

**HB**

**435**

HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF  
HB 435

Public Officers and Employees

Received January 22, 1990  
by The Judiciary Committee

Heard February 7, 1990

Adopted CSHB 435 (SA) February 7, 1990

Passed Out of Committee February 7, 1990  
4 Do Pass

## TABLE OF CONTENTS

### HB 435: Public Officers and Employees

- Item 1:** HB 435 by The Judiciary Committee  
CSHB 435 (SA)
- Item 2:** Fiscal Note and Analysis from Dept. of Law
- Item 3:** Memorandum from Rep. Gruenberg, January 30, 1990
- Item 4:** Dept. of Law Proposed Amendments to HB 435
- Item 5:** Memorandum re: Bill amending definition of "public servant"
- Item 6:** Court of Appeals Opinion for Case A-2701

# HOUSE COMMITTEE REPORT

(7)

Date Referred: January 22, 1990

FURTHER REFERRALS:

JUDICIARY

Date of Committee Action: \_\_\_\_\_

The STATE AFFAIRS Committee considered:

HB 435

HOUSE BILL NO. 435

PUBLIC OFFICERS AND EMPLOYEES

"An Act relating to the definition of 'public servant' in the criminal code."

RECOMMENDATIONS:

- be replaced with CSHB435(SA)  the same title  
 a new title
- have attached amendment(s)
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(s):  
(Dept)

APPROVES PREVIOUS:  
(Date/Dept)

- fiscal impact \_\_\_\_\_
- zero fiscal note \_\_\_\_\_
- zero with analysis Dept law

- fiscal note(s) \_\_\_\_\_
- zero fiscal note(s) \_\_\_\_\_
- zero fn/analysis \_\_\_\_\_

SIGNING DO PASS:

SIGNING:  
(Check approp. column)

David Guley  
Chris Stanley  
W.G. Bush  
Paul J.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

	Do Not Pass	No Rec	Amend

W.G. Bush  
Chairman's Signature

BY THE JUDICIARY COMMITTEE

1 IN THE HOUSE

2

HOUSE BILL NO. 435

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act relating to the definition of 'public servant' in the criminal code."

7

8

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

9

\* Section 1. AS 11.81.900(b)(48) is amended to read:

10

(48) "public servant" means each of the following, whether

11

compensated or not, but does not include jurors or witnesses:

12

(A) an officer or employee of the state, a municipal-

13

ity or other political subdivision of the state, or a govern-

14

mental instrumentality of the state, including legislators,

15

members of the judiciary, and peace officers;

16

(B) a person who participates as an advisor, consul-

17

tant, or assistant at the request or direction of the state, a

18

municipality or other political subdivision of the state, or a

19

governmental instrumentality, or an employee of a person de-

20

scribed in this subparagraph to the extent the employee as part

21

of the employment assists the employer in the participation

22

described in this subparagraph;

23

(C) a person who serves as a member of the board or

24

commission created by statute or by legislative, judicial, or

25

administrative action by the state, a municipality or other

26

political subdivision of the state, or a governmental instrumen-

27

tality;

28

(D) a person who has entered into a contract with the

29

state, a municipality or other political subdivision of the

1           state, or a governmental instrumentality of the state, to carry  
2           out services funded in whole or in part by public money, or who  
3           is administering a grant from the state under AS 37.05.315 -  
4           37.05.317 or a grant from a municipality or other political  
5           subdivision of the state, or an employee of a person described in  
6           this subparagraph to the extent the employee as part of the  
7           employment assists the employer in the activities described in  
8           this subparagraph;

9                    (E) a person nominated, elected, appointed, employed,  
10            or designated to act in a capacity defined in (A) - (D) [(A) -  
11            (C)] of this paragraph, but who does not occupy the position;

*YOUTH = INQOR, ENTERTAINMENT  
BUDGET = FOOD, CATERING - CONSIDER  
PUBLIC SPACES.*

Item 2

**FISCAL NOTE**

**REQUEST:**

Revision Date: \_\_\_\_\_  
Title: "An Act relating to the definition of "public servant" in the criminal code."  
Sponsor: House Judiciary  
Requestor: House State Affairs

Agency Affected: Department of Law  
BRU: Prosecution  
Components: All

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

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
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 FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

**POSITIONS:**

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

**ANALYSIS : (Attach a separate page if necessary)**

Please see the attached analysis.

