

HB

331

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 31, 2001

SUBJECT: Confirmation of governors appointees during a special session
(Work Order No. 22-LS1039)

TO: Representative Brian Porter
Speaker of the House of Representatives
Attn: Tom Wright

FROM: Tamara Brandt Cook
Director *TBC*

You ask whether the legislature may confirm appointees of the governor during the upcoming special session. Unfortunately, AS 39.05.080 is ambiguous on that point.

Under (1) of that section the governor is directed to present names for confirmation to the legislature during the first 30 days of a regular session. If an appointment is made after the first 30 days but while the legislature is still in session, the governor must present the name to the legislature within five days after the appointment is made. The paragraph specifically states: "only presentment that occurs during the time that the legislature is in regular session constitutes presentment under this section."

However, under (3) the governor is required to make a new appointment and present the name within 20 days after receipt of notice by the legislature that it has declined to confirm an appointee. Last session the legislature failed to confirm an appointee to the Game Board. As to this vacancy, the governor is directed to make an appointment and present the appointment by a deadline that falls during the interim before the special session begins. This conflicts with the statement in paragraph (1) that presentment may only occur during the time the legislature is in regular session. Furthermore, paragraph (3) goes on to state: "Failure of the legislature to act to confirm or decline to confirm an appointment during the session in which the appointment was presented is tantamount to a declination of confirmation on the day the session adjourns." When the appointment is made during the interim, it can certainly be urged that the session referred to in this sentence is the first session that occurs after the appointment when the message from the governor making the appointment would, presumably, be received and read by the legislature. In the case at hand, that session is the upcoming special session.

Consequently, if the governor presents an appointee to the legislature for the Game Board position and the legislature fails to consider that appointment, an argument could be made that the appointee has lost that position. To avoid that possibility the legislature should

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consider the confirmation of a person appointed to the position during the upcoming special session, despite the contradictory language of AS 39.05.080(1) if the governor presents the name to the legislature. Note, however, that the 20 day provision of paragraph (3) clearly applies only when the legislature has declined an appointment and a subsequent appointment is made as a result of the failure of the legislature to accept the first person. No other appointments that the governor may make before or during the special session are covered by paragraph (3) and they should be neither presented to the legislature by the governor nor acted upon until the next regular session under paragraph (1).

I have today checked with the Chief Clerk and been informed that the governor has not yet this interim presented any appointees to the legislature for confirmation, although that office has received copies of letters of appointment sent to the appointees. It is possible that the governor will elect to rely on AS 39.05.080(1) and present all his appointees during the next regular session.

TBC:glc
01-312.glc

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MEMORANDUM

May 30, 2001

SUBJECT: Confirmation process (Work Order No. 22-LS1040\A)

TO: Representative Brian Porter
Attn: Tom Wright

FROM: Terri Lauterbach
Legislative Counsel *TLauterbach*

Enclosed is a draft bill that would eliminate the potential for confirmation sessions to be required during special sessions of the legislature. It would also deal with the potentially conflicting parts of AS 39.05.080 regarding the timing of presentation of the governor's appointees. It is my understanding that you wish for presentments to occur only during regular sessions.

Under current law, AS 39.05.080(3) requires that the governor present a new appointee within 20 calendar days after the legislature notifies the governor of the legislature's refusal to confirm one of the governor's appointees. Since joint sessions for confirmation purposes are often held near the end of a regular session, this would mean that the time for presentation of the new appointee would probably fall during a special session (if one is held during the interim) because presentation is generally considered to occur when the governor's message of appointment is communicated to the legislature by being read across at a floor session. The special session would be when the first floor session occurred at which messages from the governor sent to the legislature after adjournment of a regular session could be read. In turn, this presentation would trigger the requirements of AS 39.05.080(2): hearings by standing committees and the holding of a joint session for confirmation purposes. Failure of the legislature to act on such an appointment by the end of a special session, according to the last sentence of AS 39.05.080(3), would be the same as refusal to confirm, and that person could not again be appointed to the same seat during that interim.

