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SENATE COMMITTEE REPORT

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DATE: 2/28/92

FURTHER:

DATE TURNED INTO OFFICE: 4/2/92

Judiciary Committee considered SENATE BILL NO. 441

"An Act exempting the University of Alaska from the administrative adjudication provisions of the Administrative Procedure Act; and providing for an effective date."

and recommends:

- replace with _____ CS _____ ()
- or adopt previous _____ CS _____ ()
- attaches amendment(s)

- same title
- new title
- technical title change (HB only)

- adopts _____ Letter of Intent
- further referral to the _____

- do pass
- do not pass
- no recommendation
- individual recommendations

NEW FISCAL NOTES: Dept/Date

- zero fiscal notes _____
- fiscal notes _____
- appropriation--no fiscal note

PREVIOUS FISCAL NOTES: Dept/Date

- zero fiscal notes _____
- 12 of A 12/23/91*
- fiscal notes _____

DO PASS:

Handwritten signatures

OTHER RECOMMENDATIONS:

Handwritten signature: Rick Halford

Chair: Signature and Recommendation

FISCAL NOTE

**STATE OF ALASKA
1992 LEGISLATIVE SESSION**

BILL NO. 92-008

Revision Date:
Title: Exempt U of A from Admin. Procedures Act

Department Affected: University of Alaska
BRU:
Component:

Sponsor: Governor
Requestor: University of Alaska

Component Serial No.

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY93	FY94	FY95	FY96	FY97	FY98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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

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

FUNDING: (Thousands of Dollars)	FY93	FY94	FY95	FY96	FY97	FY98
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:	FY93	FY94	FY95	FY96	FY97	FY98
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

There is no cost associated with passage of this legislation. However, if this legislation fails to pass, the cost to the University to administer faculty/staff and student grievances, could add tens of thousands of dollars in litigation costs each year.

Prepared by: Wendy Redman
Division: Statewide Administration

Phone: 474-7582
Date: 12/23/91

Approved by: Brian Rogers Vice President for Finance
Agency: University of Alaska

Date: 12/23/91

Distribution: (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 19, 1992

*The Honorable Richard I. Eliason
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182*

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would exempt University of Alaska student and employee grievances from the Administrative Procedure Act (APA).

The Alaska Supreme Court recently ruled that, under AS 44.62.330(a)(45), the administrative adjudication procedures of the APA (AS 44.62.330 - 44.62.630) apply to the university. Internal disputes such as employee and student grievances traditionally have been resolved through the university's grievance procedure. That procedure is built around a process of peer review, with a multi-step appeal process. Compared to the university's grievance procedure, in which grievances are often resolved with little or no expense in the earlier stages, the APA procedure is cumbersome and expensive, and not as readily accessible to the individual grievant. Therefore, the bill simply deletes the university from the list of state agencies that must use those procedures.

This legislation would permit the university to continue to use its longstanding dispute resolution and grievance process, which is consistent with practices found in the public sector and with the collegial atmosphere that characterizes a university setting.

I urge your prompt and favorable attention to this bill.

Sincerely,

A handwritten signature in cursive script that reads "Walter J. Hickel".

Walter J. Hickel
Governor

University of Alaska

Statewide System

HB 549/SB 441 Exempt UA Grievance from APA

In June 1990, the Alaska Supreme Court overturned a Superior Court decision and found that because the University of Alaska was not specifically excluded from the adjudication procedures of the Alaska Administrative Procedures Act (APA), it must implement grievance procedures pursuant to APA, or "...seek a remedy from the legislature."

The APA adjudication procedures apply to boards and commissions listed in Sec. 44.62.330, in third party actions dealing with the granting or denying "...a right, authority, license, or privilege..." For instance, when an individual is denied a real estate license, that person is entitled to a hearing before the Real Estate Commission through the process outlined in this statute. The quasi-judicial proceedings included in the APA are not intended for employee or student grievances, but rather for what are essentially licensing decisions and disputes involving state boards and commissions.

The statute as currently written applies to the University of Alaska, "...except to the extent that its inclusion is inconsistent with the provisions of AS 14.40," the statute specifically outlining the responsibility and authority of the Board of Regents and the President of the University of Alaska. AS 14.40 gives the Board of Regents the right to "...adopt reasonable rules, orders, and plans...for the good government of the University." Taken together with the strong constitutional powers in Title 14, Article VII, Section 3 of the Alaska Constitution, the Board has plenary authority to govern and manage the University. Transcripts of the legislative history of the APA statute reveal that the legislators had no intention that this section be interpreted in a way that would negate internal grievance procedures. The Supreme Court, however, did not consider legislative intent, and because the APA does not specifically exempt the University, and because the referenced statutory language in AS 14.40 does not specifically grant the Board the authority to establish grievance procedures, they essentially directed the University to seek the appropriate legislative action for clarification.

contact: Wendy Redman
UA Statewide System
463-3086 or 474-7582

The University is seeking a clear exemption from the requirements in AS 44.62.330(a)(45). The APA grievance procedures do not apply to any employee group in the state. Provisions in the state statutes covering collective bargaining require that grievance procedures be part of all collective bargaining contracts, and non-covered state employees are included in grievance procedures established within their specific agencies and departments.

Employee and student grievance procedures, which incorporate constitutionally required due process protections, are traditionally built around a process of peer review and consideration with appeal rights at several levels all the way to the President. The majority of University grievances are resolved at an early stage of review, and are done so at little or no cost to the grievant or to the University. The imposition of the APA procedures, however, will now impose a quasi-judicial proceeding on all University grievances, including the utilization of a formal hearing officer. The additional cost, complexity, and formality of the APA requirements are contradictory to the resolution of student and employee grievances, and are contradictory to the collegial approach that characterizes a University setting.

If this legislation is not passed, it is anticipated that the University will have to pay approximately \$200,000 per year for hearing officers, and associated costs involved with this complex process.

A "grandfather" clause is included with the legislation that provides the APA procedures be utilized for all grievances filed prior to the final passage of this legislation.



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DATE: 2/27/92

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COMMENTS: Hard Copy to Follow: Yes No

Excerpts from the University's Brief before the Supreme Court. pages 13-30

this Court engages in a de novo review, adopting the rule of law that is "most persuasive in light of precedent, reason and policy." 52/

In a case such as this one involving statutory interpretation, the Court applies its own independent judgment and is not bound by that of the Superior Court. 53/ In interpreting the statute, the Court will construe the language of the statute in light of the purpose of its enactment, and will not construe a statutory provision in a manner that is inconsistent with the express objective of the legislation. 54/

Finally, where this Court reviews a trial judge's refusal to apply the doctrine of collateral estoppel, the question for the Court on appeal is whether the trial judge abused his discretion in doing so. 55/

VII. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN RULING THAT THE ADMINISTRATIVE ADJUDICATION PROVISIONS OF THE APA DO NOT APPLY TO THE UNIVERSITY OF ALASKA'S GRIEVANCE PROCEEDINGS

In his memorandum and order, Judge Shortell ruled on only one issue -- whether the administrative adjudication provisions of the APA applied to the University's grievance proceedings. In

52/ Langdon v. Champion, 745 P.2d 1371, 1372 n.2 (Alaska 1987).

53/ Waller v. Richardson, 757 P.2d 1036, 1039 n.4 (Alaska 1988).

54/ Morkunas v. Anchorage Tel. Util., 754 P.2d 1117, 1120 n.12 (Alaska 1988); Anchorage Mun. Emp. Assoc. v. Municipality of Anchorage, 618 F.2d 575, 580 (Alaska 1980).

55/ Parklane Hosiery v. Shore, 439 U.S. 322, 331 (1975).

concluding that they did not, Judge Shortell reasoned as follows: (1) AS 44.62.330(a)(45) requires the University to comply with the procedural requirements of the APA "except to the extent that [the APA's] inclusion is inconsistent with the provisions of AS 14.40;" (2) AS 14.40 specifically authorizes the Board to "adopt reasonable rules, orders and plans . . . for the good government of the University;" (3) the Alaska Legislature did not intend the University to be required by law to conduct APA grievance procedures if the University were to adopt valid, adequate, and fair grievance procedures of its own; (4) under AS 14.40.170(b)(1), grievance procedures adopted by the Board need only be "reasonable," and the procedures instituted by the University meet this test of reasonableness; and (5) to the extent that the APA would require the University to hold substantially more extensive, time consuming, and expensive procedures than would be required under the validly adopted and reasonable University grievance procedures, application of the APA would be inconsistent with AS 14.40.170(b)(1). The University respectfully submits that for all the reasons set forth below, Judge Shortell's ruling is absolutely correct.

1. The APA, By Its Own Terms, Does Not Apply To The University's Grievance Proceedings.

The administrative adjudication provisions of the APA apply to the University only where their inclusion is not "inconsistent with the provisions of AS 14.40." ^{56/} Thus, where the provisions

^{56/} AS 44.62.330(a)(45).

of the APA are inconsistent with AS 14.40, the APA, by its own terms, does not apply to the University.

The University of Alaska is a constitutionally created land-grant university 57/ whose powers are derived primarily from the Alaska Constitution and secondarily from the Alaska Statutes in Title 14. Article VII, Section 3 of the Alaska Constitution states:

BOARD OF REGENTS OF UNIVERSITY. The University of Alaska shall be governed by a Board of Regents The Board shall, in accordance with law, formulate policy and appoint the president of the University.

Title 14 of the Alaska Statutes, the title specifically referenced by the APA, provides that the University of Alaska "shall be governed by a Board of Regents" 58/ Alaska Statute 14.40.170(a)(2) mandates that the Board shall be the body to determine the compensation of all professors, instructors, etc. Further, AS 14.40.170(b)(1) gives the Board the right to "adopt reasonable rules, orders, and plans . . . for the good government of the University"

Taken together, these constitutional and statutory provisions grant the University's Board plenary authority to govern and manage the University. Pursuant to that authority, the Board promulgated a reasonable regulation and policy governing grievance proceedings for its employees. Having done so, and thus having exercised its powers to manage and govern the University under AS 14.40 and the Alaska Constitution, applying the provi-

57/ Alaska Const., Art. VII, § 2.

58/ AS 14.40.120.

sions of the APA to the University's grievance procedures would be "inconsistent with the provisions of AS 14.40."

Since the Legislature did not enunciate ways in which the inclusion of the APA might be "inconsistent with the provisions of AS 14.40," it is helpful to examine the legislative history of subparagraph (a)(45) to determine the intent of the Legislature with regard to making the administrative adjudication provisions applicable to the University. 59/

The APA, enacted in 1959, did not originally designate the University of Alaska as one of the agencies to which it was intended to apply. The amendment to the APA adding subparagraph (a)(45) was one of several sections of Senate Bill 261, which was enacted during the 1977 Legislative Session. To put this in a proper historical context, it was during this period of time that the University was receiving intense criticism from the Legislature for deficiencies in its accounting and fiscal management procedures. Specifically, the Legislature was concerned about such matters as, for example, the University's perceived improper utilization of internal audit staff; bank account reconciliation problems; a perceived lack of adequate control over cash receipts and disbursements; perceived inadequate accounts receivable, billing, reconciliation, and collection procedures; a lack of expenditure control; deficiencies in purchasing procedures, etc. 60/ This criticism resulted in two very similar bills being

59/ Alaska Pub. Emp. Assoc. v. City of Fairbanks, 753 P.2d 725, 727 (Alaska 1988).

60/ R. 716-17.

introduced into the Legislature -- one in the House and one in the Senate -- both of which were directed at the fiscal management issues of the University and both of which contained proposed language amending the APA to include the University of Alaska in limited situations.

Senate Bill 261 was introduced into the Senate by the Rules Committee at the request of the Legislative Budget and Audit Committee, 61/ and contained three sections. Section 1 amended AS 44.62.330(a) by adding the University to the list of agencies subject to administrative adjudication procedures of the APA, with the limitation that it would not apply where inconsistent with AS 14.40. Section 2 proposed to add the University of Alaska to the definition of "state agency" for purposes of being included in the Fiscal Procedures Act provisions of AS 37.05, so that the University would be required, along with state agencies, to, for example, submit financial reports to the Department of Administration 60 days before the Legislature convened, 62/ participate in a centralized state accounting system, 63/ etc. Section 3 of Senate Bill 261 proposed to add the University of Alaska to the definition of "agency" for purposes of the Executive Budget Act, AS 37.07, so that the University would be required, along with state agencies, to submit its budget and

61/ R. 820.

62/ AS 37.05.030.

63/ AS 37.05.140.

goals and objectives to the Legislative Finance Division 64/ and to submit a performance report to the state's Office of Management and Budget. 65/

At the same time that the Senate was considering Senate Bill 261, the House was considering House Bill 361. 66/ That bill was introduced in the House by Representatives Miles, Malone, and Gardner and referred to the Health, Education and Social Services ("HESS") Committee and to the Finance Committee. The first three sections of House Bill 361 were identical to the three sections of Senate Bill 261. 67/ The House bill went on to add a fourth section deleting the Regents' control over the University's money (as opposed to its real and personal property), and a fifth section repealing several provisions of AS 14.40 dealing with fiscal matters. The House HESS Committee considered this bill at three separate meetings. 68/

The House HESS Committee adopted a proposed committee substitute for House Bill 361 which retained the three original sections of Senate Bill 261 but added sections requiring the University to appoint a comptroller, requiring the commissioner of administration to set criteria and guidelines for fiscal

64/ AS 37.07.050.

65/ AS 37.07.090.

66/ R. 837-38.

67/ Id.

68/ The minutes of those meetings show extensive discussion about the University's fiscal management problems and no mention of the amendment to the APA's administrative adjudication section. R. 839-58.

management practices under the Executive Budget Act and to delegate the performance of those functions to the Board, and giving the legislative auditor the "same right of access" to University management information "as exists with respect to every other state agency." 69/

House Bill 361 next went to the House Finance Committee. That Committee held a hearing on the bill, at which time the discussion concerned only the fiscal management provisions of the bill -- particularly a proposal to include in the bill a provision allowing the commissioner of administration to provide the University with cash advances on receivables to cure the University's cash flow problems. 70/ There were also general statements about the need to bring the University under the same fiscal and "other procedures" as those used by other agencies; however, no specific mention was made of the administrative adjudication provisions of the APA. 71/ No action was taken by the Committee at this meeting. Instead, Chairman Cowper appointed a subcommittee to prepare a proposed Finance Committee substitute for the House bill to be considered later that week. 72/ Thereafter, the Committee decided to hold off any

69/ R. 837-38.

70/ R. 859-60.

71/ Id.

