judgment on this issue must be reversed.[29]

V

The trial court awarded Sheffield $12,232 in attorney's fees. This was approximately 80% of the fees actually incurred. Aspen contends that this award is erroneous.

Because the trial court erred in dismissing Aspen's claim of damages for defamation, its award of attorney's fees must be vacated pending resolution of this issue. We, of course, express no opinion at this time on the merits of this issue.

VI

For the reasons set forth above, the trial court's judgment is AFFIRMED in part, REVERSED in part and REMANDED for further proceedings not inconsistent with this opinion.

26. Aspen appealed the Commissioner's decision rejecting all permits in Cook Inlet to the superior court in March of 1981. We take judicial notice that since that time, the permit application decision has been remanded back to the DNR for redetermination. The current status of the DNR's redetermination is unknown.

27. AS 38.05.258 provides that the right to prospect for minerals in tide or submerged lands may be granted by permit. This statute is clearly permissive rather than mandatory in nature and in no way requires the state to grant such privileges. Moreover, when and if the state determines that such permits should be granted they can only be granted "in the best interests of the state." AS 38.05.035(e). With no vested right or interest in the permit, Aspen cannot complain of the deprivation of any substantive property right.

28. This rule is limited only to public statements made by public officials. Internal governmental communications remain subject to the general rule.

29. Sheffield's argument that he is entitled to immunity under AS 09.50.250(3) is totally without merit. That statute applies only to claims against the state. It provides no immunity for public officials. *See EastAuthors*, 691 P.2d at 285 (Rabinowitz, J., concurring); *Rose v. Anchor*, 527 P.2d 783, 785 (Idaho 1974) (sovereign immunity immunizes the state as opposed to individuals); *Bradshaw v. Prince George's County*, 284 Md. 294, 396 A.2d 255, 261 (1979) ("immunity of such officers ... rests upon wholly different grounds from that of the State" (quoting *Ellason v. Funk*, 233 Md. 351, 196 A.2d 887 (1964))). *See generally* 63A Am.Jur.2d, § 359 at 923-26; Prosser, § 132. There is also no merit to Sheffield's argument that the separation of powers doctrine mandates absolute immunity.

Monte D. MILLE
v.
Karol T. MILLE
No. S-1
Supreme Court
June 26,

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3. Divorce ⇐247

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