The above-described result could cause longer special sessions, diffuse the focus of special sessions, or result in a person losing a position because the legislature failed to act on confirmation of the person during the special session (due to lack of time or other focus) when the person might have, in fact, been mutually agreeable to both the governor and the legislature.

The above-described result is also more complicated than this because the second sentence of AS 39.05.080(3) is at odds with the presentment requirements of

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AS 39.05.080(1). Paragraph (1) says that only presentment that occurs during a regular session constitutes presentment. However, as noted above, the 20-day requirement of paragraph (3) will often place presentment at a special session, if one is held after the legislature refuses to confirm an appointee during a regular session. This difference in the two paragraphs is not reconcilable without changing the words of either paragraph (1) or paragraph (3).

The enclosed draft reconciles the two paragraphs in the following ways:

- (1) removing the 20-day requirement in paragraph (3) and keeping the requirement of paragraph (1) that says only presentment during a regular session is valid;
- (2) throughout the section, "regular" is inserted as appropriate;
- (3) "within five calendar days" is removed from the latter part of paragraph (1).¹

Although you did not ask for it, the draft also inserts "on or before" in AS 39.05.080(1), with reference to the March 1 date in subparagraph (B). This will pick up the non-student members of the Board of Regents whose terms expire on the first Monday in February under AS 14.40.140.

This draft would also remove the last sentence of AS 39.05.080(1). You did not ask for this change either, but making this change might forestall a future potential problem. Under the A.L.I.V.E. case, it is fairly clear that the legislature cannot change a law by using a resolution. So, removal of this sentence in paragraph (1) is intended to keep this issue from coming up.

Please let me know if you would like to resolve the tension between paragraphs (1) and (3) differently, if you would like other changes, or if I can be of other assistance.

TML:glc
01-305.glc

Enclosure

¹ This five-day presentment requirement in paragraph (1) is just as problematical as the 20-day presentment requirement in paragraph (3) because the fifth day could be outside the regular session even if the appointment were made during the regular session.

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MEMORANDUM

February 28, 2002

SUBJECT: Governor's appointments (CSHB 331(STA), draft version "C")

TO: Representative John Coghill
 Attn: Rynniva

FROM: Terri Lauterbach
 Legislative Counsel *TLauterbach*

Enclosed is the draft CS you requested.

You also requested my opinion as to what "immediately" would mean with regard to when the governor would have the duty to present an appointee's name to the legislature if the appointment were made on a weekend or holiday. Your stated intent is to ensure that "immediately" would provide the governor the flexibility to present the appointee's name to the legislature on the next "business day" and still be found in compliance with the statute amended in this bill.

In my opinion, the meaning of "immediately" is flexible and depends on the context in which it is used and the circumstances existing at the time the duty to act "immediately" arises. ~~In the legislative context, immediately could reasonably mean not the next business day, but the next business day after the next business day of the legislature. It may be that the legislature could be considered to be in session on a day when the legislature holds a floor session. However, when the governor reports, as you know, the next legislative floor session could well be on a weekend or holiday, particularly toward the end of a regular session. But, at other times, the next "business day" of the legislature would normally be a weekday.~~

If you want to give the governor the flexibility to delay presentment until after a three-day holiday weekend but still ensure that "immediately" has an outside time limit, then you could amend AS 39.05.080(1) to say "immediately, but in no event more than 72 hours later."

DISCUSSION

"Immediately" appears hundreds of times in the Alaska Statutes and is defined only once. In AS 47.17.290(6), "immediately" means "as soon as is reasonably possible, and no later than 24 hours." The context of this use of "immediately" is the reporting of suspected

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child abuse and the notices and investigations that must happen after the initial report. The 24-hour limit is an outside time limit that the legislature put on the term "immediately" in this context. Without that outside time limit, the term would probably be construed according to the first phrase of the definition: "as soon as is reasonably possible."

