SB

132

IOUSE COMMITTEE REPO

(7)

Date Referred to Committee: May 5, 2005 **FURTHER REFERRALS:**

Date of Committee Action: ~~May 9, 2005~~ SS FEB. 6, 2006

The JUDICIARY Committee considered: **SB 132(efd fld)**

SENATE BILL NO. 132(efd fld) **HUMAN RIGHTS COMMISSION**

"An Act relating to complaints filed with, investigations, hearings, and orders of, and the interest rate on awards of the State Commission for Human Rights; and making conforming amendments."

Recommends it be replaced with [X] HCS *or* **[ ] CS** *for* SB 132 (JUD)

For Senate Bills with new title: [ ] Technical Title [X] New Title: HCR_____ [ ] Same Title [X] New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				X
GOV				X

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gara			✓	
John Coghill	Coghill			✓	
Peggy Wilson	Wilson			✓	
Bill Kott	Kott			✓	
M Ruenberg	Ruenberg			✓	
Chair:	MOLN			✓	
Chair:					

AMENDMENT #1 - PASSED

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY Gruenberg

TO: HCS SB 132(STA)

Page 2, line 27:

Delete "The commission, in its"

Page 2, line 28, through page 3, line 1:

Delete all material.

Page 3, line 4:

Delete ", in the executive director's discretion,"

Page 3, following line 15:

Insert the following new material:

"(c) The commission, in its discretion, may, but is not required to, review the executive director's order of dismissal under (a) or (b) of this section and may affirm the order, remand the complaint for further investigation, or, if the commission concludes that substantial evidence supports the complaint of an unlawful discriminatory practice, refer the complaint for conference, conciliation, and persuasion as provided in AS 18.80.110, or for hearing."

Page 3, line 16:

Delete "(c)"

Insert "(d)"

Page 3, line 22:

Delete ", in the executive director's discretion,"

Amendment #3* - PASSED

to HCS SB 132 (SM4) by Rep Gara

Page 2, line 7 & line 9:
Delete "180 days"
Insert "1 year"

Conceptual amendment #48 - PASSED

to HCS SB 132 (STA) by Rep. Gara

Page 4, line 17:

After "shows"

Insert ", after a reasonable opportunity for discovery,"

AMENDMENT #5

OFFERED IN THE HOUSE BY: REPRESENTATIVE GARA

TO: HCS SB132(STA)

Page 4, line 28

Delete "noneconomic"

Page 4, line 30 following "DISCRIMIATION]."

Insert "Nothing in this subsection prevents an award of noneconomic damages, including damages for emotional injury."

1/25/06

24-GS1110\G.1
Kane
1/18/06

offered 2/6/06 6 PASSED

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: HCS SB 132(STA)

Page 1, line 2:

Delete "**and**"

Insert "**providing for attorney fees and costs in cases involving human rights violations;**"

Page 1, line 3, following "**amendments**":

Insert "**; and amending Rule 82, Alaska Rules of Civil Procedure**"

Page 6, following line 15:

Insert a new bill section to read:

"*** Sec. 11.** AS 18.80 is amended by adding a new section to article 2 to read:

Sec. 18.80.147. Attorney fees and costs. (a) In an action brought by a person under AS 22.10.020(i), a prevailing plaintiff shall be awarded costs as provided by court rule and full reasonable attorney fees at the prevailing reasonable rate.

(b) Unless the action is found to be frivolous, in an action brought by a person under AS 22.10.020(i), a prevailing defendant shall be awarded attorney fees and costs as provided by court rule. If the action is found to be frivolous, the attorney fees to be awarded to the defendant shall be full reasonable attorney fees at the prevailing reasonable rate.

(c) In this section, "frivolous" means

(1) *not reasonably based on evidence* or on existing law or a reasonable extension, modification, or reversal of existing law; or

(2) brought to harass the defendant or to cause unnecessary delay or

needless expense."

Renumber the following bill sections accordingly.

Page 7, following line 3:

Insert a new bill section to read:

"* **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. The provisions of sec. 11 of this Act have the effect of changing Rule 82, Alaska Rules of Civil Procedure, by requiring the award of full reasonable attorney fees in certain cases."

Renumber the following bill sections accordingly.

