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LEGAL SERVICES

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

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


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

MEMORANDUM

May 4, 2004

SUBJECT: The applicability of the Feres doctrine to the state (HB 359)

TO: Representative Les Gara

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

You asked for a simple summary of the effect of the Feres doctrine on the state.

Q. What is the Feres doctrine?

A. The Feres doctrine is a legal doctrine that bars suits against the federal government for injuries that arise out of or occur in the course of military service.¹

Q. Does Alaska have a law with provisions similar to the Feres doctrine that bars suits against the state?

A. Yes. In 2003, the legislature enacted AS 26.05.145 that bars suits against the state to the same extent the Feres doctrine bars suits against the federal government.²

Q. Without the enactment of AS 26.05.145, would the Feres doctrine bar these type of suits against the state?

A. No. When presented with the issue, the Alaska Supreme Court held that the Feres doctrine is "strictly speaking, a federal doctrine, we are not bound by its holding."³

If I may be of further assistance, please advise.

DMB:med
04-505.med

¹ *Estate of Kenneth W. Himsel v. State of Alaska*, 36 P.3d 35, 38 (Alaska 2001), discussing *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

² Sec. 4, ch. 43, SLA 2003. The law was enacted to legislatively overrule the *Himsel* decision.

³ 36 P.3d at 39 (notes and citations omitted).

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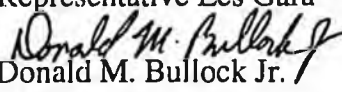
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 4, 2004

SUBJECT: Title of CSSB 338(STA) (Work Order No. 23-GS2065H)

TO: Representative Les Gara

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

You asked whether the title of CSSB 338(STA), "An Act relating to actionable claims against state employees; and providing for an effective date," encompasses the contents of the bill. The answer is yes.

Section 1 of the bill adds a new section to AS 09.50 that relates to actionable claims against state employees. Bill sec. 2 makes a conforming amendment to AS 09.50.300 based on the enactment of the new provision in sec. 1. Bill sec. 3 describes the applicability of the Act. Bill sec. 4 contains instructions to the revisor to edit the heading of art. 3 of AS 09.50 to reference the subject of the new statutory section added by sec. 1. Bill sec. 5 is the effective date.

As you can see, the contents of the above-referenced bill are consistent with the bill's title.

If I may be of further assistance, please advise.

DMB:mdr
04-214.mdr

ALASKA STATE LEGISLATURE



REPRESENTATIVE LES GARA

Sponsor Statement: HB 359 – Reinstatement of Military Member Rights To Personal Injury and Wrongful Death Recovery

HB 359 reinstates the rights of military members and their families to recover when they are injured or killed by the negligence or recklessness of a state employee. It is only fair to allow military members the same rights as non-military members when injured by the state in civilian settings. Non-military members can recover full damages for injuries caused by state employees.

Last session those rights were lost under HB 245, and the consequence was unintended by many legislators. HB 245 listed a number of circumstances in which people could no longer recover from the state when injured. Those circumstances included search and rescue cases and fire cases in which the state is allegedly negligent. This bill leaves those exemptions in place.

HB 359 reverses the following provision of HB 245. That provision states a claim for negligence or recklessness "may not be brought by or on behalf of a member of the military services against the state . . . for wrongful death, personal injury or other tort claim or injury" if the military member is on active duty. Thus, for example, if a state employee negligently runs a red light and paralyzes or kills a military member who is on his way to pick up supplies, the member cannot sue the state.

There is no good reason to take basic rights away from military members, especially in these times when military members are risking their lives to protect us. Civilians still have a right of recovery if killed or severely injured by the state. The bill provides military members with equal treatment under the law. Former Director of Military and Veterans Affairs Laddie Shaw has joined in support of this bill.

HB 359 doesn't allow military members to sue for combat or training related injuries, as those are matters of national security and internal military conduct. That exemption from liability is recognized in all 50 states.

