

HB

234

TONY KNOWLES
GOVERNOR



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March 6, 1995

The Honorable Gail Phillips
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Phillips:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to administrative adjudication under the Administrative Procedure Act (APA).

This bill would make changes to the APA in order to streamline, and cut costs of, administrative adjudication. Technical amendments to the affected sections are also made in the bill for clarification and simplification. The changes made in this bill will assist in reducing costs and providing more clarity to participants in administrative adjudications.

Sections 1, 2, and 9 of the bill allow the use of certified, rather than registered mail. The latter is more expensive and provides no better notice than the former. Registered mail costs \$2 more than certified, and is metal-tagged to allow for easier tracing if it is lost in transit; it is more appropriately used when the actual contents of the mail are valuable or irreplaceable. Section 1 of the bill also provides for service of a statement of issues by mailing to the last address provided by the applicant.

Under existing AS 44.62.410(a), the place of a hearing is determined by the senate districts as they existed in 1959 (i.e., Southeastern Senate District). In a note following that statute, the revisor of statutes has noted that those old senate districts are somewhat similar to the boundaries of judicial districts established under AS 22.10.010. Section 3 of the bill amends AS 44.62.410(a) to change the terminology to instead refer to the comparable judicial district.

Section 4 of the bill provides for routine telephonic participation in hearings. Current law gives any party veto power over telephonic hearings. In this electronic age, telephonic

participation should be routinely allowed absent some due process reason compelling personal attendance. This change will allow substantial savings to the state and respondents.

In sec. 5 of the bill, reimbursement for witness subsistence expenses is raised from \$15 a day, set in 1959, to the compensation amount paid to state employees. The new rate was chosen because court rules for witness travel compensation require compensation at "the rate allowed state employees." In sec. 5, the source of that rate is identified. Sections 5 and 6 of the bill contain technical changes to make other witness fee provisions of AS 44.62.430 more understandable.

Section 7 of the bill provides express authorization for discovery. Presently, the APA provides a limited and cumbersome process for taking depositions, and no other discovery is authorized.

Section 8 of the bill provides an express statement of the burden and standard of proof. A consistent standard is needed because hearing officers are now assigning varying standards of proof: either the "preponderance of the evidence" standard or the "clear and convincing evidence" standard. The "preponderance of the evidence" standard is the most appropriate. In Amerada Hess Pipeline v. Alaska Public Utilities Commission, 711 P.2d 1170, 1179 n.14 (Alaska 1986), the Alaska Supreme Court held that "[a] party in an administrative proceeding can assume that preponderance of the evidence is the standard of proof unless otherwise stated."

The "clear and convincing" standard of proof is rarely used by the Alaska courts. At common law, this higher standard was used in cases involving fraud; oral contracts to make a will; specific performance on an oral contract; and proceedings to modify written transactions. However, Alaska has departed from the common law so that no more than a preponderance of the evidence is necessary to establish fraud. Dairy Queen v. Travelers Indemnity, 748 P.2d 1169 (Alaska 1988); Gabaig v. Gabaig, 717 P.2d 835, 839 n. 4 (Alaska 1986); Saxton v. Harris, 395 P.2d 71, 72 (Alaska 1964). In Cavanah v. Martin, 590 P.2d 41 (Alaska 1979), the court reversed a lower court decision that required clear and convincing proof of a claim against an estate, holding that such claims need only be proved by a preponderance of the evidence.

A judicial determination to waive children's court jurisdiction over a juvenile, and to subject the juvenile to adult criminal court jurisdiction, is based on a preponderance of the evidence standard of proof. W.M.F. v. State, 723 P.2d 1298 (Alaska 1986). In Avery v. State, the court held that the use of a preponderance standard was appropriate in a parole revocation hearing. 616 P.2d 872, 874 (Alaska 1980). In order to adjudicate a child as a

The Honorable Gail Phillips
Page 3

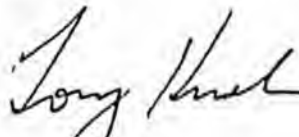
child in need of aid (which generally results in state custody over the child for a period of years), the preponderance standard applies. Children's Rule 15(c). The clear and convincing standard does not apply unless the court is also terminating parental rights.
Id.

