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Senator Gary Stevens
Alaska State Legislature

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facsimile transmittal

To: *Leg Legal* ^{*attn: Don B.*} Fax: *2029*
From: *Katrina* Date: *3/19/04*
Re: *SB 338* Pages: *2*
CC:

Urgent For Review Please Comment Please Reply Please Recycle

Hi Don,
Here is the Amendment that the
State Affairs Committee adopted.

Thanks.

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23G-2
3/18/2004
(8:38 AM)

AMENDMENT #2

OFFERED IN THE SENATE STATE
AFFAIRS COMMITTEE

BY _____

TO: Proposed CS for SB 338 (23-LS)

- 1 Add the following new subsection to proposed AS 09.50.253 (Actionable claims against state
- 2 employees):
- 3 "() The provisions of this section are in addition to and do not supersede a term
- 4 in a state employee collective bargaining agreement addressing legal defense and
- 5 indemnity."

*Adopted
4/2 8:42*

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

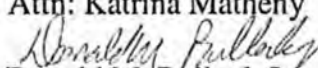
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 18, 2004

SUBJECT: CSSB 338() relating to claims against state employees
(Work Order No. 23-GS2065\D)

TO: Senator Gary Stevens
Attn: Katrina Matheny

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

Enclosed is a blank CS for SB 338.

This is a time-limited review, and I may have additional comments with the next draft.

There is one issue I raise for you to consider related to Rules 4 and 12 of the Alaska Rules of Civil Procedure. Civil Rule 12 requires a defendant to serve an answer within 20 days after the service of the summons and complaint on that defendant; however, if the service is on the state or an officer or agency of the state, the answer is to be served within 40 days after service upon the attorney general. Under Civil Rule 4, in an action against the state, service is to be made on the attorney general and, if applicable, upon an officer or agency of the state.

How would you like to treat an employee who may or may not have been acting within the scope of employment at the time the cause of action arose? Should the employee answer within 20 days, as provided in Civil Rule 12, or within the 40 day-period that is applicable to the actions against the state?

Civil Rule 25 may also be modified by this bill. Rule 25 discusses substitution of parties. Other rules relating to parties may also be offered.

On page 2, line 7, "an agreement by employee" may be considered a coerced agreement and may not be binding.

If I may be of further assistance, please advise.

DMB:mdr
04-108.mdr

Enclosure

23-GS2065\D
Bullock
3/18/04

CS FOR SENATE BILL NO. 338()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL
FOR AN ACT ENTITLED

1 **"An Act relating to actionable claims against state employees; and providing for an**
2 **effective date."**

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

4 *** Section 1.** AS 09.50 is amended by adding a new section to read:

5 **Sec. 09.50.253. Actionable claims against state employees.** (a) Except as
6 provided in (f) of this section, the remedy against the state provided by AS 09.50.250
7 for injury or loss of property or personal injury or death arising or resulting from an
8 act or omission of a state employee while acting within the scope of the employee's
9 office or employment is exclusive of any other civil action or proceeding for money
10 damages by reason of the same subject matter against the employee whose act or
11 omission gave rise to the claim or against the estate of the employee. Any other civil
12 action or proceeding for money damages arising out of or relating to the same subject
13 matter against the employee or the employee's estate is precluded without regard to
14 when the act or omission occurred.

1 (b) A state employee against whom a civil action or proceeding is brought
2 under (a) of this section shall deliver all pleadings and process served upon the
3 employee, or a copy of the papers served, to the person designated by the head of the
4 employee's agency to receive the papers and to the attorney general. The state
5 employee shall deliver these documents within the time period established by the
6 attorney general in a regulation adopted under this section. The initial delivery of
7 these documents to the attorney general constitutes an agreement by the employee to
8 cooperate with the attorney general in the state employee's defense of the action or
9 proceeding and a consent that the attorney general conduct the defense as the attorney
10 general considers advisable and in the best interests of the employee, including
11 settlement in the attorney general's discretion.

12 (c) Upon certification by the attorney general that the state employee was
13 acting within the scope of the employee's office or employment at the time of the
14 incident out of which the claim arose, any civil action or proceeding commenced upon
15 the claim in a state court is considered an action or proceeding against the state under
16 the provisions of this title, and the state is substituted as the party defendant. The civil
17 action or proceeding certified under this subsection is subject to the same limitations
18 and defenses applicable to an action or proceeding against the state. The attorney
19 general or the attorney general's designee shall defend the civil action or proceeding
20 on behalf of the state.