72/ Id.

action on House Bill 361 until it had received Senate Bill 261, which had just been passed by the Senate. 73/

While the House had been considering House Bill 361, the Senate HESS Committee had met on Senate Bill 261 and had moved the bill from the Committee with a "do pass" recommendation. 74/ The minutes of that meeting indicate that the discussions of the bill focused solely on the University's fiscal management problems. Thereafter, the Rules Committee considered Senate Bill 261 and recommended that it be placed on the calendar. 75/

At the first Senate debate on Senate Bill 261, the bill was moved from second to third reading by unanimous consent. 76/ Senator Hohman, speaking in favor of the bill, spoke almost exclusively about the financial problems of the University and the need for legislation to require the University to conform its accounting and budgeting procedures to those of state agencies. 77/

Senator Kerttula, on the other hand, spoke vehemently against the bill, expressing his view that, while the problems resulting from the University's bad fiscal management practices were serious, the Regents should be left to solve the problems themselves, without undue interference from the executive and

73/ R. 861.

74/ R. 862.

75/ R. 866.

76/ R. 867.

77/ R. 716-19.

legislative branches. 78/ He argued strongly that placing the University under the Fiscal Procedures Act and the Executive Budget Act would ultimately bring the University too far under the control of the executive, and would result in undue interference with the University's academic freedom. 79/ Ultimately, the bill was taken from the calendar and held in third reading for a later calendar. 80/

Thereafter, Senator Kerttula moved that the bill be returned to second reading, where he proposed an amendment that would bring the Legislature and the Judiciary under the provisions of the Fiscal Procedures Act and the Executive Budget Act. 81/ Senator Kerttula's purpose in proposing the amendment was to illustrate how unnecessarily intrusive it would be to place the University under these provisions. 82/ Explaining his purpose to the Senate President, Senator Kerttula stated:

Mr. President, I believe that the framers of the constitution intended that the Judiciary, of course, and the Legislature be separated from the state government, and they also, in their wisdom, passed on that same intent for the University of Alaska.

Mr. President, I just insert this amendment to show you a bit of what we are doing. We are opening up through the budget process the possibility of petty governors and petty bureaucrats and petty finance officers to influence the direction of the University.

78/ R. 719-21.

79/ Id.

80/ R. 868.

81/ R. 869-70.

82/ R. 731-33.

It's a big error, as big an error as it would be if you inserted the Legislature and the Judiciary.

The molding of the students, the molding of the secondary institutions' functions, are not the prerogative of the Legislature. They shouldn't be done through the back door. I can't say to you how much I am opposed to approaching it this way.

* * *

Mr. President, that's the reason I bring this amendment before you. It is as important not to do it to the University as it is not to do it to the Legislature or the Judiciary. 83/

Having illustrated his point, Senator Kerttula withdrew the amendment. 84/

The next day, the bill was again before the Senate in third reading. Again, Senator Kerttula voiced his concerns that the bill entangled the government with the University to too great a degree. In response, Senator Tillion reminded the Senate that the bill was directed to a very limited area of University operations -- fiscal accountability. As he stated:

The bill is designed, really, just to make them run [their fiscal operations] the same as every other component of the state government so that we don't have the mental gymnastics of trying to figure out what really happened. 85/

Thereafter, the bill passed the Senate. 86/

Senate Bill 261 was read for the first time in the House and referred only to the House Finance Committee. That committee

83/ R. 731-32.

84/ R. 732-33.

85/ R. 745.

86/ R. 871.

met to consider Senate Bill 261 87/ and adopted a proposed House Finance Committee Substitute incorporating all three of the original Senate Bill 261 sections, but adding several sections from the House bill -- specifically, provisions requiring the University to appoint a comptroller, provisions giving the commissioner of administration authority to establish procedures for the care, control and management of all money of the University, provisions allowing the commissioner of administration to delegate to the Board the performance of any functions required by the commissioner and to be performed under the Fiscal Procedures Act, and provisions allowing the Department of Administration to make advances to the University during a fiscal year against non-state revenue sources. 88/

In addition to adopting a proposed Committee Substitute, the Finance Committee also adopted a letter of intent to accompany the substitute which discussed only the fiscal management issues and made it clear that the purpose of the bill was to mandate budgeting and accounting procedures for the University that are the same as those "for other state agencies." 89/ As stated clearly in that letter:

This legislation reflects the concern of the Legislature that implementation of sound budgeting, accounting, and fiscal management systems are essential to the University in carrying out its fundamental missions of teaching, research, and public service.

87/ R. 890-91.

88/ R. 893.

89/ R. 879.

However, it is the express intent of the Legislature that the establishment of policies and directives for the actual conduct of teaching, research, and public service functions of the University within the limitations of legislative appropriations and pertinent statutes are clearly the responsibility of the Board of Regents and not that of the Executive or Legislative branch. 90/

On second reading, the House unanimously adopted the House Committee Substitute for Senate Bill 261. 91/ During debates, two legislative concerns were obvious. The first was that the entire purpose of the legislation was to insure that the University was treated like other state agencies with respect to fiscal and budgetary procedures, primarily because the lack of uniform procedures had made it impossible for the Legislature to exercise any fiscal controls over the University's use of state funds. 92/ The second concern was that, whatever the magnitude of the University's problems in the area of fiscal management, the Legislature should not do anything that would impinge upon the University's independence in pursuit of its constitutional and statutory responsibilities. No mention was made at all during these debates of the administrative adjudication provisions of the APA.

The House then unanimously adopted a motion to advance the bill. Representative Carpenter, however, moved to amend it to delete what was then section 9 of the bill, the APA provi-

90/ Id.

91/ R. 881.

92/ R. 751-794.

sion. 93/ Carpenter's arguments in support of the amendment were brief. He stated that his amendment would "remove a section of the bill pertaining to the Administrative Procedures Act, specifically the adjudicatory provision." He then added:

I question whether this has any value in a bill designed to appreciate the fiscal management of the University of Alaska. In deleting the obligatory provision, I think it leaves a bill which (indiscernible) with the normal day-to-day functioning of the University. 94/

There was no further debate on the issue, and the motion to return the bill to second reading for purposes of Representative Carpenter's amendment was defeated. 95/ The House then proceeded to adopt the bill, which was concurred by the Senate, and the final version of the bill was transmitted to the Governor as HCS SB-261 am H. 96/

This lengthy description of the legislative history of AS 44.62.330(a)(45) shows beyond doubt that in passing the legislation, the Legislature had no intent whatsoever to make the APA applicable to the University's grievance procedures. Indeed, two themes that clearly emerge from the legislative history show just the opposite. First, in enacting HCS SB 261 am H, the Legislature's ultimate goal was to insure public accountability and instill control and responsibility in the University's fiscal

93/ R. 888.

94/ R. 804.

95/ R. 805.

96/ R. 824-26, 839.

management procedures. As capsulized by then-Representative

Cowper:

Now, the bill itself, as it stands right now, is a good bill. I agree that the University of Alaska has got to become publicly accountable for the funds that it gets from public sources. You're right. That's the reason for the legislation. That's the reason all of us support it. 97/

At the same time, the legislators were acutely concerned that they not interfere in any manner with the Board of Regents' and President's constitutional and statutory powers to govern and manage the University in its day-to-day academic and administrative functions. The clear evidence supporting this crucial concern is overwhelming. From the outset, Senator Sackett, the original proponent of the bill, never intended to impinge upon the Board's sovereignty in governing the personnel matters and other internal affairs of the University. In a memorandum to Senator Sackett responding to the Senator's request for a draft bill, Billy G. Berrier, Director of the Legal Services Division, explained to Senator Sackett:

As you have requested, we have drawn an act relating to accounting and fiscal matters of the University of Alaska which has the [e]ffect of providing that the accounting for the University will be done by the Department of Administration and that all of the fiscal controls applicable to any other unit of government are applicable to the university.

As you have instructed, this bill does not impair in any way the management function of the university, except in the area of fiscal controls. This would not, for example, in any way infringe upon the powers of the board of regents in academic matters, in matters relating to selection, retention or dismissal of faculty and other employees, in matters relating to

97/ R. 775.

admission of students, or curriculum, or in matters relating to management of university property, except of course, as limited by the amounts appropriated and available for expenditure. 98/

Thus, it was never Senator Sackett's intent, in proposing Senate Bill 261 in the first instance, to intrude into the internal management of the University in any way other than in fiscal controls.

The legislators who considered the bill shared Senator Sackett's concerns. As stated by Representative Miles during the House debates:

In the letter of intent, we specifically -- and I wholeheartedly concur -- that we specifically say that the Legislature doesn't want to move into the academic area, and it is the expressed intent of the Legislature that the establishment of policies, directives, etc., pertinent statutes, are clearly the responsibility of the Board of Regents and not that of the Executive or the Legislative branch.

I don't foresee any commissioner down the pike or any executive getting into the policy decisions of the University. I think that would be a terrible thing, we are speaking to the financial procedures and the method of financial management of the University. 99/

In response to those comments, Representative Meekins added:

Speaker, to add a little to what Representative Miles is just saying, I, too, am very concerned that no one interfere with the academic freedom of the University, and certainly this bill, in my opinion, does not do that. 100/

98/ R. 892. (emphasis added).

99/ R. 762-63.

100/ R. 764.

Two further statements made during the debates show the legislators' intent to stay out of the internal management functions of the Board. As Representative Rudd stated:

I think it is very important to remember that we don't have any business telling the University who is going to teach and what they are going to teach and where they are going to teach it, but we do have business, because we have been elected by the people of the state, to make sure that the state funds are used correctly, that they are not misused, and that the records are kept so that they are understandable to us and to the rest of the people of the state. . . . 101/

Representative Miles added:

Mr. Speaker, I think if there is any question on intent of the bill, it is very, very carefully spelled out in the letter of intent, which says that the Legislature does not want to get into the policy decisions of the University.

Thus, as can be so clearly seen from the legislative history, the Legislature had no intent to interfere with the Board's sovereign power to manage and govern the internal affairs of the University. Accordingly, there was no intent to have the administrative adjudication provisions of the APA apply to the University's grievance proceedings -- proceedings that are clearly matters of internal management.

The second theme that emerges from a review of the legislative history is that the Legislature was attempting, by passing this bill, to treat the University of Alaska in the same manner as state agencies with respect to fiscal management controls. For example, as mentioned earlier, Senator Tillion saw the purposes of the bill as requiring the University to conduct its

fiscal management procedures "the same as every other component of the state government. . . ." 102/ Similarly, Representative Meekins stated:

We are just trying to make the University fall under the same procedures and be treated as any other state agency. 103/

Another document associated with HCS SB 261 and H sheds further light on the legislative intent to treat the University as other state agencies are treated for purposes of fiscal management. As then-Attorney General Avrum M. Gross reported to Governor Hammond prior to the Governor's approval of the bill:

In effect, the bill places the university in a position analogous to all executive branch agencies for purposes of fiscal management while maintaining the University's constitutional academic autonomy. The underlying concept was developed jointly by the legislature and the executive branch, and the bill follows the concept developed. 104/

Thus, it is abundantly clear that one of the legislature's main goals in passing this bill was to insure that the University would be treated as other state agencies are treated with respect to fiscal controls. Even if one were to assume that the Legislature intended this similar treatment to extend to personnel matters, which is an assumption that is not supported by any evidence, that would still not have the effect of requiring the application of the APA to the University's grievance proceedings for, as is discussed in detail below, the internal personnel

102/ R. 745.

103/ R. 764.

104/ R. 893.

matters of state agencies are not subject to the administrative adjudication provisions of the APA, but instead are governed by the State Personnel Act. ^{105/} Accordingly, the administrative adjudication provisions of the APA, by their very terms, simply do not apply to the University's grievance procedures.

a. The University's Grievance Procedures Are Reasonable.

Under AS 14.40.170(b)(1), rules adopted by the Board for the government of the University need only be "reasonable" in order to constitute valid Board action. After a full review of the University's grievance procedures, Judge Shortell ruled that the procedures were "reasonable" and constituted valid Board action for purposes of AS 14.40, thus making the APA inapplicable. That finding should be affirmed on appeal.

Appellants concede on appeal that, in order to be reasonable, a rule need only be "just" or "sensible." They argue, however, that the grievance procedures do not meet that definition since they do not specifically provide for a method of preserving a record for appeal, an impartial hearing body, pre-hearing discovery, an appointed hearing officer, subpoena power, or representation by legal counsel.

The University respectfully submits that a grievance procedure need not meet all of the prerequisites of a full judicial trial in order to be "reasonable," as apparently argued by

^{105/} AS 39.25.010 - .220.



A

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*University's brief in support of
Motion for Summary Judgment
before Superior Court, pgs. 25-59.*

*University's brief in support
of motion for summary judgment
before Superior Court. pgs. 25-59*

again, since plaintiffs have no valid grievance pending before the Council, they have no standing before this Court and the University is entitled to judgment as a matter of law on their complaint.

In summary, in order properly to ask this Court to determine whether or not the provisions of the APA apply to the University's grievance procedures, plaintiffs must have a personal stake in the outcome of that determination, or standing before this Court. In order to obtain that requisite standing, plaintiffs must have filed a valid grievance with the Grievance Council in the first instance. Plaintiffs have not done that, however, for their complaint pending before the Council fails to meet the definition of a grievance contained in the relevant Interim Grievance Policy. Even if they had filed a valid "grievance," that grievance would not have been filed in a timely manner. Since, under either theory, plaintiffs do not have a valid grievance pending before the University Grievance Council, they have no standing before this Court. Accordingly, the University is entitled to judgment as a matter of law on plaintiffs' complaint.

B. THE APA DOES NOT APPLY TO THE UNIVERSITY OF ALASKA'S GRIEVANCE PROCEEDINGS.

Should the Court determine that plaintiffs have sufficient standing to pursue this action, the main issue before the Court becomes whether the administrative adjudication

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provisions of Alaska's Administrative Procedure Act ("APA") 81/ apply to the University's grievance proceedings. Defendants submit that, for all of the reasons set forth below, those provisions do not apply to the University's grievance proceedings. First, a careful analysis of the statute and its legislative history shows that the APA, by its own terms, does not apply to the University's grievance proceedings. Second, a review of the substantive provisions of the APA shows that the Act, by its nature, does not apply to matters of internal University management such as grievance proceedings. Third, the University has broad constitutional and statutory powers in the area of personnel management that were not intended to be circumscribed by the APA. Fourth, a review of the statutory framework governing personnel matters for state agencies and other public employers reveals that the APA was not intended to apply to University grievance proceedings. Finally, the due process clauses of the Alaska and United States Constitutions do not require the application of the administrative adjudication provisions of the APA to plaintiffs' grievance proceedings. Accordingly, the University is entitled to judgment as a matter of law on plaintiffs' complaint.

1. The APA, by its own terms, does not apply to the University's grievance proceedings.

81/ AS 44.62.330 - .360.

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The administrative adjudication provisions of the APA are not applicable to the University in a wholesale fashion, but rather in only a very limited manner. As AS 44.62.330(a)(45) clearly states, the administrative adjudication procedures of the APA apply to the University only where their inclusion is not "inconsistent with the provisions of AS 14.40." ^{82/} Thus, where the provisions of the APA are inconsistent with AS 14.40, the APA, by its own terms, does not apply to the University.