Prepared by: Richard I. Pegues, Director Phone: 465-3672  
Division: Administrative Services Date: February 5, 1990  
Approved by Commissioner: Douglas B. Baily, Attorney General Date: February 5, 1990  
Agency: Department of Law

**Distribution (by preparer):**

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

# CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 435

This bill amends AS 11.81.900(b)(48) to include an employee of a person who participates as an advisor, consultant, or assistant at the request or direction of the state, a municipality or other political subdivision of the state, or a governmental instrumentality, within the criminal code's definition of a public servant.

The amendment also includes a person, or an employee of the person, who has entered into a contract with the state, a municipality or other political subdivision of the state, or a governmental instrumentality of the state, to carry out services funded in whole or in part by public money, within this definition.

The bill is in response to a recent Alaska Court of Appeals decision, in State v. Mullin, where the court found that an employee of a firm paid from a publicly-funded contract was not covered under the statutory definition of a public servant. The Department of Law has suggested alternative language to correct this problem and to avoid an overly broad definition that the department believes is contained in the current version of the bill. In any event, the bill seeks to clarify existing law, and it will therefore not have a fiscal impact on the department.

Item 3

# State of Alaska

## Committees

CO-CHAIR, HOUSE JUDICIARY  
VICE-CHAIR, HOUSE LABOR AND COMMERCE  
HOUSE HEALTH, EDUCATION  
AND SOCIAL SERVICES



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Representative Max F. Gruenberg, Jr.  
District 11  
Spenard, Upper Midtown Anchorage

### MEMORANDUM

TO: Rep. H.A. "Red" Boucher  
Chairman, House State Affairs Committee

FROM: Rep. Max F. Gruenberg, Jr.  
Co-chairman, House Judiciary Committee *MFG*

DATE: January 30, 1990

SUBJECT: Scheduling of HB 435

The House Judiciary Committee has introduced HB 435. The bill would amend the definition of the term "public servant" in the criminal code, to correct a deficiency noted by the Alaska Court of Appeals in the case of State v. Mullins.

In Mullins, an employee of a firm hired by the State to provide counselling services at a State prison was charged with accepting a bribe of \$25,000 to write a favorable report on an inmate. The court ruled that the charge must be dismissed because the employee was not a "public servant" as defined by the criminal code.

HB 435 would close this loophole in current law. The bill is ready for hearing, and I would appreciate your scheduling it at the first opportunity.

*Re: HB 435 - to amend the  
of under criminal code the STATE  
loophole class of persons  
IMMUN FROM PROSECUTION*

Item 4

DEPARTMENT OF LAW

Proposed Amendments to HB 435  
February 5, 1990

Page 1, line 16, following "person," delete "who participates":  
Insert ",or employee of a person, participating"

Page 1, line 17, following "request":  
Delete "or"  
Insert "of, the"

Page 1, line 17, following "of":  
Insert ",or under contract with"

Page 1, lines 19 - 22, following "instrumentality":  
Delete all material

Page 1, lines 28 - 29, following "(D)" and page 2, lines 1 - 8:  
Delete all material

Page 2, line 9:  
Delete "(E)"

Page 2, lines 10 - 11:  
Delete "(A) - (D) [(A) - (C)]"  
Insert "(A) - (C)"

PROPOSED AMENDMENTS TO AS 11.81.900(b)(48):

(B) a person, or employee of a person, participating  
[WHO PARTICIPATES] as an advisor, consultant, or assistant at the  
request of, the direction of, or under contract with the state, a  
municipality or other political subdivision of the state, or any  
other governmental instrumentality;

STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

4/12/85  
POUCH Y STATE CAPITOL  
UNEAU ALASKA 99811  
907 465 3800

MEMORANDUM

November 3, 1989

SUBJECT: Bill amending definition of "public servant"  
(Work Order No. 6-1706)

TO: Representative Max Gruenberg, Jr.