Page 7, line 7:

Delete "secs. 1 - 13"

Insert "secs. 1 - 14"

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 132
(S) Publish Date: 3/4/05

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title "An Act relating to complaints filed with, investigations...of the State Human Rights Comm.."
RDU Commissions/Special Offices
Component Human Rights Commission
Sponsor Rules
Requester Governor
Component No. 1

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
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	0.0	0.0	0.0	0.0	0.0	0.0
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 (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Kevin Jardell, Legislative Liaison
Phone 465-4021
Division Office of the Governor
Date/Time 3/3/05 3:25 PM
Approved by: Kevin Jardell, Legislative Liaison
Date 3/3/2005
Agency Office of the Governor

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 132
(S) Publish Date: 3/4/05

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to complaints filed with, investigations...the State Commission for Human Rights..."
RDU CIVIL
Component Labor & State Affairs
Sponsor
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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 (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill amends AS 18.80.112 to provide the staff of the Human Rights Commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The bill also sets out the appropriate remedy for employment discrimination but preserves the commission's discretion to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/28/05 2:48 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/28/2005
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HCS SB 132(JUD)
(H) Publish Date: 3/3/06

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title "An Act relating to complaints filed with, investigations...of the State Human Rights Comm..."
RDU Commissions/Special Offices
Component Human Rights Commission
Sponsor Rules Committee
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
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	0.0	0.0	0.0	0.0	0.0	0.0
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 (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Kevin Jardell, Legislative Director
Phone 465-4021
Division Governor's Legislative Office
Date/Time 1/12/06 12:00 AM
Approved by: Kevin Jardell, Legislative Director
Date 1/12/2006
Agency Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: HCS SB 132(JUD)
(H) Publish Date: 3/3/06

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to complaints filed with, investigations...the State Commission for Human Rights..."
RDU CIVIL
Component Labor & State Affairs
Sponsor
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill amends AS 18.80.112 to provide the staff of the Human Rights Commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The bill also sets out the appropriate remedy for employment discrimination but preserves the commission's discretion to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 3/1/06 9:22 AM
Approved by: Kathryn Daughhetee for David Márquez, Attorney General
Date 3/1/2006
Agency Department of Law

(Revised 9/23/2004 OMB)

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 February 7, 2006

SUBJECT: Ramifications of bill title change (HCS SB 132(JUD))
(Work Order No. 24-GS1110\F)

TO: Representative Lesil McGuire
Chair of the House Judiciary Committee
Attn: Shalon Szymanski

FROM: Brian J. Kane BK
Legislative Counsel

Enclosed is a draft of the changes you requested for HCS SB 132(JUD). However, there is an issue I would like to bring to your attention regarding the amendment for a title change.

Bill section 11 adds material allowing for recovery of full reasonable attorney fees. Please be aware that the awarding of "full reasonable attorney fees" may have the effect of amending an existing court rule, Civil Rule 82. Civil Rule 82 provides for the recovery of a percentage of attorney fees, and the percentage of recovery permitted varies with the amount of the judgment and whether the matter was contested. If there is no money judgment recovery, the rule establishes a different test. The text of the rule itself also allows for some variation from these provisions. Civil Rule 82 does make an exception from its provisions where law provides otherwise. However, the interpretation of this exception is not clear. It may mean that an attorney fee provision passed by the legislature by majority vote without complying with the usual court rule change requirements is considered an exception. It may also be interpreted to only apply to an attorney fee provision that is passed by the legislature after complying with the usual court rule change requirements, including the two-thirds majority vote. Since it is not clear which interpretation the state's Supreme Court would favor, as a matter of practice, this office recommends adhering to the usual court rule change requirements in order to safeguard the bill from attack. This is especially true given the superior court's decision (currently on appeal) in Native Village of Nunapitchuk, 1-JU-03-700 CI (April 6, 2004) that changes to Civil Rule 82 do require a two-thirds vote.

I have added the phrase "providing for attorney fees and costs in cases involving human rights violations" to the bill title. Uniform Rule 35 sets out the rule in this area, providing in pertinent parts: "A motion or proposition on a subject that requires a change in the title of the bill as enacted in the house of origin, other than a clerical or technical change, is not in order in the second house." There are additional steps that need to be taken in

order to conform with the rule. At your request, I can draft for you a concurrent resolution waiving the application of the appropriate rules that will allow this title to be changed with minimal confusion.

If I may be of further assistance, please advise.

BJK:lmb:med
06-045.lmb

Enclosure

SENATE BILL NO. 132
"AN ACT RELATING TO COMPLAINTS FILED WITH, AND INVESTIGATIONS, HEARINGS, AND ORDERS OF, AND THE INTEREST RATE ON AWARDS OF THE STATE COMMISSION FOR HUMAN RIGHTS"

SECTIONAL ANALYSIS
OFFICE OF THE ATTORNEY GENERAL

Section 1: Amends AS 18.80.100 to ensure that a complainant may withdraw a complaint of unlawful discrimination during the investigative and conciliation phases of the procedures and before the executive director issues an accusation, which begins formal procedures.

Section 2: Adds new subsections to 18.80.100. The power of the executive director to file a complaint is moved from subsection (a) to proposed subsection (b).