The University of Alaska is a constitutionally created land-grant university whose powers are derived primarily from the Alaska Constitution and secondarily from the Alaska Statutes in Title 14. Article VII, Section 3 of the Alaska Constitution states:

BOARD OF REGENTS OF UNIVERSITY. The University of Alaska shall be governed by a Board of Regents The Board shall, in accordance with law, formulate policy and appoint the president of the University.

Title 14 of the Alaska Statutes, the title specifically referenced by the APA, provides that the University of Alaska "shall be governed by a Board of Regents" ^{83/} Alaska Statute 14.40.170(a)(2) mandates that the Board shall be the body to determine the compensation of all professors, instructors, etc. Further, AS 14.40.170(b)(1) gives the Board of

^{82/} AS 44.62.330(e)(45).

^{83/} AS 14.40.120.

Regents the right to "adopt reasonable rules, orders, and plans . . . for the good government of the University"

As recently recognized by this Court, taken together, the constitutional and statutory provisions referenced above grant the University's Board of Regents "plenary authority to govern and manage the University." 84/ Pursuant to that authority, the Board promulgated a reasonable regulation and policy governing grievance proceedings for its employees. Having done so, and thus having exercised its powers to manage and govern the University under AS 14.40 and the Alaska Constitution, applying the provisions of the APA to the University Grievance Procedures would be "inconsistent with the provisions of AS 14.40."

Since the Legislature did not enunciate ways in which the inclusion of the APA might be "inconsistent with the provisions of AS 14.40," it is helpful to examine the legislative history of subparagraph (a)(45) to determine the intent of the Legislature in making the administrative adjudication provisions applicable to the University. 85/

84/ Decision and Order on Cross-Motions for Summary Judgment in Community College Coalition of Alaska, Inc. et al. v. University of Alaska, et al., No. JAN-87-3216 Civil, at 11 (Sept. 7, 1988, Shortell, J.).

85/ Alaska Public Employees Association v. City of Fairbanks, 753 P.2d 725, 727 (Alaska 1988).

The APA, enacted in 1959, did not originally designate the University of Alaska as one of the agencies to which it was intended to apply. The amendment to the APA adding subparagraph (a)(45) was one of several sections of Senate Bill 261, which was enacted during the 1977 Legislative Session. To put this in a proper historical context, it was during this period of time that the University was receiving intense criticism from the Legislature for deficiencies in its accounting and fiscal management procedures. Specifically, the Legislature was concerned about such matters as the University's perceived improper utilization of internal audit staff; bank account reconciliation problems; deficiencies in payroll systems and procedures; a perceived lack of adequate control over cash receipts and disbursements; perceived inadequate accounts receivable, billing, reconciliation, and collection procedures; a lack of expenditure control; untimely billings; grants and contracts; deficiencies in purchasing and accounts payable procedures, etc. ^{86/} This criticism resulted in two very similar bills being introduced into the Legislature -- one in the House and one in the Senate -- both of which were directed at the fiscal management issues of the University and both of which contained proposed language

^{86/} See Excerpts from the Alaska State Legislature Proceedings Before the Senate and House of Representatives, attached hereto as Ex. 4, at 3-4.

amending the APA to include the University of Alaska in limited situations.

Senate Bill 261 was introduced into the Senate on March 17, 1977 by the Rules Committee at the request of the Legislative Budget and Audit Committee, 87/ and contained three sections. Section 1 amended AS 44.62.330(a) by adding the University to the list of agencies subject to administrative adjudication procedures of the APA, with the limitation that it would not apply where inconsistent with AS 14.40.

Section 2 proposed to add the University of Alaska to the definition of "state agency" for purposed of being included in the ~~APA~~. Under that amendment, the University would be required, along with state agencies, to submit financial reports to the Department of Administration 60 days before the Legislature convened, 88/ to submit annual reports of the aggregate of all loans that it made or purchased during the year, 89/ to participate in a centralized

87/ See attachment 1 to Affidavit of Susan R. Burke, attached hereto as Ex. 5. Senator Sackett had asked the Budget and Audit Committee to seek introduction of the bill at the committee's March 16, 1977 meeting. See attachment 2 to Ex. 5. The draft bill is identical to the Senate Bill 261 that was introduced at the Committee's request. The Budget and Audit Committee minutes do not reflect any discussions on the provisions of the bill. The Committee voted 9 to 1 to sponsor the bill, with only Senator Kerttula voting not to do so.

83/ AS 37.05.030.

89/ AS 37.05.035.

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state accounting system, 90/ and to be subjected to other rigorous reporting and auditing requirements of the Fiscal Procedures Act.

Section 3 of Senate Bill 261 proposed to add the University of Alaska to the definition of "agency" for purposes of being included in the ~~Executive Budget Act AS 37.07.01~~. Under that amendment, the University would be required, along with state agencies, to submit its budget and goals and objectives to the Legislative Finance Division 91/ and to submit a performance report to the state's Office of Management and Budget. 92/

At the same time that the Senate was considering Senate Bill 261, the House was considering House Bill 361. 93/ That bill was introduced in the House by Representatives Miles, Mallone, and Gardner on March 16, 1977, and referred to the Health, Education and Social Services ("HESS") Committee and to the Finance Committee. The first three sections of House Bill 361 were identical to the three sections of Senate Bill 261 discussed above. 94/ The House bill went on to add a fourth section deleting the Regents' control over the University's money

90/ AS 37.05.140.

91/ AS 37.07.050.

92/ AS 37.07.090.

93/ Ex. 5, att. 3.

94/ Id.

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(as opposed to its real and personal property), and a fifth section repealing several provisions of AS 14.40 dealing with fiscal matters. The House HESS Committee considered this bill at three separate meetings. 25/

On April 2, 1977, the House HESS Committee adopted a proposed committee substitute for House Bill 361 which retained the three original sections of Senate Bill 251 but added sections reflecting a somewhat different approach to the fiscal management issues. 26/ Specifically, the substitute added provisions requiring the University to appoint a comptroller, requiring the commissioner of administration to set criteria and guidelines for fiscal management practices under the Executive Budget Act and to delegate the performance of those functions to the Board of Regents, and giving the legislative auditor the "same right of access" to University management information "as exists with respect to every other state agency." 27/

From the House HESS Committee, House Bill 361 went to the House Finance Committee. That Committee held a hearing on the House bill on April 19, 1977, at which time the discussion

25/ The minutes of those meetings show extensive discussion about the University's fiscal management problems and no mention of the amendment to the APA's administrative adjudication section. Ex. 5, atts. 5, 6, 7.

26/ Ex. 5, att. 4.

27/ Id.

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concerned only the fiscal management provisions of the bill -- particularly a proposal to include in the bill a provision allowing the commissioner of administration to provide the University with cash advances on receivables to cure the University's cash flow problems. 98/ There were also general statements about the need to bring the University under the same fiscal and "other procedures" as those used by other agencies; however, no specific mention was made of the administrative adjudication provisions of the APA. 99/ No action was taken on the bill by the Committee at this meeting. Instead, Chairman Cowper appointed a subcommittee to prepare a proposed Finance Committee substitute for the House bill to be considered later that week. 100/ On April 22, 1977, the Committee met and decided to hold off any action on House Bill 361 until it had received Senate Bill 261, which had just been passed by the Senate. 101/

While the House had been considering House Bill 361, the Senate HESS Committee had met on Senate Bill 261 on March 23, 1977, and had moved the bill from the Committee with a "de pass" recommendation without making any changes in the bill. 102/ The

98/ Ex. 5, att. 9.

99/ Id.

100/ Id.

101/ Ex. 5, att. 9.

102/ Ex. 5, att. 10.

minutes of that meeting indicate that the discussions of the bill focused solely on the University's fiscal management problems. 103/ On April 12, 1977, the Rules Committee considered Senate Bill 261 and recommended that it be placed on the April 13 calendar. 104/

The Senate first debated Senate Bill 261 on April 13, 1977. 105/ The bill was moved from second to third reading by unanimous consent. 106/ Senator Hohman, speaking in favor of the bill, spoke almost exclusively about the financial problems of the University and the need for legislation to require the University to conform its accounting and budgeting procedures to those of state agencies. 107/ Senator Hohman's only mention of Section 1 of the bill, the APA provision, came when he quoted from portions of a sectional analysis of the bill that had been prepared by Glen Vernon, a fiscal analyst for the Division of

103/ Id. The Senate Judiciary Committee also considered Senate Bill 261, but there are no records of the Committee's deliberations or actions except for the report of the "do pass" recommendation appearing in the Senate Journal of April 11, 1977. The Committee made no change in the bill. Ex. 5, att. 11.

104/ Ex. 5, att. 11 at 307.

105/ Ex. 4 at 2.

106/ Ex. 5, att. 11 at 829.

107/ Ex. 4 at 3-6.

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Legislative Finance. 108/ The entire portion of the analysis dealing with section 1 stated:

Section 1 of the bill would have the effect of placing the University of Alaska under the Administrative Procedures Act. This section would require the University to promulgate regulations and procedures so as to assure uniformity in administration of the University. Don Dafoe, retained as a consultant to the House Finance Committee feels this section is of dubious value, but sees no problem for the University if it is left in. 109/

Senator Kerttula spoke vehemently against the bill, expressing his view that, while the problems resulting from the University's bad fiscal management practices were serious, the Regents should be left to solve the problems themselves, without undue interference from the executive and legislative branches. 110/ According to Senator Kerttula, placing the University under the Fiscal Procedures Act and the Executive Budget Act would ultimately bring the University too far under the control of the executive, and would result in undue interference with the University's academic freedom. 111/ Apparently believing, however, that section 1 would not interfere signifi-

108/ See Ex. 5, Att. 12.

109/ Id.

110/ Ex. 4 at 6-8.

111/ Id.

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cantly with the Regent's control over the University, Senator Kerttula stated, in passing, that section 1 did not trouble him. 112/ Ultimately, the bill was taken from the calendar and held in third reading for the April 20th calendar. 113/

On April 20, 1977, Senator Kerttula moved that the bill be returned to second reading, where he proposed an amendment that would bring the Legislature and the Judiciary under the provisions of the Fiscal Procedures Act and the Executive Budget Act. 114/ Senator Kerttula's purpose in proposing the amendment was to illustrate how unnecessarily intrusive it would be to place the University under these provisions. 115/ Explaining his purpose to the Senate President, Senator Kerttula explained:

Mr. President, I believe that the framers of the constitution intended that the Judiciary, of course, and the Legislature be separated from the state government, and they also, in their wisdom, passed on that same intent for the University of Alaska.

Mr. President, I just insert this amendment to show you a bit of what we are

112/ Id. at 8.

113/ During the April 13 hearing, Senator Ray moved that the bill be held over until April 14. On April 14, Senator Hohman moved that the bill be taken from the calendar and held in third reading for April 20. That motion was adopted by unanimous consent. See Ex. 5, att. 11 at 849.

114/ Id. at 905-06.

115/ Ex. 4 at 18-20.

doing. We are opening up through the budget process the possibility of petty governors and petty bureaucrats and petty finance officers to influence the direction of the University. It's a big error, as big an error as it would be if you inserted the Legislature and the Judiciary.

The molding of the students, the molding of the secondary institutions' functions, are not the prerogative of the Legislature. They shouldn't be done through the back door. I can't say to you how much I am opposed to approaching it this way.

* * *

Mr. President, that's the reason I bring this amendment before you. It is as important not to do it to the University as it is not to do it to the Legislature or the Judiciary. 116/

Having illustrated his point, Senator Kerttula withdrew the amendment. 117/

On April 21, 1977, the bill was again before the Senate in third reading. 118/ Again, Senator Kerttula voiced his concerns and his opposition to the bill in that it entangled the government with the University to too great a degree. In

116/ Id. at 18-19.

117/ Id. at 19-20.

118/ Also on April 21, 1977, Jay Hogan, Director of Legislative Finance, sent George Hohman a memo in which he describes Senate Bill 261 and House Bill 361 and concludes that Senate Bill 261 is "the best bid." Ex. 5, att. 13. Hogan describes the Senate Bill's provisions as making "the University of Alaska a state agency with regards to the Administrative Procedures Act, the Executive Budget Act, and the Uniform Accounting Act." Id.

response, Senator Tillion reminded the Senate that the bill was directed to a very limited area of University operations -- fiscal accountability. As he stated:

The bill is designed, really, just to make them run [their fiscal operations] the same as every other component of the state government so that we don't have the mental gymnastics of trying to figure out what really happened. 119/

The bill passed the Senate on April 21, 1977 on a vote of 17 Yeas and two Nays, in exactly the form in which it had been introduced. 120/

Senate Bill 261, as passed by the Senate, was read for the first time in the House on April 22, 1977 and referred only to the House Finance Committee. 121/ The House Finance Committee met to consider Senate Bill 261 on April 23, 1977, 122/ and adopted a proposed House Finance Committee Substitute. 123/ This version of the Senate Bill incorporated all three of the original Senate Bill 261 sections, but added several sections from the House bill -- specifically, provisions requiring the University to appoint a comptroller, provisions giving the commissioner of

119/ Ex. 4 at 32.

120/ Ex. 5, att. 11 at 920.

121/ Id. at 965.

122/ Ex. 5, att. 15.

123/ Ex. 5, att. 1-b.

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administration authority to establish procedures for the care, control and management of all money of the University, provisions allowing the commissioner of administration to delegate to the Board of Regents the performance of any functions required by the commissioner and to be performed under the Fiscal Procedures Act, and provisions allowing the Department of Administration to make advances to the University during a fiscal year against non-state revenue sources. 124/

In addition to adopting a proposed Committee Substitute, the Finance Committee also adopted a letter of intent to accompany that proposed Committee Substitute. 125/ The letter of intent discussed only the fiscal management issues, and made it clear that the purpose of the bill was to mandate budgeting and accounting procedures for the University that are the same as those "for other state agencies." As stated clearly in that letter:

This legislation reflects the concern of the Legislature that implementation of sound budgeting, accounting, and fiscal management systems are essential to the University in carrying out its fundamental missions of teaching, research, and public service.

However, it is the express intent of the Legislature that the establishment of policies and directives for the actual conduct of teaching, research, and public

124/ Id.

125/ Ex. 5, att. 14 at 1019.

service functions of the University within the limitations of legislative appropriations and pertinent statutes are clearly the responsibility of the Board of Regents and not that of the Executive or Legislative branch. 126/

Senate Bill 261 was before the House in second reading on April 27, 1977. The House unanimously adopted the House Committee Substitute for Senate Bill 261 in lieu of Senate Bill 261. 127/ During these debates, two legislative concerns were obvious. The first was that the entire purpose of the legislation was to insure that the University was treated like other state agencies with respect to fiscal and budgetary procedures, primarily because the lack of uniform procedures had made it impossible for the Legislature to exercise any fiscal controls over the University's use of state funds. 128/ The second concern was that, whatever the magnitude of the University's problems in the area of fiscal management, the Legislature should not do anything that would impinge upon the University's independence in pursuit of its constitutional and statutory responsibilities. No mention was made at all during these debates of the administrative adjudication provisions of the House Committee Substitute.