The legislature has also put outside time limits on the use of "immediately" in another context. Under AS 47.12.250, a statute relating to alleged delinquents, a police officer who detains a minor must "immediately, and in no event more than 12 hours later," notify the court about the detention, and the court must "immediately, and in no event more than 48 hours later," hold a hearing except that, if the minor is being held securely in correctional facilities that house adult prisoners, the court must "immediately, and in no event more than 24 hours after the custody begins," hold a hearing. Again, this is a specific context in which the legislature has chosen to put an outside time limit on the term "immediately." There may be other statutes with outside time limits on "immediately."

However, most of the uses of "immediately" in the statutes carry no outside time limit. These statutes relate predominantly to notice situations, notices that must be given by or to courts, boards, departments, corporations, banks, etc. At least one other relates to the governor's duty to "immediately" appoint a board member (AS 03.09.010(b)). In these contexts, a court would probably use a reasonableness standard for the term "immediately." For instance, when construing insurance policies that require an insured to give "immediate" notice of a claim to the insurer, courts have found that the notice must be given "within a reasonable time under the circumstances." *Black's Law Dictionary, Seventh Edition.*

Therefore, I think "immediately," as used in AS 39.05.080(1) in the enclosed CS, would probably be construed by a court as meaning "within a reasonable time under the circumstances." In the context of AS 39.05.080(1), the circumstances considered by the court would include the fact that the legislature should be given time to consider a name presented to it. A reasonable time for presenting an appointment made on the 60th day of a regular session might be several days. There would still be plenty of time for the legislature to act on the appointment. In contrast, a reasonable time for presenting an appointment made on the 100th day could well be construed to be by the time of the next legislative floor session, which is when messages from the governor could be read across.

There is a possibility that a court would allow "immediately" to be longer than several days. If it is important to you that there be an outside time limit, then you should put that time limit in the statute.

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I hope you find this discussion helpful to you as you consider your legislative options. I have attached a printout showing where "immediately" is used in the Alaska Statutes. If I may be of further assistance, please advise.

TML:med
02-232.med

Enclosure

ALASKA STATE LEGISLATURE

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House of Representatives
House District 24

Sponsor Summary HB 331

HB331 eliminates ambiguities in AS 39.05.080 making it clear that presentment of the governor's appointees to boards and commissions may only occur during regular sessions of the legislature. This bill eliminates the potential for confirmation sessions occurring during special sessions and it also reconciles potentially conflicting language regarding the timing of the appointee's presentation.

This issue arose at the end of the 2001 regular session, following the failed confirmation bid of a Game Board appointee. In response to that event, under paragraph (3), the governor made a new appointment and presented the name to the legislature within 20 days following notification of the failed nomination. As to that Game Board vacancy, the governor was correct under paragraph (3) in appointing and presenting the name, but since the regular session of the legislature had adjourned, under paragraph (1), that presentment was ineffective.

Because joint sessions for confirmation purposes are often held near the end of the regular session, this means that the time for a new appointee's presentment would most likely fall during a special session (if one is held in the interim).

The waters become muddy because the 20-day requirement (that the governor has to name a candidate following a failed confirmation) of paragraph (3) is a direct conflict with paragraph (1), which states that only presentment that occurs during a regular session constitutes presentment. To further complicate the issue, AS 39.05.080 is utterly ambiguous as to whether the legislature is even authorized to confirm appointees during the special session.

HB331 reconciles the two problematic paragraphs of AS 39.05.080 by:

- Removing the 20-day requirement in paragraph (3) and keeping the requirement of paragraph (1) stating that only presentment during a regular session is valid;
- Inserting as appropriate throughout the section, "regular;"
- Removing "within five calendar days" from the latter part of paragraph (1) because the five-day presentment requirement in paragraph (1) is just as problematical as the 20-day presentment requirement since the fifth day could be outside the regular session even if the appointment were made during the regular session.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSHB 331(STA)
 (H) Publish Date: 3/15/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Office of the Governor
 Title: "An Act relating to appointment of BRU Executive Operations
positions that require confirmation..." Component Executive Office
 Sponsor: Representative Kott
 Requester: State Affairs Component No. 6

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
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						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Michael A. Nizich, Administrative Director Phone 465-3876
 Division: Administrative Services Date/Time 2/6/02 9:47 AM
 Approved by: David Ramseur, Chief of Staff Date 02/06/2002
 Agency: Office of the Governor

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House of Representatives
House District 24

HB331

Sectional Analysis

AS 39.05.080 establishes the procedures on how the positions or memberships on a specific board or commission shall be handled.