FROM: John B. Gaguine <sup>JBG</sup>  
Legislative Counsel

Enclosed you will find a bill that amends the definition of "public servant" in Title 11, the criminal code. This bill is necessary to alter the result of the Alaska Court of Appeals' decision in State v. Mullin, 778 P.2d 233 (1989), a copy of which is attached. There the court held that the state could not prosecute an employee of a counseling firm that under contract with the Department of Corrections was treating incarcerated sex offenders when the employee allegedly solicited and received \$25,000 from an offender to render a favorable progress report on the offender. Because ambiguous criminal statutes must be interpreted in favor of the accused, the court said, the definition of "public servant" in AS 11.81.900(b)(48) could not be applied to the employee, since she did not work for the state and was not directly contracting with the state.

The bill would make two changes in the definition. First it would broaden subsection (B) - defining "public servant" as "a person who participates as an advisor, consultant, or assistant at the request or direction of the state" - to include the employees of a person who advises, consults or assists. (The term "person" is defined in AS 11.81.-900(b)(39) as including, when appropriate, an organization; AS 11.81.900(b)(37) broadly defines "organization".) Mullins' attorney implied, *id.* at 234, that she would have no defense if subsection (B) had incorporated employees of an advisor, consultant, or assistant, and I think this position may be right. However, because the terms in (B) are rather vague, I also added a new subsection (D), which specifically applies to individuals in Mullins' position - persons, entities or employees of entities which are per-

Representative Max Gruenberg  
Page 2  
November 6, 1989

forming government services under contract or are administering state or local grants.

The change in (B) and the new subsection (D) will largely overlap. However, because (B) is imprecise and because I can conceive of some circumstances where (B) would apply and (D) would not - say where a person not in government was informally advising the governor or some other high official - I believe it is appropriate to make both changes.

This proposed change would affect a number of statutes within Title 11, and likely would affect several statutes outside of that title, since a court would probably look to the Title 11 definition if a question of interpreting "public servant" in those non-Title 11 statutes arose. Several Title 11 statutes criminalize conduct by public servants: AS 11.41.520(a)(4) (extortion); 11.41.530(a)(4) (coercion); 11.56.110 (receiving a bribe); 11.56.120 (receiving unlawful gratuities) (the charge involved in Mullins); 11.56.370 (permitting an escape); 11.56.850 (official misconduct); and 11.56.860 (misuse of confidential information). Other Title 11 statutes criminalize activities taken against public servants: AS 11.46.550 (offering a false instrument for recording); 11.56.100 (bribery); 11.56.210 (unsworn falsification); 11.56.610 (tampering with physical evidence); and 11.56.830 (impersonating a public servant). The non-Title 11 statutes that use the term are AS 05.15.200 (criminalizing making a false statement to a public servant for a game-of-chance permit), AS 12.36.090 (defining "peace officer" as public servant with power to maintain order or make arrests), and AS 36.10.200 - 36.10.210 (civil and criminal penalties for unsworn falsification about local hire meant to mislead public servant). I do not believe that the change in definition creates problems for any of these statutes.

If I may be of further assistance, please advise.

JBG:lmb  
L8/012

Enclosure

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA,	)	
	)	Court of Appeals No. A-2701
Appellant,	)	Trial Court No. 4FA-S88-1924CR
	)	
v.	)	<u>O P I N I O N</u>
	)	
CHRISTINE MULLIN,	)	
	)	
Appellee.	)	[No. 953 - August 11, 1989]

Appeal from the District Court of the State of Alaska, Fourth Judicial District, Fairbanks, Christopher E. Zimmerman, Judge.

Appearances: Robert C. Anderson, Assistant District Attorney, Harry L. Davis, District Attorney, Fairbanks, and Grace Berg Schaible, Attorney General, Juneau, for Appellant. Dick L. Madson, Law Office of Dick L. Madson, Fairbanks, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

BRYNER, Chief Judge.

Christine Mullin was charged with four counts of receiving unlawful gratuities, in violation of AS 11.56.120(a), which provides:

A public servant commits the crime of receiving unlawful gratuities if, for having engaged in an official act which was required or authorized and for which the public servant was not entitled to any special or additional compensation, the public servant

- (1) solicits a benefit, regardless of value; or
- (2) accepts or agrees to accept a benefit having a value of \$50 or more.