126/ Id.

127/ Id. at 1063.

128/ Ex. 4 at 38-81.

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Two amendments to the House Committee Substitute were proposed during these debates and both were defeated. 129/ Ultimately, the bill was held over two times 130/ and was eventually taken up in the House on May 2, 1977. During the May 2 floor session, the bill was returned to second reading for purposes of an amendment. 131/ This amendment, which was adopted by the House, addressed the fiscal management provisions of the bill and made it clear that the procedures adopted by the commissioner of administration for the management of the University's money would be "in accordance with existing procedures for other state agencies." 132/

The House then unanimously adopted a motion to advance the bill to third reading. Representative Carpenter, however, moved to return the bill again to second reading for purposes of amending it to delete what was then section 9 of the bill, the administrative adjudication provision. 133/ Carpenter's arguments in support of the amendment were brief. He stated that his amendment would "remove a section of the bill pertaining to

129/ Ex. 5, att. 14 at 1063-65.

130/ Id. at 1096, 1118.

131/ Id. at 1149-50.

132/ Id.

133/ Id. at 1151.

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the Administrative Procedures Act, specifically the adjudicatory provision." He then added:

I question whether this has any value in a bill designed to appreciate the fiscal management of the University of Alaska. In deleting the obligatory provision, I think it leaves a bill which (indiscernible) with the normal day-to-day functioning of the University. 134/

There was no further debate on the issue, and the motion to return the bill to second reading for purposes of Representative Carpenter's amendment was defeated. 135/ The House then proceeded to adopt the bill, with the one amendment that had been previously adopted. 136/ When the bill was returned to the Senate, the Senate concurred in the House amendments, and the final version of the bill was transmitted to the Governor as HCS SB 261 am H. 137/

This lengthy, yet important, description of the legislative history of AS 44.62.330(a)(45) shows beyond doubt that in passing the legislation, the Legislature had no intent whatsoever to make the APA applicable to the University's grievance procedures. Indeed, two themes that clearly emerge from the legislative history show just the opposite. First, in

134/ Ex. 4 at 91.

135/ Id. at 92.

136/ Ex. 5, att. 14 at 1151.

137/ Ex. 4, att. 11 at 1152; Ex. 5, att. 1-c.

enacting HCS SB 261 am H, the Legislature's ultimate goal was to insure public accountability and instill control and responsibility in the University's fiscal management procedures. As capsulized by then-Representative Cowper:

Now, the bill itself, as it stands right now, is a good bill. I agree that the University of Alaska has got to become publicly accountable for the funds that it gets from public sources. You're right. That's the reason for the legislation. That's the reason all of us support it. 138/

At the same time that the legislators were imposing controls on the University's fiscal management procedures, they were acutely concerned that they not interfere in any manner with the Board of Regents' and president's constitutional and statutory powers to govern and manage the University in its day-to-day academic and administrative functions. The clear evidence supporting this crucial concern is overwhelming. First, from the outset, Senator Sackett, the original proponent of the bill, never intended to impinge upon the Board of Regents' sovereignty in governing the personnel matters and other internal affairs of the University. In a March 7, 1977 memorandum to Senator Sackett responding to the Senator's request for a draft bill, Billy G. Berrier, Director of the Legal Services Division, explained to Senator Sackett:

138/ Ex. 4 at 62.

As you have requested, we have drawn an act relating to accounting and fiscal matters of the University of Alaska which has the [e]ffect of providing that the accounting for the University will be done by the Department of Administration and that all of the fiscal controls applicable to any other unit of government are applicable to the university.

As you have instructed, this bill does not impair in any way the management function of the university, except in the area of fiscal controls. This would not, for example, in any way infringe upon the powers of the board of regents in academic matters, in matters relating to selection, retention or dismissal of faculty and other employees, in matters relating to admission of students, or curriculum, or in matters relating to management of university property, except of course, as limited by the amounts appropriated and available for expenditure. 139/

Thus, it was never Senator Sackett's intent, in proposing Senate Bill 261 in the first instance, to intrude into the internal management of the University in any way other than in fiscal controls.

Second, the legislators who considered the bill shared Senator Sackett's concerns. As stated by Representative Miles during the House debates:

In the letter of intent, we specifically -- and I wholeheartedly concur -- that we specifically say that the Legislature doesn't want to move into the academic area, and it is the expressed intent of the Legislature that the establishment of policies, directives, etc., pertinent statutes, are clearly the responsibility of

139/ Ex. 5, att. 16 (emphasis added).

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the Board of Regents and not that of the Executive or the Legislative branch.

I don't foresee any commissioner down the pike or any executive getting into the policy decisions of the University. I think that would be a terrible thing, we are speaking to the financial procedures and the method of financial management of the University. 140/

In response to those comments, Representative Meekins added:

Speaker, to add a little to what Representative Miles is just saying, I, too, am very concerned that no one interfere with the academic freedom of the University, and certainly this bill, in my opinion, does not do that. 141/

Two further statements made during the debates are particularly illuminating on the issue of the legislators' intent to focus solely on the fiscal aspects of the University and to stay out of the internal management functions of the Board of Regents. As Representative Rudd so stated:

I think it is very important to remember that we don't have any business telling the University who is going to teach and what they are going to teach and where they are going to teach it, but we do have business, because we have been elected by the people of the state, to make sure that the state funds are used correctly, that they are not misused, and that the records are kept so that they are understandable to us and to the rest of the people of the state. . . . 142/

140/ Ex. 4 at 49-50.

141/ Id. at 51.

142/ Ex. 4 at 60.

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Representative Miles further added, immediately prior to the passing of the bill:

Mr. Speaker, I think if there is any question on intent of the bill, it is very, very carefully spelled out in the letter of intent, which says that the Legislature does not want to get into the policy decisions of the University.

Thus, as can be so clearly seen from the legislative history, the Legislature had no intent to interfere with the Board of Regents' sovereign power to manage and govern the internal affairs of the University. Accordingly, there was no intent to have the administrative adjudication provisions of the APA apply to the University's grievance proceedings, proceedings that are clearly matters of internal management.

The second theme that emerges from a review of the legislative history is that the Legislature was attempting, by passing this bill, to treat the University of Alaska in the same manner as state agencies with respect to fiscal management controls. For example, as mentioned earlier, Senator Tillion saw the purposes of the bill as requiring the University to conduct its fiscal management procedures "the same as every other component of the state government. . . ." 143/ Similarly, Representative Meekins stated:

143/ Ex. 4 at 32.

We are just trying to make the University fall under the same procedures and be treated as any other state agency. 144/

Another document associated with HCS SA 261 am H sheds further light on the legislative intent to treat the University as other state agencies are treated for purposes of fiscal management. As then-Attorney General Avrum M. Gross reported to Governor Hammond prior to the Governor's approval of the bill:

In effect, the bill places the university in a position analogous to all executive branch agencies for purposes of fiscal management while maintaining the University's constitutional academic autonomy. The underlying concept was developed jointly by the legislature and the executive branch, and the bill follows the concept developed. 145/

Thus, it is abundantly clear that one of the legislature's main goals in passing this bill was to insure that the University would be treated as other state agencies are treated with respect to fiscal controls. Even if one were to assume that the Legislature intended this similar treatment to extend to personnel matters, which is an assumption that is not supported by any evidence, that would still not have the effect of requiring the application of the APA to University's grievance proceedings for, as is discussed in detail below, the internal personnel matters of state agencies are not subject to the

144/ Id. at 51.

145/ Ex. 5, att. 17.

administrative adjudication provisions of the APA, but instead are governed by the State Personnel Act. 146/ Accordingly, the administrative adjudication provisions of the APA simply do not apply to the University's grievance procedures.

In summary, upon reviewing the entire legislative history of the bill ultimately adopted by the Legislature to amend the APA to include the University, there can be no doubt that the Legislature had no intention whatsoever for the administrative adjudication provisions of the APA to apply to the University's grievance proceedings. The bill amending the APA to include the University was directed solely to requiring the University to become publicly accountable for the funds that it received from public sources. It had no effect at all on the University's internal day-to-day functioning, and indeed, there is much evidence that the Legislature was very careful to stay out of the Board of Regents' powers to govern the University. Accordingly, it must be concluded that the language of AS 44.62.330(a)(45) specifying that the APA would not apply to the University if its "inclusion is inconsistent with the provisions of AS 14.40" meant that the administrative adjudication provisions of the APA would not apply to the University in areas such as internal personnel management, where the Board of Regents and the president have plenary powers to govern and manage the

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146/ AS 39.25.010 - .220.

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University under AS 14.40. Accordingly, the APA, by its own terms, does not apply to the University's grievance proceedings.

2. The APA, by its nature, does not apply to the University's grievance proceedings.

As shown above, the administrative adjudication provisions of the APA, by their own terms, do not apply to the University's grievance proceedings. A close look at the substantive provisions of the statute show as well that, for at least four reasons, the provisions do not apply to the University's grievance procedures. First, the administrative adjudication provisions of the APA are directed only toward an agency's actions in dealing with third parties in the granting or denying of a right, authority, license, or privilege. Second, the administrative adjudication provisions of the APA apply only where an agency statute expressly provides for a hearing and adjudication. Third, a University grievance proceeding is not a "procedure" within the meaning of AS 44.62.330(a). Finally, the administrative adjudication provisions of the APA apply only where one raises adjudicative issues, not legislative matters as plaintiffs have done here. Accordingly, the University is entitled to judgment as a matter of law on this issue.

A close reading of the APA shows clearly that the Legislature meant for the administrative adjudication provisions of that statute to apply only to agency actions in dealing with third parties in granting or denying "a right, authority,

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license, or privilege. . . ." 147/ For example, the administrative adjudication provisions apply to numerous professional examining boards that grant or deny occupational licenses, such as the Board of Chiropractic Examiners 148/, the Board of Dental Examiners 149/, the Board of Examiners in Optometry 150/, the State Medical Board 151/, the Boards of Nursing 152/, Pharmacy 153/, and Public Accountancy 154/, and the Real Estate Commission. 155/ The administrative adjudication provisions also apply to such agencies as the Department of Public Safety, with respect to the suspension or revocation of a security guard's license, 156/ the Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors, 157/ and the Alaska Commission

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- 147/ AS 44.62.330, .370.
148/ AS 44.62.330(a)(2).
149/ Id. at (a)(3).
150/ Id. at (a)(6).
151/ Id. at (a)(8).
152/ Id. at (a)(10).
153/ Id. at (a)(11).
154/ Id. at (a)(12).
155/ Id. at (a)(14).
156/ Id. at (a)(23).
157/ Id. at (a)(27).

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on Postsecondary Education with respect to the denial of applications and revocation of authorizations and permits. ^{158/} Obviously, as this list shows, the adjudication provisions of the APA were clearly meant to apply only to agencies acting in their regulatory or licensing capacities, not to intra-agency personnel matters.

A similar result was reached by the Supreme Court of Arkansas in Arkansas Livestock & Poultry Commission v. House, ^{159/} where the court was asked to decide whether the discharge of an employee of the Arkansas Livestock & Poultry Commission was subject to the state's Administrative Procedures Act. In reaching the conclusion that it was not, the court stated:

It seems too obvious for serious argument that the Administrative Procedure Act . . . was never designed nor intended to create supervisory responsibility by the judicial branch of state government over the day-to-day actions of the executive branch, including the hiring and firing of personnel, but rather, to establish procedures for hearings and notice (which meet due process requirements) in those functions of the executive branch which are basically adjudicatory or quasi-judicial, particularly with respect to rule making, the renewal or revocation of licenses, and where, under law, an agency of the State must make orders based on the adjudication process. . . . It hardly need be said that firing employees is clearly an

^{158/} Id. at (a)(43).

^{159/} 634 S.W.2d 388 (Ark. 1982).

administrative act and not a matter that involves the quasi-judicial function of an agency. If firing is subject to judicial review then we can think of no logical reason why hiring should not be also. And if hiring is, it follows that promotion would also come under our purview, and so on and so on.

. . . Obviously, when and under what circumstances an agency employee should be terminated is not a judicial function, but a basic and perfunctory part of the administrative routine of an agency in its discharge of public business and nothing would be more inimical to the separation of powers than for the judicial branch to claim the power to monitor such decisions. 160/

Here, as in the Arkansas Livestock case, "it seems too obvious for serious argument" that the administrative adjudication provisions of Alaska's APA were not intended to apply to the day-to-day internal management actions of state agencies, but rather to their official actions in dealing with third parties in granting or denying rights, authorities, licenses, or privileges. 161/ Accordingly, the administrative adjudication provisions do not apply to the University's grievance proceedings.

160/ Id. at 389; see also Abramson v. Board of Regents, University of Hawaii, 548 P.2d 253, 263 (Hawaii 1976) (administrative adjudication provisions of state APA that apply to the "determination of legal rights, duties, or privileges" not applicable to university's instructor's denial of tenure).

161/ See also Klein v. State Board of Education, No. 6391 (Ala. Civ. App. June 1, 1988), 1988 Ala. Civ. App. Lexis 179 (APA applicable to contested cases, not to University personnel matters).

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A second alternative reason for not applying Alaska's APA to the University's grievance proceedings is that Alaska's APA applies only where a particular agency statute provides for a hearing and adjudication. In McCarrey v. Commissioner of Natural Resources, 162/ the Alaska Supreme Court had the opportunity to determine exactly the type of proceedings to which the adjudicative provisions of the APA applied. There, the holder of a state grazing lease from the Division of Lands of the Department of Natural Resources claimed that the administrative adjudication provisions of the APA should have been applied to the termination of her grazing lease, since AS 44.62.330(a) made those provisions applicable to the "Division of Lands under the Alaska Lands Act where applicable." 163/ The Supreme Court rejected this contention because it found no indication in the Alaska Lands Act that the application of the administration adjudication provisions of the APA was required. 164/ In reaching that conclusion, the Court analogized Alaska's APA to the Federal Administrative Procedure Act, 165/ noting that

The adjudicatory provisions of the Federal Administrative Procedure Act apply only "in every case of adjudication required by

162/ 526 P.2d 1353 (Alaska 1974).

163/ See AS 44.62.330(a)(9).

164/ 526 P.2d at 1357.

165/ 5 U.S.C. § 500 et seq.

statute to be determined on the record after opportunity for an agency hearing. . . ." In order for this provision to be operative, the particular agency statute in question must expressly provide for a hearing and adjudication. 156/

Since the Alaska Lands Act did not require a determination on the record after an opportunity for an agency hearing, the Alaska APA did not apply to the termination of the leaseholder's lease.

As established in McCarkey, the administrative adjudication requirements of Alaska's APA apply only where a particular agency statute expressly provides for a hearing and adjudication on the record. Since neither Title 14 nor any other statute provides for a hearing to be determined on the record in faculty grievance proceedings, the administrative adjudication provisions of the APA simply do not apply to the University's grievance proceedings.