Proposed subsection (c) adds to 18.80.100 the limitation period for filing a complaint set out in 6 AAC 30.230. The limitation period established allows the filing of a complaint for 180 days after the discriminatory act or practice ends.

Section 3: Amends 18.80.110 to require a written and signed agreement if a complaint is resolved in the conciliation phase, to make that agreement the equivalent of a commission order for purposes of enforcement, and to authorize the compromise of a damages claim in the agreement.

Section 4: Adds a new section establishing the procedure to be followed if a complaint lacks substantial supporting evidence and expanding the discretion of the executive director to dismiss a complaint that is supported by substantial evidence in appropriate circumstances. A purpose of the section is to reverse the Alaska Supreme Court's decision in *Department of Fish and*

Game v. Meyer, 906 P.2d 1365 (Alaska 1995), that a hearing is mandatory if a complaint is supported by substantial evidence. The Court concluded that the law did not give the commission staff discretion to discontinue action on a complaint after an investigator found substantial evidence of unlawful discrimination. *Id.*, at 1373. The effect of this decision was to require the commission to commit its resources to any complaint supported by substantial evidence without regard to such factors as the weakness of the evidence, the strength of an employer's affirmative defenses, or the significance of the alleged violation.

Subsection (a) establishes the procedure that follows a conclusion after investigation that substantial evidence does not support a complaint of unlawful discrimination. The executive director dismisses the complaint without prejudice. The commission is provided with the discretion to consider an appeal from the director's dismissal.

Subsection (b) expands the discretion of the executive director to pursue complaints based on such factors as, for example, the strength of the evidence, the severity of the alleged violation, an employer's history before the commission, the complainant's cooperation, or the complaint's value in establishing precedent guiding future conduct.

Subsection (c) ensures that the executive director's administrative dismissal is not a dismissal on the merits and that a complainant may file an action with a court or another agency or even file a new complaint with the commission if the reason for the administrative dismissal can be resolved.

Section 5: Repeals and reenacts 18.80.120, which sets out the requirements for a hearing on a complaint of discrimination.

Subsection (a) implements the expanded discretion of the executive director to choose the complaints that commission staff pursue to hearing and provides that the commission may not review the executive director's exercise of that discretion. It also provides that, if the executive director refers a complaint for hearing, the executive director must issue an accusation based on the investigator's determination of substantial evidence.

Subsection (b) adds a requirement that the chief administrative law judge appoint the hearing officer who will conduct the hearing, that various statutes applying to the Office of Administrative Hearings (including those addressing disqualification of a hearing officer and administrative hearing records but excluding the section addressing hearing procedures) apply to the hearing, and a requirement that the hearing follow the procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630, except where the statutes applying to the commission provide otherwise.

Subsection (c) allows reasonable and fair amendments to an accusation, but it provides that substantial evidence must support an amendment naming a different discriminatory practice and that the parties must have an opportunity to resolve the different discriminatory practice in conciliation before the hearing may proceed.

Subsection (d) establishes the burden of proof at a hearing by requiring that the elements of an accusation or defense be proven by a preponderance of the evidence.

Subsection (e) authorizes the commission to issue a summary decision without a hearing

in the same manner that a court may issue a summary judgment -- when the facts are not in dispute and the party petitioning for a summary decision is entitled to an order as a matter of law.

Section 6: Amends the remedial provisions in 18.80.130(a) to authorize the commission to order a remedy after a hearing or after considering a petition for a summary decision. It clarifies the remedial authority of the commission by providing that the commission may order action to correct the discriminatory practice but may not order awards of noneconomic or punitive damages.

Paragraph (1), addressing employment, is amended to set out the specific remedies that the commission can award to remedy a discriminatory employment practice. To the remedies of hiring, reinstatement or upgrading an employee with or without back pay, it adds the authority to order training regarding discriminatory practices, accommodation of a disability, changes to personnel records, posting signs, restoration of seniority, and the payment of front pay for a period of one year in special circumstances: if hiring, reinstatement or upgrading of an employee cannot be accomplished because the employer does not have an appropriate vacancy; if the employer's discriminatory conduct made the employee incapable of returning to work; or if the relationship between the employer and employee has so deteriorated that they cannot work together. The paragraph adds a duty to mitigate. An order for either front pay or back pay must be reduced by the amount that the employee could have earned if the employee made a reasonably diligent effort to obtain comparable employment.

Section 7: Makes conforming amendments to 18.80.130(c).

Section 8: Adds a provision tying the rate of interest when the commission awards interest to the legal rate in AS 09.30.070.

Section 9: Makes conforming amendments to 18.80.135(b)

Section 10: Makes conforming amendments to 18.80.140.

Section 11: Makes conforming amendments to 18.80.270.