Paragraph 1. This paragraph directs the governor to:

- Present names of appointed individuals to the legislature. It stipulates that only presentments that occur while the legislature is in regular session constitute 'presentment.'
- Within the first 30 days after the legislature convenes its regular session, the governor presents the names of the following persons to the legislators:
 - A. appointments who have not been previously confirmed by the legislature; and
 - B. appointments of persons who will fill a position for which the term will expire **on or before March 1** during that legislative session. If an appointment is made after the first 30 days of the convening of the legislature but while the legislature is in regular session, the governor shall immediately present that appointment to the legislature for confirmation.

This paragraph of AS 39.05.080 also reflects the elimination of the five-day period of time in which the governor had to present the individual to the legislature following the appointment. The five-day presentment requirement in paragraph (1) was problematic because the fifth day could be outside the regular session even if the appointment was made during the regular session.

This paragraph also reflects the elimination of a mechanism (by concurrent resolution) where the legislature could have extended the five-day deadline. This is, of course an unconstitutional provision. A statute may only be modified by another statute not by a concurrent resolution of agency regulation.

Paragraph 2. When appointments are presented to the legislature for confirmation:

- A. The presiding officers of each house assign the appointee to a committee for a hearing, report, and recommendation. The standing committees may meet jointly; then

Sectional Analysis

- B. Before the end of the regular session in which the appointments are presented, the legislature meets in joint session to act by confirming or declining to confirm by a majority vote.

The word "regular" is added to this paragraph of AS 39.05.080 so that it is clear that confirmation hearings do not occur during special sessions.

Paragraph 3. When the legislature declines to confirm an appointment:

- the governor is notified of its action and a vacancy for the position is created which the governor fills by making a new appointment.
 - The governor cannot re-appoint the rejected candidate during the regular session of the legislature at which the confirmation failed. Likewise, the governor may not appoint the failed candidate during the interim between regular sessions to carry out the duties of that vacant position.
 - Finally, if the legislature fails to act to confirm an appointee during the regular session, the appointee is, in effect, rejected.

The 20-day provision for the governor's presentment following the initial failed confirmation is deleted from Section 3. By eliminating the 20-day provision of section (3) and keeping the requirement of section (1) it is clear that only presentment during a regular session is valid.

Paragraph 4. The appointees with pending confirmations shall exercise the functions, have the powers and be charged with the duties prescribed by law.

There are several specific limitations cited in this paragraph, such as:

- The term of an appointee who is named during the interim by a governor who leaves office prior to the first day of the regular session ends on the first day of the regular session.

This section is completely unchanged from the original statute.

Alaska State Legislature

House of Representatives

RULES COMMITTEE, CHAIR
COMMITTEE ON COMMITTEES
LABOR & COMMERCE COMMITTEE
MILITARY & VETERANS AFFAIRS
LEGISLATIVE COUNCIL



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SESSION:
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JUNEAU, AK 99801

Memorandum

To: Senator Gene Therriault
From: Rep. Pete Kott
Date: March 18, 2002

Regarding: HB 331
Governor's Appointments

Attached to this memorandum is a copy of HB 331, relating to the timing of the governor's appointments, that just passed the House of Representatives this morning. This bill is important as it cleans up a statute that is replete with ambiguities and inconsistencies relative to the procedures of the governor's presentation of board candidates. I am also submitting my sponsor statement and a sectional analysis for your consideration.

At this time, I would like to request a hearing in State Affairs, at the earliest opportunity.

Representative Pete Kott

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