A third reason that the administrative adjudication provisions of the APA do not apply to the University's grievance proceedings is that those proceedings are not "procedures" within the meaning of AS 44.62.330. As noted earlier, that section states that the "procedures" of the listed boards, commissions, etc. shall be conducted under the administrative adjudication provisions of the statute. To determine whether a faculty

166/ 526 P.2d 1357 n.17.

grievance proceeding is a "procedure" of a state agency subject to the APA and therefore covered by the APA, it is helpful to turn to AS 44.62.640, the definition section of the APA. Subsection (a)(3) of that provision states that

"regulation" means every rule, regulation, order or standard of general application . . . adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of a state agency; . . . whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public. 167/

It could hardly be argued, and indeed is firmly established by the Alaska State Personnel Act, that rules concerning employee grievances "relate to the internal management of state agencies." 168/ Therefore, rules governing faculty grievances relate to the internal management of the University and are not "covered" by the APA. If faculty grievance rules are not "covered" by the APA, then they do not "govern [the University's] procedure" for purposes of AS 44.62.330. Therefore, they are not part of the "procedure" of a state agency subject to the administrative adjudication requirement of Alaska's APA.

Finally, even assuming that the administrative adjudication provisions of the APA could possibly apply to the

167/ AS 44.62.640(a)(3).

168/ AS 39.25.140.

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University's grievance proceedings, which the University denies, it is clear that, under the APA, plaintiffs in this case would still not be entitled to the APA trial-type hearing that they seek. This is so because the administrative adjudication requirements of the APA are intended to apply only where adjudicative facts are raised that require a quasi-judicial proceeding for determination, not where mere legislative matters are at issue.

The distinction between adjudicative and legislative matters is best illustrated by an Attorney General's opinion written in 1960 addressing the question whether the administrative adjudication requirements of the APA applied to the hearing required under the Alaska Banking Code in passing upon applications for bank charters and certificates of authority for branch banks. 169/ The Attorney General observed that "chapter 1 [the rule making provisions] of the Administrative Procedure Act sets forth the procedure which must be followed when an agency exercises its quasi-legislative power." 170/ He then stated that

Chapter 2 [the administrative adjudication provision] provides for adjudication and the kind of hearing which would be designated as a trial. A trial would not be necessary or desirable in a quasi-legislative proceeding. This is recognized in the statute by the provision for a different kind of hearing

169/ 1960 Op. Att'y Gen., No. 7.

170/ Id. at 3.

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based upon argument in Chapter 1 which is made applicable to quasi-legislative proceedings. Therefore, it is believed that Chapter 2 was intended to be applicable to quasi-judicial proceedings and not quasi-legislative proceedings. 171/

The Attorney General concluded that "[a trial-type] hearing would not be required under the Administrative Procedure Act unless there was an issue of adjudicative fact which could be determined under Chapter 2 of the Act." 172/ In distinguishing between adjudicative and legislative facts, the Attorney General stated:

Adjudicative facts are the facts about the parties and their activities, businesses and properties. Adjudicative facts . . . are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Yet people who are not necessarily

171/ Id. at 4-5 (emphasis added).

172/ Id. at 5.

parties, frequently the agencies and their staffs, may often be the masters of legislative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues of that legislative facts. 173/

In this case, plaintiffs are seeking a trial-type hearing in connection with their grievance concerning the University's interim policy on rank. As discussed above, however, that grievance does not challenge the applicability of the policy to plaintiffs, but rather challenges the basic wisdom and fairness of the University's policy. Seeking a determination on that issue raises legislative, not adjudicative, facts. The establishment of a uniform policy does not turn on facts involving particular activities or circumstances of the plaintiffs, but involves instead considerations of the "good government" and "good of the University," matters which are uniquely committed to the discretion of the Board of Regents. The administrative adjudication provisions of the APA therefore simply would not apply to such a quasi-legislative determination.

In summary, a review of the substantive procedures of the administrative procedures of the administrative adjudication provisions of the APA clearly shows that they were never intended to be applied to the University's grievance proceedings. First,

173/ Id. at 2-3 (quoting 1 Davis, Administrative Law Treatise at 413 (1958)).

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the provisions were clearly meant to apply only to the actions of the enumerated agencies in dealing with third parties in the granting or denying of rights, authorities, licenses, or privileges. Second, the administrative adjudication provisions do not apply to University's grievance proceedings because there is no express provision in Title 14 or elsewhere that provides for a hearing and adjudication on the record in connection with such matters. Third, a University grievance proceeding is not a "procedure" within the meaning of AS 44.62.330 because it relates solely to the internal management of the University. Finally, even assuming that the provisions could apply to the University's grievance proceedings, they would not apply in this particular case since plaintiffs raise only legislative issues before the Council and not adjudicative issues. Accordingly, the University is entitled to judgment as a matter of law on this issue.

- 3. The University has broad explicit and implied constitutional and statutory powers in the area of personnel management that were not intended to be circumscribed by the APA.

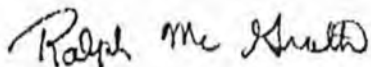
As clearly shown above, a careful review of the terms and the nature of the APA shows that the administrative adjudication provisions of that statute were not intended to be applied to the University's grievance proceedings. A similar review of the constitutional and statutory powers of the University further shows that the University has very broad powers in the area of personnel management that were not intended

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3. Resolution from Southeast Faculty Senate in opposition to the Bill which passed unanimously.
4. Copy of Aden Superior Court order (originating issue).
5. Copy of Supreme Court decision regarding McGrath and Mohr. (and 130 faculty statewide).
6. News story regarding Supreme Court Decision.

Should you have further questions or concerns we would be happy to assist.

Sincerely,



Ralph Mc Grath, President
ACCPT

To: Senator Pat Rodey and Senate Judiciary Committee

Information regarding SB441 exempting University of Alaska from the Administrative Procedures Act

1. Explanatory summary sheet.
2. University Legislative Proposal Form (note university states students and faculty will support this legislation).
3. Resolution from Southeast faculty senate passed unanimously opposed to SB 441 and HB 549.
4. Copy Aden decision. (originating issue).
5. Copy Supreme Court decision regarding McGrath and Mohr (and 130 other faculty)
6. News story related to Supreme Court decision.

The University of Alaska has requested a bill exempting it from the Alaska Administrative Procedures Act. This is not good legislation and it has a long and expensive history.

The University of Alaska was sued by a Professor named Aden, the gist of the litigation revolved around the fact that Ms. Aden was denied tenure--she grieved the issue; however the grievance procedure in place did not afford Ms. Aden basic protections which are required under the Alaska Administrative Procedures Act and available to all other state employees. The court ruled the Administrative Procedure Act should have applied to the Aden grievance. Soon thereafter, and following the 1987 absorption of the community college teachers into the university, the university:

1. unilaterally repudiated the existing collective bargaining agreement between the University of Alaska and the Alaska Community Colleges' Federation of Teachers 2404 (the union for the community college teachers). The union contract contained a grievance procedure which paralleled the Administrative Procedures Act.

2. Merged the 300 community college teachers into the university personnel procedures and grievance policy while simultaneously denying 130 of them tenure and/or proper placement into the job title grids.

The ACCFT 2404 filed a grievance on behalf of its 130 injured members. Naturally, the University refused to recognize the grievance procedure in the union contract--so the grievance was filed under the university's grievance policy. Since the final determinator of the university's grievance procedure is the President of the University---the same person who remanded the 300 community college teachers to the university personnel procedures and the inappropriate job title grids--a university grievance committee recommended to the then President of the university Donald O'Dowd--that the existing grievance procedure--was inadequate and the Administrative Procedures Act should apply. Donald O'Dowd rejected the recommendation of the committee and denied the grievance.

The ACCFT filed litigation--which ultimately went to the Alaska Supreme Court. On 6/26/91 in a 5-0 decision the Court ruled that the Administrative Procedures Act must apply to the University of Alaska grievance policy. (see attached).

The proposed legislation is not about students and their complaints about grades, cafeteria food and the like. The proposed legislation is an attempt on the part of the University of Alaska to deny all of its 3500 employees the protections that all other State employees have.

The University lost in Court and is now attempting to subvert the law through this legislation. Outside legal counsel, Tom Owens so far has been paid \$88,641.00 to represent the University in this matter and has lost.

1992 LEGISLATIVE PROPOSAL FORM

HB 549
SB 441

DEPARTMENT: The University of Alaska

SUBJECT OF PROPOSED BILL: Exempt University of Alaska Grievance Policy from the Quasi-judicial proceedings of Administrative Procedures Act

SUMMARY OF INTENT: *Include what the problem is, how this proposal solves it, and how many incidents have occurred which necessitate this change.*

In May 1988, Ralph McGrath and Don Mohr filed a class-action type grievance on their own behalf and that of a number of other former community college faculty members who are now on the UAA faculty. The grievants specifically requested that the matter be heard pursuant to the Alaska Administrative Procedures Act (AAPA). The UAA Grievance Council denied that request, and in September 1988 Mr. McGrath, et al, filed a complaint against the University for declaratory judgment and injunctive relief ordering the University to conduct the grievance hearing in accordance with the AAPA. Following thorough briefings by both parties, Judge Brian Shortell issued an order in March 1989 holding that the University is not required to conform its grievance hearings with the procedural requirements of the AAPA. Plaintiffs appealed this decision to the Alaska supreme court, and in June 1990, the Supreme Court overturned the earlier decision opining that since the University was not specifically excluded from the requirements of the AAPA, it was, therefore, required to implement grievance procedures pursuant to the AAPA.

The University is seeking a clear exemption from the requirements in AS 44.62.330 (a)(45). The AAPA grievance procedures do not apply to any employee group in the state, and there is a substantial body of evidence from legislative hearings that there was no intent that the AAPA be applied to University grievance procedures. The quasi-judicial proceedings included in the AAPA are not intended for employee or student grievances, but rather for citizen grievances against state boards and commissions. Employee and student grievance procedures are traditionally built around a process of peer review and consideration with appeal rights at several levels all the way to the President. The majority of University grievances are resolved at an early stage of review, and are done so at little or no cost to the grievant or to the University. The imposition of the AAPA procedures, however, will now impose a quasi-judicial proceeding on all university grievances, including the utilization of a formal hearing officer. The additional cost, complexity and formality of the AAPA requirements are contradictory to the resolution of student and employee grievances, and are contradictory to the collegial approach that characterizes a university setting.

ESTIMATED FISCAL IMPACT:

Operating: Without Legislation -- \$200,000/year

Capital: None

WHAT OTHER DEPARTMENTS WILL BE AFFECTED BY THIS PROPOSAL: None

WHO WILL SUPPORT THIS BILL: University faculty, staff and students

WHO WILL OPPOSE THIS BILL: Possible: Alaska Community College Federation of Teachers (ACCFT). (The ACCFT is a collective bargaining unit that represented faculty assigned to the states' community colleges. They currently represent the 9 faculty at Prince William Sound Community College)

BRIEFLY OUTLINE ANY PRECEDENTS FOR THIS PROPOSAL IN ALASKA OR OTHER STATES. As stated above, there is no employee group in the state that uses the AAPA model for grievance procedures. The quasi-judicial proceedings are expensive, cumbersome, and ill-suited to employee dispute resolution.

IF A SUBSTANTIALLY SIMILAR BILL HAS BEEN DRAFTED AND NOT INTRODUCED, OR INTRODUCED AND NOT PASSED, PLEASE GIVE LAWLOG OR BILL NUMBER:

Sept 20, 1991
Date

Jerome Komisar, President
University of Alaska Statewide System

Governor's Office Notes:

It has come to our attention that the administration of University of Alaska, through the Governor's Office, has requested the introduction of a bill to exempt the University from the administrative adjudication provisions of the Administrative Procedure Act. The Faculty Senate of the University of Alaska Southeast categorically opposes such an action, and has passed the following resolution.

"WHEREAS the University of Alaska is currently bound by the adjudication provisions of the Administrative Procedure Act,

WHEREAS the Act provides an equitable venue for resolution of disputes,

WHEREAS the exemption of the University from the Act's adjudication provisions would substantially disadvantage appellants in challenging University policies, procedures and decisions,

BE IT RESOLVED that the Faculty Senate of the University of Alaska Southeast categorically opposes any legislation which would grant the University exemption from said provisions of the Administrative Procedure Act, and calls on all members of the Alaska State Legislature to reject the attempt by the University to diminish the appellant rights of its employees."

Sincerely,

Michael Baran

President, UAS Faculty Senate

Note - per P.S. Campus Rep

Passed 26-0

Fri - UAS Fac. Senate

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

LOIS ADEN,)
)
 Plaintiff,)
)
 vs.)
)
 UNIVERSITY OF ALASKA,)
)
 Defendant.)

FILED IN THE COURT
STATE OF ALASKA THIRD DISTRICT

AUG 25 1987

Clerk of the said Courts
By RLW Deputy

Case No. JAN-85-17179 Civil

ORDER REGARDING ADMINISTRATIVE HEARING

On October 1, 1986, this Court ordered that Plaintiff must exhaust her administrative remedies with Defendant University of Alaska's Grievance Council before litigating UAA's non-retention decision before the Court. At that time, the Court also ordered further briefing on the issue of whether Alaska's Administrative procedures Act, AS 44.62.330 - .630 (APA) applies to such grievance proceedings.

On February 2, 1987 the Court, having reviewed those supplemental briefings, found that Defendant University of Alaska's Grievance Procedure must follow the requirements of the APA. Thus, the Court ordered Defendant UAA to modify the Grievance procedure, as set out in the University of Alaska Regents' Policy §04.04.01 and University of Alaska Regulation §04.04.01, to comport with the requirement of the APA.

Since the parties were still unable to agree upon an administrative hearing procedure, the Court, on May 11, 1986, further ordered each party to submit a proposed order setting forth the administrative hearing procedure which each party desired this Court to adopt. Having reviewed those proposals, the Court Hereby Orders as follows:

1. The administrative hearing of Plaintiff's grievance of the University's non-retention decision shall be conducted in accordance with the procedures set forth

below. These procedures are based on the University of Alaska Regents' Policy §04.04.01, but have been modified to comport with the requirements of the Alaska Administrative Procedures Act.

2. Plaintiff shall have 20 days from the date of this order to file a written grievance in accordance with University of Alaska Regulation §04.04.01(c).

3. The preliminary investigation provided for in Regulation §04.04.01(d) and the option of dismissing the grievance provided for in Regulation §04.04.01(e) shall be omitted, and Plaintiff's grievance shall proceed directly to hearing.

4. Plaintiff's grievance shall be heard by a five member Grievance Council, selected as provided for in Policy §04.04.01(c).

5. The hearing shall be presided over by a hearing officer appointed by the Governor in accordance with AS 44.62.350. Such a hearing officer shall have all the powers and duties of an administrative hearing officer under the Administrative Procedures Act.