"Public servant" is defined in AS 11.81.900(b)(48):

"[P]ublic servant" means each of the following, whether compensated or not, but does not include jurors or witnesses:

- (A) an officer or employee of the state, a municipality or other political subdivision of the state, or a governmental instrumentality of the state, including legislators, members of the judiciary, and peace officers;
- (B) a person who participates as an advisor, consultant, or assistant at the request or direction of the state, a municipality or other political subdivision of the state, or a governmental instrumentality;
- (C) a person who serves as a member of the board or commission created by statute or by legislative, judicial, or administrative action by the state, a municipality or other political subdivision of the state, or a governmental instrumentality;
- (D) a person nominated, elected, appointed, employed, or designated to act in a capacity defined in (A) through (C) of this paragraph, but who does not occupy the position.

The trial court granted Mullin's motion to dismiss the complaint on the grounds that Mullin was not a public servant within the purview of AS 11.56.120. The state appeals from the order of dismissal. We affirm.

At the time of the alleged offense, Mullin was employed by Fairbanks Treatment Associates (FTA) as a counselor. Fairbanks Treatment Associates was under contract with the State of Alaska to provide counseling services to inmates enrolled in the Sex Offender Treatment Program at the Fairbanks Correctional Center (FCC).

As a counselor, Mullin provided counseling services to inmates in the Sex Offender Treatment Program, maintained case notes recording the content of the counseling sessions and her impressions and recommendations, and contributed to reports made for participants in the

program. The criminal complaint filed against Mullin charged that Mullin solicited and agreed to accept a benefit having a value of more than \$50 from FCC inmate Arthur Smith. Specifically, the state alleged that Mullin offered to render a favorable progress report for Smith, who faced an upcoming hearing before the parole board, in exchange for \$25,000.

The state argues that Mullin was a public servant within paragraph (B) of the definition: "a person who participates as an advisor, consultant, or assistant at the request or direction of the state . . . ." Mullin contends that the omission from this definition of employees of persons participating as advisors or consultants indicates the legislature's intent not to include someone in her position within the statute.

This is a case of first impression in Alaska. We have not previously been called upon to interpret the term "public servant" as it is used in AS 11.56.120.

The state urges us to follow the federal cases interpreting 18 U.S.C. § 201, the federal bribery statute. That statute prohibits "public officials" from accepting anything of value in return for being influenced in the performance of their official duties. The statute defines "public official" as follows:

Member of Congress, Delegate, or Resident Commissioner . . . or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

18 U.S.C. § 201(a)(1).

In Dixon v. United States, 465 U.S. 482 (1984), the Supreme Court held that the executive director and rehabilitation coordinator of a

nonprofit organization designated by the City of Peoria to administer and distribute federal block grant funds were public officials for the purposes of 18 U.S.C. § 201. The Court found that the defendants had been acting "for or on behalf of" the United States in an official function, Dixson, 465 U.S. at 497, notwithstanding the fact that they had no direct contractual relationship with the United States Government. The Court reasoned that:

[T]he proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities.

Dixson, 465 U.S. at 496. The Court found that by accepting the responsibility for distributing federal funds, the defendants had "assumed the quintessentially official role of administering a social service program established by the United States Congress." Dixson, 465 U.S. at 497. Four justices dissented from the Court's opinion on the grounds that "[t]he rule of lenity demands that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" Dixson, 465 U.S. at 501 (O'Connor, J., dissenting) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

A case more closely analogous to the present case is United States v. Ricketts, 651 F.Supp. 283 (S.D.N.Y. 1987), aff'd, 838 F.2d 1204 (2d Cir. 1987). Ricketts was the house manager of Chrysalis, a halfway house that contracted with the Federal Bureau of Prisons, pursuant to a federal statute, to house federal inmates. Ricketts, 651 F.Supp. at 284. After finding that "[d]efendant's position is closely analogous to that of a prison guard, who is unquestionably a public official," the court held that Ricketts was a "public official" under the definition in 18 U.S.C. § 201.

The helpfulness of these cases is limited because of the differences between 18 U.S.C. § 201(a)(1) and the applicable Alaska statutes. In the federal statute, "public official" is defined to include "person[s] acting for or on behalf of the United States." The definition of "public servant" in AS 11.81.900(b)(48) does not contain similarly broad language. The legislative commentary to AS 11.81.900(b)(48) does indicate the legislature's intent to adopt a broad definition of "public servant."