21 (d) If the attorney general refuses to make the certification under (c) of this
22 section, the state employee may, at any time before trial, petition the superior court to
23 find and certify that the employee was acting within the scope of the employee's office
24 or employment at the time of the incident out of which the claim arose. Upon
25 certification by the court, the civil action is considered to be a civil action or
26 proceeding brought against the state under the provisions of this title, and the state is
27 substituted as the party defendant. Upon certification by the court, the state shall
28 reimburse the state employee the employee's reasonable costs and attorney fees
29 incurred in bringing the petition. A copy of the petition under this subsection shall be
30 served upon the state in accordance with the provisions of Rule 4(d)(7), Alaska Rules
31 of Civil Procedure. The petition to the superior court is the exclusive remedy to

1 challenge the noncertification decision by the attorney general of a state employee
2 under this section.

3 (e) A claim or suit for damages may not be filed against the state or the
4 attorney general arising out of the process for certification under this section.

5 (f) This section does not extend or apply to a civil action or proceeding against
6 an employee of the state that is brought for a violation of the Constitution of the
7 United States or that is brought for a violation of a law of the state under which an
8 action or proceeding against an employee is expressly authorized.

9 (g) The provisions of this section are in addition to and do not supercede a
10 provision in a state employee collective bargaining agreement addressing legal
11 defense and immunity.

12 (h) In this section,

13 (1) "acting within the scope of the employee's office or employment"
14 means acts or omissions

15 (A) that the state employee is employed or authorized to
16 perform;

17 (B) of the state employee that occur substantially within the
18 authorized time and space limit;

19 (C) that are activated by a purpose to serve the state; and

20 (D) that do not constitute acting, or failing to act, with wilful,
21 reckless, or intentional misconduct, or with gross negligence or malice;

22 (2) "state employee"

23 (A) means

24 (i) a permanent, probationary, seasonal, temporary,
25 provisional, or nonpermanent employee in the executive, legislative, or
26 judicial branch of state government, whether in the classified, partially
27 exempt, or exempt service; or

28 (ii) a person appointed to a board or commission of
29 state government;

30 (B) does not include an employee of

31 (i) the University of Alaska;

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- (ii) the Alaska Railroad Corporation; or
- (iii) a political subdivision of the state, including a regional educational attendance area.

* Sec. 2. AS 09.50.300 is amended to read:

Sec. 09.50.300. Compromise by attorney general. Except as provided in AS 09.50.253, the [THE] attorney general may, with the approval of the court, arbitrate, compromise, or settle any action filed under AS 09.50.250 - 09.50.300.

* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to a cause of action that arose on or after the effective date of this Act.

* Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTIONS. The revisor of statutes is instructed to change the heading of art. 3 of AS 09.50 from "Article 3. Claims Against State" to "Article 3. Claims Against the State or State Employees."

* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

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facsimile transmittal

To: *Leg. Secrel* Fax: *2029*
From: *Katrina* Date: *3/17/04*
Re: *SB 338* Pages: *4*
CC:

Urgent For Review Please Comment Please Reply Please Recycle

Can I please get a blank CS for SB 338 that incorporate these two amendments.

Thank you

Subject: Re: FW: SB 338/HB 488

Date: Wed, 17 Mar 2004 14:48:59 -0900

From: Scott Nordstrand <Scott_Nordstrand@law.state.ak.us>

To: joe@psea.net

Dear Mr. D'Amico,

Our attorneys looked at your proposal and modified it somewhat, although I think it still does what you intended. Here it is:

★ ["The provisions of AS 09.50.253 are in addition to and do not supercede a term in a state employee collective bargaining agreement addressing legal defense and indemnity."]

Please let me know if you can support this language. I believe the bill will be of great benefit to all State of Alaska employees, particularly your members.

Looking forward to hearing from you,

Scott.

>>> Joe D'Amico <joe@psea.net> 3/16/2004 1:51:46 PM >>>

Dear Mr. Nordstrand,

Thank you and your staff for your time this morning to discuss PSEA's concerns with SB 338 and HB 488 regarding claims against state employees. Mr. Gasper and I appreciate the opportunity to discuss the issue and the ability to get straight answers to our questions. As I mentioned in our meeting, PSEA does not wish to hinder the State's ability to defend state employees or the State in civil actions. However, we have concerns about changes in the system that has been in place for some time. I also would like to reiterate that the A.G.'s Office has been very dependable in the defending of State Troopers as well as Airport Police and Firefighters regarding this matter.

After carefully reviewing the Bill, the amendment and the information you and your staff provided, PSEA would like to offer this one sentence to be added to the Bill:

"Nothing in this statute shall supercede a provision in a collective bargaining agreement that creates a different level of protection for state employees."

If I understood the discussion and previous testimony, it is not the intent of the Department of Law to change levels of protection provided in Collective Bargaining Agreements. If the Department could adopt this sentence, PSEA would withdraw all opposition to the Bill, and would instead support it.

If you have any questions, please feel free to contact me at 337-1979. Thank you.