6. In accordance with AS 44.62.450(c), any party may seek disqualification of the hearing officer or a member of the Grievance Council by filing a written challenge, stating with specificity the grounds for such a request. If a party seeks to disqualify a Grievance Council member, the other members shall determine the issue.

7. The Grievance Council will convene a hearing within 30 days of the filing of Plaintiff's written grievance or within 30 days of the beginning of the fall term, whichever is later. The time for convening a hearing will be tolled for a review of any challenge for cause of a council member or hearing officer. The Grievance Council shall complete the hearing as promptly as is reasonably possible.

8. As provided for by AS 44.62.430, before the hearing begins the Grievance Council shall issue subpoenas

at the request of a party in accordance with the rules of civil procedure. After the hearing begins, either the Grievance Council or the hearing officer may issue subpoenas.

9. As provided in University of Alaska Regulation §04.04.01(f), and in accordance with AS 44.62.460, the parties at the Grievance Council hearing shall have the right to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues, even though that matter was not covered in the direct examination; to impeach any witness regardless of which party called him/her to testify; to rebut evidence; and to be advised by counsel. *The Court modifies (to allow) (B) in accordance with this section, the parties do not have the right to have legal counsel make formal appearance, examine witnesses, or address the Council.* (B) *at their own expense*

10. In accordance with 44.62.450(d), the proceedings at the hearing shall be recorded. *at defendant's expense (B)* The Grievance Council shall be responsible for ensuring that this is done.

11. In accordance with 44.62.500 and in modification of Policy §04.04.01(g), the Grievance Council shall render a decision in this matter. Any member of the Council who has not heard the evidence may not vote on the decision. (C) The Hearing Officer shall be present at all deliberations to advise and assist the Grievance Council.

12. In the event the Grievance Council recommends that Plaintiff's grievance should be denied for untimeliness, the Council shall still hear the grievance and make findings and recommendations on the merits.

DATED at Anchorage, Alaska, this 28th day of August, 1987.

I certify that on 8-27-87 a copy of this document was sent to:
 CASE Accused(s) of Record
 Plaintiff Defendant
 Other
By: Halle Date: 8/27/87 Deputy Clerk

Douglas J. Stumpe
DOUGLAS J. STUMPE
Deputy Clerk

(D) (Cont'd)
The final decision herein may be rendered by the Chancellor of the University, provided that the Chancellor has "heard" the evidence herein, meaning listened to or read the record, exhibits and arguments, and has he also reviewed the recommendations, findings and conclusions.

Notice: This 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 SUPREME COURT OF THE STATE OF ALASKA

RALPH McGRATH and)	
DON MOHR,)	
)	Supreme Court No. S-3418
Appellants,)	
)	Superior Court No.
v.)	3AN-SB8-08936 Civil
)	
UNIVERSITY OF ALASKA,)	<u>O P I N I O N</u>
)	
Appellee.)	[No. 3708 - June 21, 1991]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Brian C. Shortell, Judge.

Appearances: Robert A. Royce, Jermaine Dunnagan & Owens, Anchorage for Appellants. Thomas P. Owens, Jr. and C. Ann Courtney, Owens & Turner, P.C., Anchorage, William R. Kauffman, Fairbanks, for Appellee.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

RABINOWITZ, Chief Justice.

I. FACTS AND PROCEEDINGS

The University of Alaska ("University") is a statewide institution which operates both four-year universities and community colleges. In 1987, the University undertook a

system-wide restructuring and eliminated the separate administration of the community colleges. Previously, the faculty at the community colleges had been represented by the Alaska Community Colleges' Federation of Teachers, Local 2404, and covered by a collective bargaining agreement. This agreement had no rank or tenure provisions. After the restructuring, the community colleges' faculty was offered an opportunity to transfer to the combined faculty of the University of Alaska. In the combined faculty, the community college faculty would not have union representation and the employees would be subject to the same rank and tenure system as their colleagues at the University of Alaska.

All members of the community colleges' faculty were offered an opportunity to transfer to the combined faculty, and all but one accepted. The University's Board of Regents adopted a policy "to provide the guidelines for faculty appointment, tenure, academic ranks, and salary for faculty in the transition." The policy provided that former full-time community college faculty with seven full years of service were eligible to receive tenure; those with four to six years were eligible to receive two-year contracts; and those with fewer years of service were eligible to receive one-year contracts. No former community college faculty member was offered a full-professorship; the highest rank offered was associate professor.

Many community college faculty members were dissatisfied with their rank and tenure assignments. Associate Professor Don Mohr, as a representative of the community colleges' faculty union,

filed an informal grievance on behalf of faculty members who claimed that they were wrongly denied tenure. Similarly, Associate Professor Ralph McGrath requested a change in the rank assignments. Thereafter, the two professors filed a formal grievance on behalf of themselves and seventy-three other former community college faculty members.

At the time Mohr and McGrath filed their initial complaints, the University of Alaska's administration had not yet established grievance procedures for the newly integrated institution. The Anchorage campus chancellor adopted an interim grievance procedure, which mirrored the procedures previously used by the Anchorage campus. The chancellor then appointed an interim grievance council ("council") to implement the interim procedures.

The council conducted a preliminary investigation and determined that a grievance hearing should proceed. Additionally, the council recommended that the University hold this formal grievance hearing in accordance with the provisions of Alaska's Administrative Procedure Act ("APA"), AS 44.62.330-.650.

However, the president of the University rejected the council's recommendation that the grievance be processed in accordance with the APA. Instead, it determined that the grievance would be processed under the Board of Regents' Policy, see 04.04.01 (June 4, 1987), and the interim grievance procedures. Under the Board of Regents' policy, the council was required to recommend dismissal or hold a hearing on the grievance within thirty days of its filing, and then forward a recommendation to the

chancellor for decision. The chancellor's decision was then appealable to the president.

The council notified McGrath and Mohr that it was ready to go forward with the hearing and that procedures would not be governed by the APA. Rather than proceeding with the hearing before the council, McGrath and Mohr then filed a complaint in superior court, seeking a declaratory judgment and mandatory injunction to require the University to conduct the grievance hearing under the APA. They contended that the APA procedures were required and that the contemplated grievance procedures denied them due process.

Thereafter, the plaintiffs and the University filed motions for summary judgment. The superior court held that the APA did not apply to the grievance proceedings in the instant case.¹

II. DISCUSSION

A. Do the provisions of the APA govern the grievance proceedings in this case?

Article 8 of the APA deals with administrative adjudication. AS 44.62.330(a) provides, in part, that "[t]he procedure of the state boards, commissions, and officers listed in this subsection . . . shall be conducted under AS 44.62.330-

1. Summary judgment was granted in this case on the basis of stipulated facts and exhibits. De novo review is the applicable standard of review on an appeal from a grant of summary judgment. Kollodge v. State, 757 P.2d 1028, 1032 (Alaska 1988). There is no genuine issue of material fact; rather, this appeal concerns statutory interpretation, which involves our own independent judgment. Waller v. Richardson, 757 P.2d 1036, 1039 n.4 (Alaska 1988).

44.62.630. This procedure, including, but not limited to . . . conduct of hearings . . . shall be governed by this chapter. . . ." AS 44.62.330(a)(45) lists the University of Alaska as a covered entity, with the proviso "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40."

McGrath and Mohr argue that AS 44.62.330(a)(45) mandates that their grievances be processed in accordance with procedures called for by the APA. The University advances numerous arguments in support of the superior court's grant of summary judgment and its holding that the APA is inapplicable to the proceedings in question.² More particularly, the University contends that the legislative history of AS 44.62.330(a) demonstrates that the

2. The University emphasizes that the superior court reasoned, in part, as follows in reaching its decision:

(1) AS 44.62.330(a)(45) requires the University to comply with the procedural requirements of the APA "except to the extent that [the APA's] inclusion is inconsistent with the provisions of AS 14.40;" (2) AS 14.40 specifically authorizes the Board to "adopt reasonable rules, orders and plans . . . for the good government of the University;" (3) the Alaska Legislature did not intend the University to be required by law to conduct the APA grievance procedures if the University were to adopt valid, adequate, and fair grievance procedures of its own; (4) under AS 14.40.170(b)(1), grievance procedures adopted by the Board need only be "reasonable," and the procedures instituted by the University meet this test of reasonableness; and (5) to the extent that the APA would require the University to hold substantially more extensive, time consuming, and expensive procedures than would be required under the validly adopted and reasonable University grievance procedures, application of the APA would be inconsistent with AS 14.40.170(b)(1).

legislature never intended to interfere with the Board of Regents' independent power to manage and govern the internal affairs of the University; that the University's grievance procedures are reasonable; that application of the APA to the University's grievance proceedings would be inconsistent with AS 14.40; that the APA by its very nature does not apply in the circumstances of this case; that grievance procedures are not "procedures" within AS 44.62.330; that the APA only applies to "adjudicative facts" not to "legislative facts;" and that the statutory framework governing personnel matters for state agencies and other public employees shows that the APA does not apply to the University's grievance procedures.

We have reviewed all of the University's contentions listed above and conclude that they should be rejected. Therefore, the APA's procedures must govern any grievance hearings in the case at bar.

(i) Applicability of the APA

As noted at the outset, AS 44.62.330-.630 governs the adjudicative procedures of the University "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40." AS 44.62.330(a)(45). The University notes that under AS 14.40.170(b)(1), the Board of Regents may "adopt reasonable rules, orders and plans . . . for the good government of the university. . . ." The University then argues that since its rules governing grievance procedures are reasonable, an application of

the APA procedures to its grievance proceedings would be inconsistent with the authority of the Board to manage the University. More specifically, the University contends that the APA procedures are inconsistent with AS 14.40 because they are more extensive and costly than its own reasonable grievance procedures, and therefore they are precluded under AS 44.62.330(a)(45).

We think these contentions are adequately and correctly answered by Judge Serdahely's opinion Aden v. University of Alaska, No. 3AN-85-17179 Civil (Alaska Super., Feb. 2, 1987). In rejecting contentions similar to those advanced by the University in the instant case, Judge Serdahely held the following:

The Court concludes that AS 44.62.330 et seq. does apply to Defendant University of Alaska and that Defendant's grievance proceedings must comply with the provisions of such Act.

In so ruling, the Court notes that on its face, the APA applies to Defendant University of Alaska. AS 44.62.330(45) [sic] expressly provides that the provisions of the Act apply to the "University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40." Having reviewed the provisions of AS 14.40, particularly including the powers and duties of the University President as defined in AS 14.40.210-.220, the Court concludes that there is nothing -- inconsistent -- between such provisions and the APA. Clearly, the President's power to appoint professors and assistants, and to define and supervise the duties of such persons, are not inconsistent with the APA hearing procedure which is designed to guarantee due process to persons adversely affected by administrative action, such as adverse employment or personnel action.

(ii) Does the APA govern intra-agency adjudications, such as employee grievance hearings?

Three arguments advanced by the University of Alaska converge here. The University contends that the statutory framework governing personnel matters for state agencies and public employees shows that the APA does not apply to University grievance proceedings; that grievance procedures are not procedures within AS 44.62.330; and that the APA applies only to adjudicative facts, not legislative facts.

The University correctly observes that the State Personnel Act, AS 39.25.010-.220, "governs personnel matters for all state employees in non-exempt service positions." AS 39.25.090. Neither those state employees in non-exempt service positions nor state employees covered by the Public Employment Relations Act ("PERA"), AS 23.40.070-.260, are covered by the APA procedures when grievance proceedings are implicated.³ Therefore, the University concludes that the "the Legislature intended

3. The personnel division of the Department of Administration administers the State Personnel Act. AS 39.25.030. The labor relations agency administers PERA. AS 23.40.090; AS 23.40.170. Neither of these agencies are enumerated under the APA. AS 44.62.330(a). However, hearings conducted pursuant to either of these statutes contain considerable procedural protections. See AS 39.25.170-.176; 2 AAC 10.400-.440. PERA applies to the University when the University has a collective bargaining agreement. See Alaska Community Colleges' Fed'n of Teachers v. University of Alaska, 669 P.2d 1299 (Alaska 1983). Hearings conducted under that agreement would be conducted pursuant to 2 AAC 10.400-.440. The University concludes that where no collective bargaining agreement exists, hearings should be conducted pursuant to internal policy. We think a more logical conclusion is that where no collective bargaining agreement exists, hearings should be conducted pursuant to the APA.

University employees to have only the same rights as state and other public employees in personnel matters. . . ."

University employees, however, are exempt from the State Personnel Act. AS 39.25.110(5). Thus, they do not receive the protection of grievance rules promulgated by the Director of Personnel under AS 39.25.150(16). Consequently, the exclusion of other state personnel from the APA does not, in our view, conclusively demonstrate that University personnel should be similarly excluded.

The University relies on two statutes in support of its argument that intra-agency grievance proceedings are not the type of proceedings meant to be included within AS 44.62.330. First, the APA's definition of "regulation" excludes anything which "relates only to the internal management of a state agency." AS 44.62.640(a)(3). Second, the State Personnel Act establishes procedures for amendment of personnel rules affecting non-exempt state employees. AS 39.25.140. Subsection (e) of this section states, "[t]he rules adopted under this chapter relate to the internal management of state agencies and their adoption is not subject to the Administrative Procedure Act." While the State Personnel Act does not apply to University employees, the University argues, by analogy, that a blanket legislative intent exists not to have the APA apply to employment matters.

We believe these arguments are fundamentally flawed. Both statutes refer to the application of the APA to an agency's rulemaking authority, i.e. the adoption of rules. Neither statute

applies to an agency's adjudicatory functions. If adjudication and rulemaking were coextensive, these statutes would be controlling here. However, the two functions differ significantly. Rulemaking procedures are designed to ensure a fair and open adoption of policy; adjudication procedures are intended to ensure a fair application of policy to parties.⁴ Thus, the fact that rulemaking procedures do not apply to internal personnel rules does not indicate that the protections of the APA's adjudicatory procedures are inapplicable to individual personnel decisions.

The APA outlines the manner in which a hearing "to determine whether a right, authority, license or privilege should be revoked, suspended, limited, or conditioned" is initiated. AS 44.62.360. It similarly informs as to how a hearing "to determine whether a right, authority, license or privilege should be granted, issued or renewed" is initiated. AS 44.62.370. From these provisions, the University concludes that the APA only covers hearings which concern rights, authorities, licenses, and privileges, and that this does not include "intra-agency personnel matters." In support of this argument, the University cites cases from other jurisdictions, holding that their respective

4. See Wickersham v. State, Commercial Fisheries Entry Comm'n, 680 P.2d 1135, 1139, 1143-44 (Alaska 1984). See also R. Cass & C. Diver, Administrative Law 325 (1987) ("There is no doubt, however, that the procedures requisite for decisions addressing many members of an affected class on grounds generally applicable classwide are minimal in comparison to the procedures constitutionally required for individualized determinations.").

administrative procedure acts are inapplicable to agency personnel decisions.⁵

The University further contends that the APA adjudication procedures are inapplicable because McGrath is not grieving "adjudicative facts," but rather "legislative facts." As one court explained, "agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact.' Adjudicatory hearing procedures are used in

5. In Abramson v. Board of Regents, Univ. of Hawaii, 548 P.2d 253 (Hawaii 1976), the plaintiff who was denied tenure and sued asserted, in part, a denial of her rights under the Hawaii AFA. Id. at 255. This portion of her claim was rejected because the coverage of that act was limited to "'a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.'" Id. at 263. Accord Klien v. State Bd. of Educ., 547 So. 2d 549, 551-52 (Ala. Civ. App. 1988), cert. quashed by Ex parte Klein 547 So. 2d 554 (Ala. 1989). However, Alaska's APA has no such limitation. Therefore, this authority is not on point here.