The Alaska Supreme Court has held that the use of the preponderance standard, rather than the clear and convincing standard was proper in attorney discipline cases. In re Walton, 676 P.2d 1078, 1085 n. 11 (Alaska 1983); In re Robson, 575 P.2d 771 (Alaska 1978); cf. In re Hanson, 532 P.2d 303 (Alaska 1975) ("clear and convincing" standard applied to judicial discipline case).

Section 10 of the bill clarifies the time period for requesting reconsideration of an agency decision. Some respondents (including those represented by attorneys) have viewed AS 44.62.540(a) as allowing a full 30 days to file a petition for reconsideration, giving no time for the agency to review the petition and determine whether to order reconsideration. The amended language will clearly inform a respondent of the limited time in which he or she may file a petition for reconsideration. The amended language was taken from comparable court rules. See Civil Rule 77(k) and App. Rule 506(b).

I urge your favorable action on this bill.

Sincerely,



Tony Knowles
Governor

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. _____

Revision Date: _____ Dept. Affected: Department of Law
 Title: "An Act relating to administrative adjudication
under the Administrative Procedure Act." BRU: Legal Services
 Sponsor: Rules by Request of the Governor Component: Operations
 Requester: Governor's Office/OMB COMPONENT SERIAL NO. 0093

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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 EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: \$ 0093

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill would make changes to the Administrative Procedure Act (APA) in order to streamline, and cut costs of, administrative adjudication. Technical amendments to the affected sections are also made in the bill for clarification and simplification. The changes made in this bill will assist in reducing costs and providing more clarity to participants in administrative adjudications.

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Prepared by: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Division Date: 2/23/95
 Approved by Commissioner: Bruce M. Botelho, Attorney General Date: 2/23/95
 Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

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ANALYSIS CONTINUATION:

to the comparable judicial district.

Section 4 of the bill provides for routine telephonic participation in hearings. Current law gives any party veto power over telephonic hearings. In this electronic age, telephonic participation should be routinely allowed absent some due process reason compelling personal attendance. This change will allow substantial savings to the state and respondents.

Sections 5 and 6 of the bill contain technical changes to make the witness fee provisions of AS 44.62.430 more understandable. For example, AS 44.62.430(c)(1) authorizes "fees," but does not state how to calculate the amount. The statute taken as a whole indicates an intention to use the court fee structure. Existing AS 44.62.430(c)(2), relating to travel expenses, is amended by sec. 5 of the bill to directly refer the reader to the state reimbursement rates used for the majority of state employees.

Section 7 of the bill provides express authorization for discovery. Presently, the APA provides a limited and cumbersome process for taking depositions, and no other discovery is authorized.

Section 8 of the bill provides an express statement of the burden and standard of proof. A consistent standard is needed because hearing officers are now assigning varying standards of proof: either the "preponderance of the evidence" standard or the "clear and convincing evidence" standard. The "preponderance of the evidence" standard is the most appropriate. In Amerada Hess Pipeline v. Alaska Public Utilities Commission, 711 P.2d 1170, 1179 n.14 (Alaska 1986), the Alaska Supreme Court held that "[a] party in an administrative proceeding can assume that preponderance of the evidence is the standard of proof unless otherwise stated."

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The changes included in the bill will reduce costs for state agencies and the public, and clarify and simplify certain sections of the APA. In an era of rising costs and falling revenues this is an important improvement in how the state conducts its business. To the extent that the Department of Law represents state agencies in administrative adjudications the bill will help contain the department's costs.

03/18/95 11:26:56 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM
MESSAGE FROM: LIOCJAS IN ANCHORAGE

LTN1120
JNU

RE TCN: 50419 SCHEDULED FOR: 03/18/95 10:00 TO 12:00
SPONSOR: HOUSE STATE AFFAIRS PURPOSE: PUBLIC HEARING

MESSAGE TEXT: THERESA WILLIAMS IS ON FOR HB 234.