The commentary states:

The term "public servant" is defined broadly to include not only every category of government or public officer, but every employee of every such office or agency, every person retained to perform some government service and every person who, though not having yet assumed his official duties, has been selected to become a public servant.

The definition has been drafted to make it clear that those serving "political subdivisions" and "governmental instrumentalities" within the state are public servants. Coverage is also intended to reach persons who serve governmental instrumentalities and political subdivisions of the state in advisory or consultative capacities.

The words "whether compensated or not" have been added to insure that the bribery statutes cover individuals who are serving in a compensatory position as well as those serving without pay. The gist of the offense is the intent to influence the course of public administration. The public servant functioning gratuitously can be as effective in corrupting governmental process as the paid functionary.

Witnesses and jurors are excluded from the definition. Bribery and bribe receiving of and by such persons is covered in Article 4 of the Chapter.

Commentary on the Alaska Revised Criminal Code, Senate Journal Supplement No. 47 at 69-70 (June 12, 1978).

Like the statute itself, the commentary is ambiguous. Mullin may or may not be included in the phrase "every person retained to perform some government service." It is not clear whether this refers only to

those actually retained by the government, or whether it refers as well to those retained by private employers to do work for the government. Thus, we cannot determine from the commentary whether a person retained in a non-supervisory position by a private organization contracting with the government is a public servant.

Mullin cites cases from other jurisdictions in which bribery statutes similar to our own have been interpreted narrowly. One of these cases, State v. Pinckney, 276 N.W.2d 433 (Iowa 1979), is not directly on point. The statute involved prohibited the acceptance of gratuities only by "public officers," rather than by all public employees. The court held that Pinckney, a liquor properties manager from the Iowa Beer and Liquor Control Department, could not be prosecuted under the statute because he was only a public employee, not a public officer. The holding and reasoning in Pinckney are not applicable to the Alaska statute, which does not distinguish between "officers" and other public servants.

Mullin also cites Bailey v. People, 617 P.2d 549 (Colo. 1980), which interprets the Colorado statute prohibiting bribery of a public servant. The Colorado statute defines "public servant" as

any officer or employee of government, whether elected or appointed, and any person participating as an advisor, or consultant, engaged in the service of process, or otherwise performing a governmental function . . . .

Colo. Rev. Stat. § 18-8-101(3) (1973). "Government" is defined in the same statute:

"Government" includes any branch, subdivision, institution, or agency of the government of this state or any political subdivision within it.

Colo. Rev. Stat. § 18-8-101 (1973).

The issue in Bailey was whether an employee of the Colorado Springs Urban Renewal Effort (CURE), a corporate body created under the

authority of the Colorado Urban Renewal Law, was a public servant. The court held that the CURE employee was not a public servant, because CURE did not come within the definition of government in section 18-8-101(1). The court followed the rule cited by the dissenting justices in Dixon, that criminal statutes are to be strictly construed in favor of the accused. Since the language "any corporation" was not included in the statutory definition of government, the court held that CURE employees were not "public servants" performing a "governmental function" on behalf of a "government." Bailey, 617 P.2d at 551.

We are persuaded by the reasoning of the Colorado Supreme Court in Bailey. The rule that ambiguities in criminal statutes are to be narrowly read and strictly construed against the state is well established in Alaska. See, e.g., Newsom v. State, 726 P.2d 561, 563 (Alaska App. 1986); State v. R.H., 683 P.2d 269, 280 (Alaska App. 1984); Dailey v. State, 675 P.2d 657, 661 (Alaska App. 1984). Judge Zimmerman correctly applied that rule in this case. The language of AS 11.81.900(b)(48) does not make it clear whether someone like Mullin, an employee of a private organization contracting with the state to provide services to prison inmates, is a "public servant." Although the legislative commentary to the statute indicates that the definition is intended to be a broad one, it does not specifically address positions such as Mullin's. This ambiguity in the statutory definition of "public servant" must be strictly construed in favor of the defendant. The district court did not err in ruling that Mullin was not a public servant within the definition in AS 11.81.900(b)(48).

The order dismissing the complaint against Mullin is AFFIRMED.

**THE WIZARD OF ID .....by B. Parker & J. Hart**