The University of Alaska interprets McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974), as holding that "the APA applies only where a particular agency statute provides for a hearing and adjudication." This, however, overstates the holding. The APA's adjudicatory chapter only includes the "Division of Lands under Alaska Land Act where applicable." AS 44.62.330(a)(9) (emphasis added). The land act gave the commissioner discretion to terminate grazing leases; hence, we held that application of the APA was not required. McCarrey, 526 P.2d at 1356. Where not similarly limited, however, the APA would apply across the board. McCarrey quotes from the federal APA, which, like the Hawaii APA, is limited to cases where "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing." 526 P.2d at 1356 n.17 (quoting 5 U.S.C.A. § 554 (1967)). Alaska's APA as it applies to the University has no such limitation; indeed, it specifically applies "notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed." AS 44.62.330(a). Thus, the fact that the adjudicatory provisions of the APA do not apply to termination of a grazing lease does not dictate that they are inapplicable to University of Alaska grievance procedures.

individual cases where the outcome is dependent on the resolution of particular 'adjudicative facts.'" Independent Bankers Ass'n of Georgia v. Board of Governors of Fed. Reserve Sys., 516 F.2d 1206, 1215 (D.C. Cir. 1975).⁶

The limitation of administrative adjudicatory hearings to adjudicatory facts is not made explicit in the APA.⁷ Nevertheless, the distinction has been recognized. See Wickersham v. State, Commercial Fisheries Entry Comm'n, 680 P.2d 1135, 1143-47 (Alaska 1984) (refusing to apply the more relaxed public notice requirements of rulemaking procedures to adjudicatory procedures which involve individual rights). The structure of the APA, which establishes separate procedures for rulemaking and adjudications, suggests that Alaska has implicitly limited adjudicative functions

6. In Independent Bankers, the United States Court of Appeals for the District of Columbia Circuit adopted the following distinction:

Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

516 F.2d at 1215 n.26 (quoting 1 K. Davis, Administrative Law Treatise § 7.02 at 413 (1958)).

7. Cf. California Code, Government Code §§ 11000-11529 at § 11500(f) (West 1980), which defines "adjudicatory hearing" to mean "a state agency hearing which involves the personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual. . . ."

to adjudicatory facts and rulemaking functions to legislative facts. Compare AS 44.62.010-.320 with AS 44.62.330-.630. See also AS 44.62.640(a)(3) (defining regulation). Further, the distinction is one which must be made in order to determine whether an administrative entity has made an adjudicatory decision for purposes of Appellate Rule 602(a)(2). See Kollodue v. State, 757 P.2d 1028, 1033 (Alaska 1988); Ballard v. Stich, 628 P.2d 918, 920 (Alaska 1981). Finally, the bifurcation of administrative functions along the legislative/adjudicative facts distinction is recognized in both federal and other state courts.⁸

The formal grievance complaint filed by both McGrath and Mohr does not explicitly distinguish between legislative facts and administrative facts. The grievance complaint alleges "[i]nappropriate placement of former community college faculty in rank Inappropriate denial of tenure for certain former community college faculty Discriminatory treatment by UA administration against grievants."

Upon remand, it will be left to the parties and the grievance council to identify any claims of McGrath and Mohr involving legislative facts, as such issues are not controlled by the adjudicative provisions of the APA.

8. See 1 K. Davis, Administrative Law Treatise § 7.06 (1958) and cases cited therein. Ballard defined the test for determining when an agency is engaging in adjudication as "functional." 628 P.2d at 920. "Whenever an entity which normally acts as a legislative body applies policy to particular persons in their private capacities, instead of passing on general policy or the rights of individuals in the abstract, it is functioning as an administrative agency within the meaning of Appellate Rule [602(a)(2)]." Id.; Kollodue, 757 P.2d at 1033.

B. Does application of the APA to University of Alaska's grievance proceedings impermissibly circumscribe explicit and implicit constitutional and statutory grants of power to the University in the area of personnel management?

As to this issue, we again refer to and adopt the reasoning of Judge Serdahely in Aden v. University of Alaska. In rejecting the same argument as the University makes in the case at bar, Judge Serdahely stated,

Nor does the Court find that the application of the APA to Defendant's grievance procedure violates provisions of Alaska's Constitution establishing the University of Alaska and its Board of Regents. Likewise, the Court is unpersuaded that requiring Defendant to comply with the APA in connection with its grievance procedure constitutes unconstitutional or impermissible interference with the internal affairs or academic freedom of the University. In this Court's view, the University's academic freedom is strengthened, rather than undermined, by the existence of a grievance procedure for adverse employment decisions which comports with the basic requirements of the APA and due process. Ultimately, if Defendant seeks to be exempted from the workings of the APA, it must seek such remedy from the Legislature, not this Court.

(Emphasis added).

III. CONCLUSION

The judgment of the superior court is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.'

ORDER

Pursuant to Appellate Rules 308(e) and (f) (1), attorney fees of \$1,000 are awarded to appellant and to appellant for costs and file with this court as itemized on a verified cost bill by 7-1-87 entered by direction of Justice [Signature].
Dated 6-19-87 Deputy: [Signature]

9. Our resolution of the appeal has made it unnecessary to address any of the other issues and arguments raised by the parties.

On remand, we suggest that it would not be inappropriate for the grievance council to integrate the adjudicatory provisions of the APA into its grievance procedures by following the hearing procedures outlined by Judge Serdahely in his August 25, 1987 "Order Regarding Administrative Hearing," which was entered in the Aden case.

Ralph McGRATH and Don
Mohr, Appellants,

v.

UNIVERSITY OF ALASKA, Appellee.

No. S-3418.

Supreme Court of Alaska.

June 21, 1991.

Following merger of state community college system into state university system, professors filed grievance regarding tenure status. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., affirmed university's determination that Administrative Procedure Act was not applicable to grievance, and appeal was taken. The Supreme Court, Rabinowitz, C.J., held that Alaska Administrative Procedure Act was applicable to University of Alaska employee grievance proceedings.

Reversed and remanded.

1. Administrative Law and Procedure
⚡5

Colleges and Universities ⚡8(1)

Alaska Administrative Procedure Act was applicable to University of Alaska employee grievance proceedings; Act procedures were not inconsistent with authority of Regents to manage University. AS 44.62.330-44.62.650.

2. Administrative Law and Procedure
⚡441

Claims involving legislative as opposed to adjudicative facts, are not controlled by adjudicative provisions of Administrative Procedure Act. AS 44.62.330-44.62.650.

Robert A. Royce, Jermain, Dunnagan & Owens, Anchorage for appellants.

Thomas P. Owens, Jr. and C. Ann Courtney, Owens & Turner, P.C., Anchorage, William R. Kauffman, Fairbanks, for appellee.

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

OPINION

RABINOWITZ, Chief Justice.

I. FACTS AND PROCEEDINGS

The University of Alaska ("University") is a statewide institution which operates both four-year universities and community colleges. In 1987, the University undertook a system-wide restructuring and eliminated the separate administration of the community colleges. Previously, the faculty at the community colleges had been represented by the Alaska Community Colleges' Federation of Teachers, Local 2404, and covered by a collective bargaining agreement. This agreement had no rank or tenure provisions. After the restructuring, the community colleges' faculty was offered an opportunity to transfer to the combined faculty of the University of Alaska. In the combined faculty, the community college faculty would not have union representation and the employees would be subject to the same rank and tenure system as their colleagues at the University of Alaska.

All members of the community colleges' faculty were offered an opportunity to transfer to the combined faculty, and all but one accepted. The University's Board of Regents adopted a policy "to provide the guidelines for faculty appointment, tenure, academic ranks, and salary for faculty in the transition." The policy provided that former full-time community college faculty with seven full years of service were eligible to receive tenure; those with four to six years were eligible to receive two-year contracts; and those with fewer years of service were eligible to receive one-year contracts. No former community college faculty member was offered a full-professorship; the highest rank offered was associate professor.

Many community college faculty members were dissatisfied with their rank and tenure assignments. Associate Professor Don Mohr, as a representative of the com-

munity colleges' faculty union, filed an informal grievance on behalf of faculty members who claimed that they were wrongly denied tenure. Similarly, Associate Professor Ralph McGrath requested a change in the rank assignments. Thereafter, the two professors filed a formal grievance on behalf of themselves and seventy-three other former community college faculty members.

At the time Mohr and McGrath filed their initial complaints, the University of Alaska's administration had not yet established grievance procedures for the newly integrated institution. The Anchorage campus chancellor adopted an interim grievance procedure, which mirrored the procedures previously used by the Anchorage campus. The chancellor then appointed an interim grievance council ("council") to implement the interim procedures.

The council conducted a preliminary investigation and determined that a grievance hearing should proceed. Additionally, the council recommended that the University hold this formal grievance hearing in accordance with the provisions of Alaska's Administrative Procedure Act ("APA"), AS 44.62.330-.650.

However, the president of the University rejected the council's recommendation that the grievance be processed in accordance with the APA. Instead, it was determined that the grievance would be processed under the Board of Regents' Policy, see 04-04.01 (June 4, 1987), and the interim grievance procedures. Under the Board of Regents' policy, the council was required to recommend dismissal or hold a hearing on the grievance within thirty days of its filing, and then forward a recommendation to the chancellor for decision. The chancellor's decision was then appealable to the president.

1. Summary judgment was granted in this case on the basis of stipulated facts and exhibits. *De novo* review is the applicable standard of review on an appeal from a grant of summary judgment. *Kollodge v. State*, 757 P.2d 1028, 1032 (Alaska 1988). There is no genuine issue of material fact; rather, this appeal concerns statutory interpretation, which involves our own in-

The council notified McGrath and Mohr that it was ready to go forward with the hearing and that procedures would not be governed by the APA. Rather than proceeding with the hearing before the council, McGrath and Mohr then filed a complaint in superior court, seeking a declaratory judgment and mandatory injunction to require the University to conduct the grievance hearing under the APA. They contended that the APA procedures were required and that the contemplated grievance procedures denied them due process.

Thereafter, the plaintiffs and the University filed motions for summary judgment. The superior court held that the APA did not apply to the grievance proceedings in the instant case.¹

II. DISCUSSION

A. Do the provisions of the APA govern the grievance proceedings in this case?

Article 8 of the APA deals with administrative adjudication. AS 44.62.330(a) provides, in part, that "[t]he procedure of the state boards, commissions, and officers listed in this subsection . . . shall be conducted under AS 44.62.330-44.62.630. This procedure, including, but not limited to . . . conduct of hearings . . . shall be governed by this chapter. . . ." AS 44.62.330(a)(45) lists the University of Alaska as a covered entity, with the proviso "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40."

McGrath and Mohr argue that AS 44.62.330(a)(45) mandates that their grievances be processed in accordance with procedures called for by the APA. The University advances numerous arguments in support of the superior court's grant of summary judgment and its holding that the APA is inapplicable to the proceedings in question.²

dependent judgment. *Waller v. Richardson*, 757 P.2d 1036, 1039 n. 4 (Alaska 1988).

2. The University emphasizes that the superior court reasoned, in part, as follows in reaching its decision:

(1) AS 44.62.330(a)(45) requires the University to comply with the procedural require-

More particularly, the University contends that the legislative history of AS 44.62.330(a) demonstrates that the legislature never intended to interfere with the Board of Regents' independent power to manage and govern the internal affairs of the University; that the University's grievance procedures are reasonable; that application of the APA to the University's grievance proceedings would be inconsistent with AS 14.40; that the APA by its very nature does not apply in the circumstances of this case; that grievance procedures are not "procedures" within AS 44.62.330; that the APA only applies to "adjudicative facts" not to "legislative facts;" and that the statutory framework governing personnel matters for state agencies and other public employees shows that the APA does not apply to the University's grievance procedures.

We have reviewed all of the University's contentions listed above and conclude that they should be rejected. Therefore, the APA's procedures must govern any grievance hearings in the case at bar.

(i) Applicability of the APA

[1] As noted at the outset, AS 44.62.330-.630 governs the adjudicative procedures of the University "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40." AS 44.62.330(a)(45). The University notes that under AS 14.40.170(b)(1), the Board of Regents may "adopt reasonable rules, orders and plans ... for the good government of the university...." The University then argues that since its rules governing grievance procedures are reasonable, an application of the APA procedures to its grievance proceedings would be inconsistent with the authority of the Board to manage the Uni-

ments of the APA "except to the extent that [the APA's] inclusion is inconsistent with the provisions of AS 14.40;" (2) AS 14.40 specifically authorizes the Board to "adopt reasonable rules, orders and plans ... for the good government of the University;" (3) the Alaska Legislature did not intend the University to be required by law to conduct the APA grievance procedures if the University were to adopt valid, adequate, and fair grievance procedures of its own; (4) under AS 14.40.170(b)(1),

University. More specifically, the University contends that the APA procedures are inconsistent with AS 14.40 because they are more extensive and costly than its own reasonable grievance procedures, and therefore they are precluded under AS 44.62.330(a)(45).

We think these contentions are adequately and correctly answered by Judge Serdahely's opinion *Aden v. University of Alaska*, No. 3AN-85-17179 Civil (Alaska Super., Feb. 2, 1987). In rejecting contentions similar to those advanced by the University in the instant case, Judge Serdahely held the following:

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In so ruling, the Court notes that on its face, the APA applies to Defendant University of Alaska. AS 44.62.330(45) [sic] expressly provides that the provisions of the Act apply to the "University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40." Having reviewed the provisions of AS 14.40, particularly including the powers and duties of the University President as defined in AS 14.40.210-.220, the Court concludes that there is nothing inconsistent between such provisions and the APA. Clearly, the President's power to appoint professors and assistants, and to define and supervise the duties of such persons, are not inconsistent with the APA hearing procedure which is designed to guarantee due process to persons adversely affected by administrative action, such as adverse employment or personnel action.

grievance procedures adopted by the Board need only be "reasonable," and the procedures instituted by the University meet this test of reasonableness; and (5) to the extent that the APA would require the University to hold substantially more extensive, time consuming, and expensive procedures than would be required under the validly adopted and reasonable University grievance procedures, application of the APA would be inconsistent with AS 14.40.170(b)(1).