Joe D'Amico
Business Manager
Public Safety Employees Association

AMENDMENT #1

Adopted

OFFERED IN THE SENATE STATE
AFFAIRS COMMITTEE
TO: SB 338

BY _____

1 Page 1, line 1:

2 Delete "relating to the state's"

3

4 Page 1, lines 2 - 4:

5 Delete all material.

6

7 Page 1, line 7:

8 Delete "adding new sections to read"

9 Insert "adding a new section to read"

10

11 Page 3, line 2, following "defendant.":

12 Insert "Upon certification by the court, the state shall reimburse the state employee the
13 employee's reasonable costs and attorney fees incurred in bringing the petition."

14

15 Page 3, following line 12:

16 Insert the following new material:

17 "(g) In this section,

18 (1) "acting within the scope of the employee's office or employment"

19 means acts or omissions

20 (A) that the state employee is employed or authorized to perform;

21 (B) of the state employee that occur substantially within the

22 authorized time and space limit;

1 (C) that are activated by a purpose to serve the state; and
2 (D) that do not constitute acting, or failing to act, with willful,
3 reckless, or intentional misconduct, or with gross negligence or malice;

4 (2) "state employee"

5 (A) means

6 (i) a permanent, probationary, seasonal, temporary,
7 provisional, or nonpermanent employee in the executive, legislative, or
8 judicial branch of the state government, whether in the classified, partially
9 exempt, or exempt service; or

10 (ii) a person appointed to a board or commission of the
11 state government;

12 (B) does not include an employee of

13 (i) the University of Alaska;

14 (ii) the Alaska Railroad Corporation; or

15 (iii) a political subdivision of the state, including a regional
16 educational attendance area."
17

18 Page 3, line 13, through Page 6, line 7:

19 Delete all material.
20

21 Page 6, line 10:

22 Delete "AS 09.50.253 - 09.50.257. the"

23 Insert "AS 09.50.253, the"
24

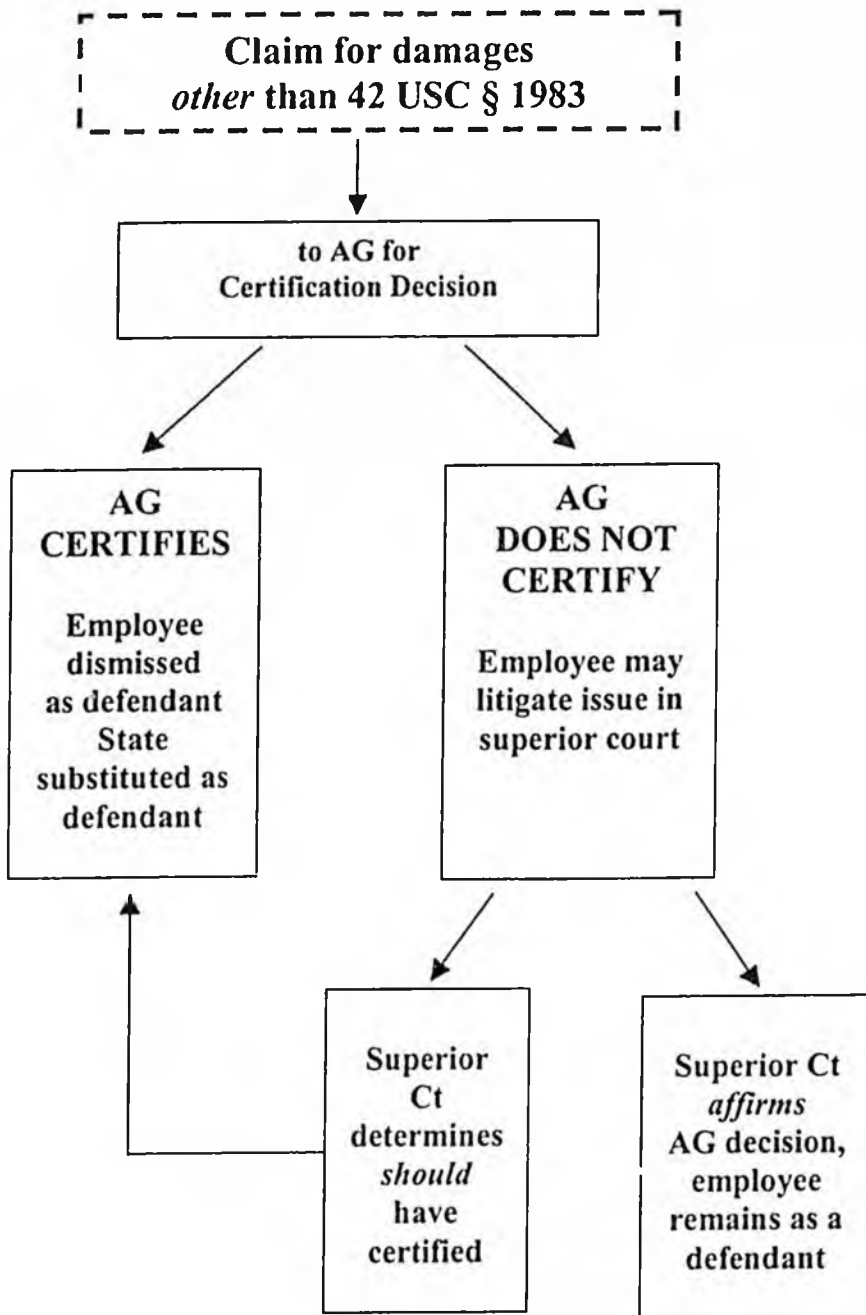
25 Page 6, line 13, through Page 7, line 28:

26 Delete all material.
27

28 Renumber the following bill sections accordingly.

SB 338 -- HOW IT WORKS

State employee individually sued for damages



SENATE BILL NO. 338
"AN ACT RELATING TO ACTIONABLE CLAIMS
AGAINST STATE EMPLOYEES"

SECTIONAL ANALYSIS (as amended)
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 (g) 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.

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.

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 Rules
 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						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

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. Renkos, Attorney General Date 2/13/2004
 Agency Department of Law

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

MAR 05 2004

File

POSITION PAPER – Senate Bill 338

The Public Safety Employees Association (PSEA) represents over 1,300 law enforcement and correctional officers statewide. Our members are employed by the Ketchikan, Sitka, Juneau, Fairbanks and Unalaska Police Departments, the Airport Police and Fire Departments at the Anchorage and Fairbanks International Airports, the Alaska Department of Corrections and the Alaska State Troopers.

SB-338 would directly impact over 1,000 of our members. PSEA strongly opposes this Bill and believes it is an unfair and unwarranted attack on our State's Law Enforcement Officers. Under the current Collective Bargaining Agreement, the Alaska State Troopers, as well as the Airport Police and Firefighters, have a clause which states a member will be indemnified by the State unless a "Court of competent jurisdiction" determines that an officer operated outside the scope of their duties. This level of protection has a practical application which allows a trooper or other officer to know they will be indemnified until an impartial third party, rather than a state employee, reviews their actions. This disinterested party would likely be either a judge or a jury of the officer's peers. Under the proposed Bill, those protections will be stripped away from our law enforcement officers and that crucial decision whether or not to indemnify the officer will be left to an attorney, employed by the State.

The State contends that this Bill simply codifies the existing practice and sets up a system, which they do not have regarding employee indemnification. PSEA believes that is inaccurate with regard to State Troopers and Airport Police and Firefighters. The current system we have works just fine and has been in place for some time. It is true that the Correctional Officers do not have this level of protection, as they are laboring under outdated General Government Unit Indemnification Language. But, this Bill would not provide what these officers need. That level of protection is being sought at the negotiation table, as it should be.

Members of our group are Class I Employees and therefore, cannot strike, which is a good thing. A strike by those in the last line of defense in our safety net would be bad public policy. Instead, under PERA, these employees have a dispute resolution system. This Bill removes a layer of that protection and exposes our law enforcement professionals to added concern, distraction and worry over consequences of their actions.

We are strongly urging you, the Alaska Legislature (our last line of defense) to NOT SUPPORT SB-338 as it pertains to the Law Enforcement Officers and Correctional Officers of our State. If you need additional information, please contact Joe D'Amico at (907) 337-1979. Thank you.

SB 338



FRANK H. MURKOWSKI
GOVERNOR
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 13, 2004

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill relating to: (1) indemnification of tort claims against state employees; and (2) the attorney general's decision whether to indemnify an employee and arbitration of that decision.

Current Alaska law addresses lawsuits against the state in AS 09.50.250. However, the statutes fail to address a core concept of the Federal Tort Claims Act (FTCA). Under the FTCA, if a lawsuit is filed against a federal employee, and the attorney general of the United States certifies the employee was acting in the scope of employment, the United States is substituted as the defendant for the employee. The individual employee is no longer a defendant in the case. This bill adds this critical concept to Alaska law.

This bill would allow state employees to carry out their duties knowing that if there is a lawsuit filed against them for an act or omission within the scope of their employment, the lawsuit will not proceed against them as an individual. They will not be subject to the burdens court rules place on a "party" including being subject to an award of costs and fees to a prevailing party. The public would benefit as services would not be interrupted while state employees participate in lawsuits.

The bill would further provide that the decision of the attorney general whether to indemnify an employee is not subject to arbitration. An employee who is denied indemnification can contest that decision in the courts.

I urge your prompt and favorable action on this measure.

Sincerely yours,

Frank H. Murkowski
Governor

Enclosure