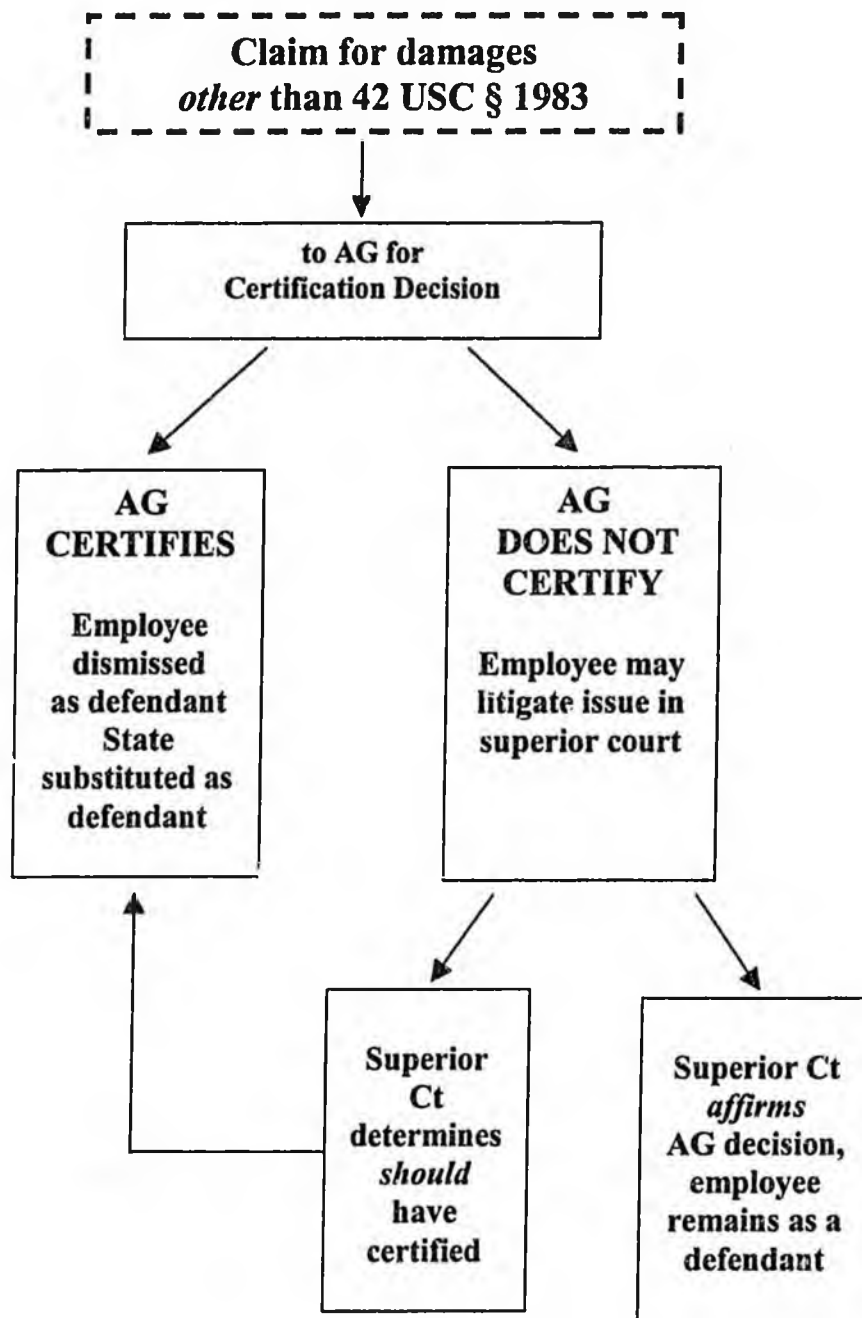
PROPOSED AMENDMENT TO CSSB 338 (STA)

- The proposed amendment would require a title change to the bill: SB 338's title is "claims against state employees"; the amendment would be in effect "Claims by State and Federal employees Against the State". A title change resolution (2/3 vote) would be required, and the bill would have to go back to the Senate for concurrence. This proposed amendment seriously jeopardizes passage of SB 338, a bill that is supported by state employees and their collective bargaining units.
- The proposed amendment would be the first hearing on what was pre-filed during this session (HB 359), referred to the Military and Veterans Affairs Committee, and no hearing to date scheduled on the bill. In stark contrast, SB 338 had hearings in the Senate, was passed out of the Senate on a vote of 19 - 0, and the companion bill has already had hearings on the House side.
- The proposed amendment is directly contrary to the exclusive remedy provision of state workers compensation. This amendment would give a state military member a tort remedy that **no other state employee has** - - to sue the state in tort in addition to his workers compensation benefits. So a military member would be allowed to sue any other state agency other than Military and Veterans Affairs for tort remedies, in addition to the compensation already paid by the state for workers compensation injuries. No other state employee has such a bonus.
- The proposed amendment fails to recognize that state agencies work cooperatively with one another, and with the federal government in operations involving both state and federal military members. For example, exercises at the airport involve State DOT. Other operations (such as wildfire suppression) involve the Department of Natural Resources, and the Department of Public Safety (search and rescue). The amendment would allow both state and federal service members to sue any of these other agencies for tort damages, while still receiving workers compensation benefits from the state or the United States Government. If a federal military member is injured incident to military service, it is fair that the federal, not state, government pay for those injuries that result from the member's deployment.

- The amendment is inconsistent with the immunities provided in AS 18.60.125, AS 41.15.045, and AS 41.17.081. These immunities were thoroughly discussed and debated last session in both the House and the Senate.
- The current law does not take away any longstanding established rights of Alaska military members. The *Feres* Doctrine had been the *status quo* until the Alaska Supreme Court in 2001 deviated from the federal rule and that of sister states. The Legislature's actions in 2003 brought the law back where it had always been.