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Three arguments advanced by the University of Alaska converge here. The University contends that the statutory framework governing personnel matters for state agencies and public employees shows that the APA does not apply to University grievance proceedings; that grievance procedures are not procedures within AS 44.62.330; and that the APA applies only to adjudicative facts, not legislative facts.

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University employees, however, are exempt from the State Personnel Act. AS 39.25.110(5). Thus, they do not receive the protection of grievance rules promulgated by the Director of Personnel under AS 39.25.150(16). Consequently, the exclusion of other state personnel from the APA does not, in our view, conclusively demonstrate that University personnel should be similarly excluded.

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We believe these arguments are fundamentally flawed. Both statutes refer to the application of the APA to an agency's rulemaking authority, i.e. the adoption of rules. Neither statute applies to an agency's adjudicatory functions. If adjudication and rulemaking were coextensive, these statutes would be controlling here. However, the two functions differ significantly. Rulemaking procedures are designed to ensure a fair and open adoption of policy; adjudication procedures are intended to ensure a fair application of policy to parties.⁴ Thus, the fact that rulemaking procedures do not apply to internal personnel rules does not indicate that the protections of the APA's adjudicatory procedures

ists, hearings should be conducted pursuant to internal policy. We think a more logical conclusion is that where no collective bargaining agreement exists, hearings should be conducted pursuant to the APA.

4. See *Wickersham v. State, Commercial Fisheries Entry Comm'n*, 680 P.2d 1135, 1139, 1143-44 (Alaska 1984). See also R. Cass & C. Diver, *Administrative Law* 325 (1987) ("There is no doubt, however, that the procedures requisite for decisions addressing many members of an affected class on grounds generally applicable classwide are minimal in comparison to the procedures constitutionally required for individualized determinations.").

are inapplicable to individual personnel decisions.

The APA outlines the manner in which a hearing "to determine whether a right, authority, license or privilege should be revoked, suspended, limited, or conditioned" is initiated. AS 44.62.360. It similarly informs as to how a hearing "to determine whether a right, authority, license or privilege should be granted, issued or renewed" is initiated. AS 44.62.370. From these provisions, the University concludes that the APA only covers hearings which concern rights, authorities, licenses, and privileges, and that this does not include "intra-agency personnel matters." In support of this argument, the University cites cases from other jurisdictions, holding that their respective administrative procedure acts are inapplicable to agency personnel decisions.⁵

The University further contends that the APA adjudication procedures are inapplicable because McGrath is not grieving "adju-

5. In *Abramson v. Board of Regents, Univ. of Hawaii*, 548 P.2d 253 (Hawaii 1976), the plaintiff who was denied tenure and sued asserted, in part, a denial of her rights under the Hawaii APA. *Id.* at 255. This portion of her claim was rejected because the coverage of that act was limited to "a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." *Id.* at 263. *Accord Klein v. State Bd. of Educ.*, 547 So.2d 549, 551-52 (Ala.Civ.App.1988), *cert. quashed by Ex parte Klein* 547 So.2d 554 (Ala.1989). However, Alaska's APA has no such limitation. Therefore, this authority is not on point here.

The University of Alaska interprets *McCarrey v. Commissioner of Natural Resources*, 526 P.2d 1353 (Alaska 1974), as holding that "the APA applies only where a particular agency statute provides for a hearing and adjudication." This, however, overstates the holding. The APA's adjudicatory chapter only includes the "Division of Lands under Alaska Land Act where applicable." AS 44.62.330(a)(9) (emphasis added). The land act gave the commissioner discretion to terminate grazing leases; hence, we held that application of the APA was not required. *McCarrey*, 526 P.2d at 1356. Where not similarly limited, however, the APA would apply across the board. *McCarrey* quotes from the federal APA, which, like the Hawaii APA, is limited to cases where "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing." 526 P.2d at 1356 n. 17 (quoting 5 U.S.C.A. § 554 (1967)). Alaska's APA as it applies to the University has no such limitation;

dicative facts," but rather "legislative facts." As one court explained, "agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact.' Adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular 'adjudicative facts.'" *Independent Bankers Ass'n of Georgia v. Board of Governors of Fed. Reserve Sys.*, 516 F.2d 1206, 1215 (D.C.Cir.1975).⁶

The limitation of administrative adjudicatory hearings to adjudicatory facts is not made explicit in the APA.⁷ Nevertheless, the distinction has been recognized. See *Wickersham v. State, Commercial Fisheries Entry Comm'n*, 680 P.2d 1135, 1143-47 (Alaska 1984) (refusing to apply the more relaxed public notice requirements of rulemaking procedures to adjudicatory procedures which involve individual rights). The structure of the APA, which establishes separate procedures for rulemaking and

indeed, it specifically applies "notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed." AS 44.62.330(a). Thus, the fact that the adjudicatory provisions of the APA do not apply to termination of a grazing lease does not dictate that they are inapplicable to University of Alaska grievance procedures.

6. In *Independent Bankers*, the United States Court of Appeals for the District of Columbia Circuit adopted the following distinction:

Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

516 F.2d at 1215 n. 26 (quoting 1 K. Davis, *Administrative Law Treatise* § 7.02 at 413 (1958)).

7. Cf. California Code, Government Code §§ 11000-11529 at § 11500(f) (West 1980), which defines "adjudicatory hearing" to mean "a state agency hearing which involves the personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual...."

adjudications, suggests that Alaska has implicitly limited adjudicative functions to adjudicatory facts and rulemaking functions and legislative facts. Compare AS 44.62-010-.320 with AS 44.62.330-630. See also AS 44.62.640(a)(3) (defining regulation). Further, the distinction is one which must be made in order to determine whether an administrative entity has made an adjudicatory decision for purposes of Appellate Rule 602(a)(2). See *Kollodge v. State*, 757 P.2d 1028, 1033 (Alaska 1988); *Ballard v. Stich*, 628 P.2d 918, 920 (Alaska 1981). Finally, the bifurcation of administrative functions along the legislative/adjudicative facts distinction is recognized in both federal and other state courts.⁸

The formal grievance complaint filed by both McGrath and Mohr does not explicitly distinguish between legislative facts and administrative facts. The grievance complaint alleges "[i]nappropriate placement of former community college faculty in rank.... Inappropriate denial of tenure for certain former community college faculty.... Discriminatory treatment by UA administration against grievants."

[2] Upon remand, it will be left to the parties and the grievance council to identify any claims of McGrath and Mohr involving legislative facts, as such issues are not controlled by the adjudicative provisions of the APA.

B. Does application of the APA to University of Alaska's grievance proceedings impermissibly circumscribe explicit and implicit constitutional and statutory grants of power to the University in the area of personnel management?

As to this issue, we again refer to and adopt the reasoning of Judge Serdahely in

8. See 1 K. Davis, *Administrative Law Treatise* § 7.06 (1958) and cases cited therein. *Ballard* defined the test for determining when an agency is engaging in adjudication as "functional." 628 P.2d at 920. "Whenever an entity which normally acts as a legislative body applies policy to particular persons in their private capacities, instead of passing on general policy or the rights of individuals in the abstract, it is functioning as an administrative agency within the meaning of Appellate Rule [602(a)(2)]." *Id.*; *Kollodge*, 757 P.2d at 1033.

Aden v. University of Alaska. In rejecting the same argument as the University makes in the case at bar, Judge Serdahely stated,

Nor does the Court find that the application of the APA to Defendant's grievance procedure violates provisions of Alaska's Constitution establishing the University of Alaska and its Board of Regents. Likewise, the Court is unpersuaded that requiring Defendant to comply with the APA in connection with its grievance procedure constitutes unconstitutional or impermissible interference with the internal affairs or academic freedom of the University. In this Court's view, the University's academic freedom is strengthened, rather than undermined, by the existence of a grievance procedure for adverse employment decisions which comports with the basic requirements of the APA and due process. *Ultimately, if Defendant seeks to be exempted from the workings of the APA, it must seek such remedy from the Legislature, not this Court.*

(Emphasis added).

III. CONCLUSION

The judgment of the superior court is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.⁹



9. Our resolution of the appeal has made it unnecessary to address any of the other issues and arguments raised by the parties.

On remand, we suggest that it would not be inappropriate for the grievance council to integrate the adjudicatory provisions of the APA into its grievance procedures by following the hearing procedures outlined by Judge Serdahely in his August 25, 1987 "Order Regarding Administrative Hearing," which was entered in the *Aden* case.

Faculty wins hearing in tenure case

Court finds teachers denied forum for complaints during merger with UAA



Chief Justice Rabinowitz

By PETER BLUMBERG
Daily News reporter

Former Anchorage Community College faculty members absorbed into the University of Alaska in a 1987 merger have won their case before the state Supreme Court in a longstanding controversy over academic rank and tenure.

The high court, in reversing a 1988 Superior Court ruling, asserts that about 73 faculty members were deprived of a proper forum for airing complaints that the merger unfairly denied them

tenure when they gave up their community college positions.

The university offered to address the complaint under its own grievance procedures, but refused to honor the faculty members' request for a formal hearing governed by Alaska's Administrative Procedure Act, according to court documents.

Two faculty members, Ralph McGrath and Don Mohr, then asked the court to order an administrative hearing, but their case was

dismissed by Superior Court Judge Brian Shortell.

The Supreme Court, in a 5-0 opinion written by Chief Justice Jay Rabinowitz, said McGrath, Mohr and all other former community college instructors denied tenure are entitled to an impartial hearing under the Administrative Procedure Act.

In that hearing, the instructors will be guaranteed the right to be represented by lawyers, as well as the right to use documents a

Please see Page B-3, TENU

TENURE: Staff victory

Continued from Page B-1

witnesses to make their case before a hearing officer, said Robert Royce, the attorney for McGrath and Mohr.

"It comes down to basic fairness in the procedures," Royce said. "They will now have a better chance and will be better protected."

No hearing date has been scheduled. McGrath, president of the community college faculty members' union, said he is unsure how many of the 73 instructors who initially complained about the tenure process are still employed by the university.

In the merger, all community college instructors were allowed to keep their jobs, but only those with seven years of employment were offered tenure, and none was offered full professorship, according to court papers.

April 2, 1992

Honorable Rick Halford, Chair
Honorable Pat Rodey, Vice Chair
Honorable Virginia Collins
Honorable Steve Frank
Honorable Al Adams

Senate Judiciary Committee:

As an employee with the University of Alaska, Anchorage campus, I urge you to vote no on SB 441. This bill would exempt all University of Alaska employees from the protection of the Administrative Procedures Act.

The State Supreme Court unanimously ruled that the University must adhere to the Administrative Procedures Act. I feel this bill is an attempt by the University to circumvent the Supreme Court Ruling. I also feel I have the right to be protected under the APA as are all other state employees.

Thank you for considering my views on this issue.

Sincerely,

Art Schneider
Box 458
Girdwood, AK 99587



Alaska Public
Employees Association

Federation of Public Employees

340 N. Franklin, Juneau, AK 99801 (907) 586-2334 FAX: 463-4980

APEA/AFT

AFL-CIO

TESTIMONY BEFORE THE
ALASKA STATE SENATE JUDICIARY COMMITTEE
March 31, 1992

Honored Members of the Senate Judiciary Committee:

APEA strongly opposes SB 441.

The Administrative Procedures Act was created by the legislature for the purpose of ensuring due process to persons adversely affected by administrative action, such as adverse employment or personnel actions. With SB 441, the Governor is suggesting that the University of Alaska be permitted to disregard these due process concerns. No justifiable policy reason has been presented for departing from the same set of rules the rest of the State follows.

When the state community college system merged into the state university system, the Alaska Supreme Court addressed the issue of the applicability of the APA to a grievance brought by community college instructors in McGrath v. University of Alaska, 813 P.2d 1370 (Alaska 1991). The Supreme Court held that the use of the APA was appropriate and, in fact, "... the University's academic freedom is strengthened, rather than undermined, by the existence of a grievance procedure for adverse employment decisions which comports with the basic requirements of the APA and due process."

Please do not permit the undoing of this well reasoned decision.
Vote against SB 441.

Sincerely,

Joan Wilkerson
Southeast Regional Manager

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825 College Road
Fairbanks, AK 99701
Telephone: (907) 456-5412
FAX: (907) 456-7478

Anchorage Field Office
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Juneau Field Office
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Telephone: (907) 586-2334
FAX: (907) 463-4980

31 March 1992

ATTN: Alaska Senate Judiciary Committee

SUBJ: SENATE BILL 441 -- A bill to exempt the University of Alaska from certain provisions of the Alaska Administrative Procedures Act

We the undersigned faculty members of the University of Alaska Southeast Ketchikan Campus, would like to take this opportunity to express our objection to granting the University of Alaska any exemption to the Alaska Administrative Procedures Act.

The University would have you believe that the Administrative Procedures Act imposes an unreasonable financial burden on the University. On the contrary, we feel that the modest cost of compliance is a very small price to pay for ensuring University employees the protections of due process.

The committee should also be aware that the Regional Faculty Senate of the University of Alaska Southeast, representing over fifty full-time faculty members, voted unanimous opposition to the proposed exemption on Friday, 27 March 1992.

Respectfully:

Tamm M. Bill
Instructor of Computer Science

[Signature]
Assoc. Prof of L.L. Science

[Signature]
Reading Inst.

Christine Hough
Asst. Prof. of English

Cynthia Schutte

Asso. Prof. Anthropology - Sociology

Members of the Faculty,
Ketchikan Campus
University of Alaska Southeast.

[Signature]

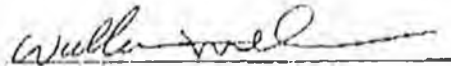
Assistant Prof of Education

Margaret Lyman
Assoc. Professor of Office Admin.

[Signature]
Assistant Professor, Economic Development

To: Rick Cook
Senate Judiciary Committee

The following resolution was passed by unanimous vote at the regular meeting of the Faculty Senate of the University of Alaska Southeast on Friday, March 27, 1992



Wallace M. Olson
President-elect
Faculty Senate
University of Alaska Southeast

RESOLUTION

It has come to our attention that the administration of University of Alaska, through the Governor's Office, has requested the introduction of a bill to exempt the University from the administrative adjudication provisions of the Administrative Procedure Act. The Faculty Senate of the University of Alaska Southeast categorically opposes such an action, and has passed the following resolution.

"WHEREAS the University of Alaska is currently bound by the adjudication provisions of the Administrative Procedure Act,

WHEREAS the Act provides an equitable venue for resolution of disputes,

WHEREAS the exemption of the University from the Act's adjudication provisions would substantially disadvantage appellants in challenging University policies, procedures and decisions,

BE IT RESOLVED that the Faculty Senate of the University of Alaska Southeast categorically opposes any legislation which would grant the University exemption from said provisions of the Administrative Procedure Act, and calls on all members of the Alaska State Legislature to reject the attempt by the University to diminish the appellant rights of its employees."

Sincerely,



Michael Baran

President, UAS Faculty Senate