SB 338 -- HOW IT WORKS

State employee individually sued for damages



CS FOR SENATE BILL NO. 338 (STA)
"AN ACT RELATING TO ACTIONABLE CLAIMS
AGAINST STATE EMPLOYEES"

SECTIONAL ANALYSIS
OFFICE OF THE ATTORNEY GENERAL

Section 1: Creates new sections in Title 9. Proposed 09.50.253 converts lawsuits and claims against individual state employees,¹ when acting within the scope of the employee's office or employment, into a claim against the state. The state is substituted as the defendant in the action. It provides that the Attorney General determines whether the claim arose within the scope of the employee's office or employment. ("acting within the scope of the employee's office or employment" is defined on page 3, following line 12 in (h) of the bill). The Attorney General then certifies the action and the individually sued state employee is dismissed from the lawsuit with the state substituted as the defendant. The attorney general or the attorney general's designee then defends the action. All defenses and limitations applicable to the state are then applicable to the action.

If the Attorney General does not certify that the state employee was acting within the scope of the employee's office or employment, the state employee may petition the superior court for relief. If the superior court finds that the state employee was acting within the scope of office or employment, the state is substituted as the defendant and the state employee is

¹ Excluded from the definition of "state employee" are the University of Alaska, the Alaska Railroad Corporation, and a political subdivision of the state. The Attorney General does not provide representation to these entities and each may sue and be sued pursuant to its own authorizing statutes. (University of Alaska, AS 14.40.040; Alaska Railroad Corporation, AS 42.40.010, AS 42.40.900; and political subdivisions of the state, AS 09.65.070)

entitled to reimbursement by the state for the employee's reasonable costs and attorney fees incurred in filing the successful superior court petition.

The section does not apply to civil actions or proceedings against a state employee for a violation of the United States Constitution or in violation of a state statute expressly authorizing an action.

Subsection (g) provides that the certification process is in addition to and does not supercede legal defense and indemnity terms in state collective bargaining agreements.

Section 2: This is a conforming amendment to AS 09.50.300.

Section 3: This section applies the law prospectively, to causes of action arising after it is enacted.

Section 4: Includes instructions to the Revisor to change the heading of art. 3 of AS 09.50.

Section 5: Provides an immediate effective date.

Public Safety Employees Association, Inc.
"Representing Alaska's Finest"

COPY

March 23, 2004

Senator Con Bunde, Chairman
Senate Judiciary Committee
Alaska Legislature
State Capitol, Room 506
Juneau, AK 99801-1182

Re: Senate Bill 338

Dear Senator Bunde,

The Public Safety Employees Association (PSEA) represents over 1,300 Law Enforcement Officers from 8 different agencies throughout Alaska. We have been following Senate Bill 338 and its counterpart in the House with great interest. As you know, oftentimes a law enforcement officer has to make a life-and-death decision in a split-second. Too often, litigious suspects are able to bring a lawsuit against these public servants with little or no merit hoping for a big settlement.

In the original form, Senate Bill 338 raised concerns for our members, as some protections provided for in the Collective Bargaining Agreement would have been lost. However, after working with representatives of the Attorney General, we were pleased to see amendments which resulted in the adoption of the Committee Substitute. The CS actually increases the level of protection for Law Enforcement Officers from these types of suits.

The Public Safety Employees Association supports the CS for Senate Bill 338 in its current form. If you or any other members of the Judiciary Committee have any questions, please feel free to contact me.

Sincerely,



Joe D'Amico
Business Manager
Public Safety Employees Association

cc: Representative Tom Anderson
Representative Lesil McGuire
Mr. Scott Nordstrand ✓

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

April 15, 2004

Representative Lesil McGuire
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol, Room 118
Juneau, Alaska 99801

Subject: CSHB488 (L&C) /CSSB338 (STA), Claims Against State Employees

Dear Representative McGuire:

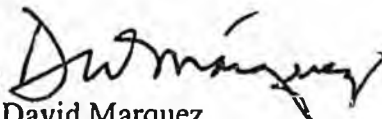
CSHB488 (L&C) passed out of the House Labor and Commerce Committee on April 2 and was referred to your Judiciary Committee on April 13. I have previously requested a hearing before your committee on CSHB 488.

CSSB338 (STA) which is the governor's bill on the same subject as CSHB488 has passed the Senate and has been referred to your Judiciary Committee.

I respectfully request that you have a hearing on CSSB(STA) 388 at your earliest convenience.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: 
David Marquez
Chief Assistant Attorney General

DWM/lcc

cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law
Gail Voigtlander, Torts & Workers' Compensation Section Chief, Department of Law

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 338
 (S) Publish Date: 2/16/04

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title An Act relating claims against RDU Civil
state employees and claims arising.... Component Torts & Workers' Compensation
 Sponsor Ruies
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
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 (FY2004) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 This bill amends AS 09.50 by converting claims against state employees acting within the scope of their employment into claims against the state."

Passage of this legislation is not anticipated to have any foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhete, Director Phone _____
 Division: Administrative Services Date/Time 2/13/04 3:22 PM
 Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date 2/13/2004
 Agency: Department of Law