Section 12: Adds definitions of "complainant" and "pay" to the definition section in 18.80.300.

Section 13: Adds a paragraph to the Administrative Procedure Act adding the commission to the list of agencies that the Act's hearing provisions cover.

Section 14: Authorizes the commission to begin adopting regulations to implement the changes before the effective date of the act and provides that the regulations may not take effect before the act's effective date.

Section 15: Applies the law prospectively, to complaints filed after it is enacted.

Section 16: Provides an immediate effective date for section 14, which authorizes the commission to begin procedures to adopt regulations.

Section 17: Provides an effective date of July 2, 2005.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB132-LAW-L&SA-3-21-
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to complaints filed with, investigations...the State Commission for Human Rights..."
RDU CIVIL
Component Labor & State Affairs
Sponsor Senate Rules Committee
Requester Senate State Affairs
Component No. 2718

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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 (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill amends AS 18.80.112 to provide the staff of the Human Rights Commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The bill also sets out the appropriate remedy for employment discrimination but preserves the commission's discretion to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/13/06 3:11 PM
Approved by: K. Daughhetee for Scott Nordstrand, Acting Attorney General
Date 1/13/2006
Agency Department of Law

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 132
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title "An Act relating to complaints filed with, investigations...of the State Human Rights Comm..."
RDU Commissions/Special Offices
Component Human Rights Commission
Sponsor Rules Committee
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
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	0.0	0.0	0.0	0.0	0.0	0.0
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 (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Kevin Jardell, Legislative Director
Phone 465-4021
Division Governor's Legislative Office
Date/Time 1/12/06 12:00 AM
Approved by: Kevin Jardell, Legislative Director
Date 1/12/2006
Agency Governor's Legislative Office

(Revised 9/7/2005 OMB)

COMMENTS OF THE COMMISSIONERS OF THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS ON HCS SB 132(STA) (as amended by the House Judiciary Committee)

August 22, 2005

The Commissioners submit the following comments on HCS SB 132(STA) as amended by the House Judiciary Committee. The Commissioners met in Fairbanks on June 28 and 29 to discuss the bill and the recent amendments. The Commissioners are concerned about the impact of some of the amendments on the Commission's ability to effectively investigate and resolve discrimination claims.

Expanding the Time to File Complaints

The Commissioners are particularly concerned about changes to the bill that would expand the time for filing complaints with the Commission from 180 days to 365 days from the date of harm. Presently, the Commission's regulations provide for 180 days for a person to file a complaint from the date an alleged discriminatory act or practice occurred. 6 AAC 30.230(b). The Commission reduced the filing time from 300 days in 1997 in the face of dwindling resources and a growing backlog of cases. At that time the Commissioners considered the impact to the public and determined that 180 days was sufficient time fort Alaskans to bring claims to an administrative agency. The Commission found that reducing the filing time resulted in fewer cases filed and allowed some lessening of the backlog.

Commission staff estimates that expanding the filing time to 365 days will result in approximately 125 additional cases per year. Currently, the backlog of cases awaiting investigation is approximately ninety cases, and most cases are not assigned for investigation for up to eight months after they have been filed. An increase of another 125 filings each year will increase this backlog significantly, and an even greater amount of time will be required before active investigation will begin. The Commission experienced a similar backlog several years ago, frustrating both businesses and complainants seeking efficient resolution of discrimination claims. Although partly lessened by a reduction in filing time, the Commission was able to completely eliminate the backlog after receiving resources for additional staff. These resources have since been reduced and the Commission has lost approximately twenty-five percent of its staff.

The Commissioners believe that, should the filing time be expanded to 365 days, it is imperative that additional resources be given to the Commission to avoid the serious backlog and wait time that would result. At current staffing levels, cases could wait for more than one year before being investigated. The Commission's mandate to conduct prompt investigations would be frustrated by this outcome.

The Commissioners are also concerned that expanding the filing time to 365 days, especially without the influx of additional resources, will cause most cases to become stale before they are ever investigated. As mentioned above, cases now must wait up to eight months before being assigned for active investigation. In cases where complainants wait up to 365 days to file complaints *and* where the cases has been backlogged for up to a year, two year's time could elapse between the alleged discriminatory act and the beginning of the investigation. Even where shorter times have passed, problems with locating witnesses, accurate recollections, and retention of evidence already exist. Moreover, the parties will continue to be frustrated by the additional delays.

Finally, the Commissioners believe that, as a matter of policy, 180 days is sufficient time to allow for the filing of a complaint with the agency. The Commission is an alternative forum in which to file discrimination complaints. Alaskans retain the right to file a complaint in court for up to two years from the date of the alleged discrimination, and are not required to first exhaust their administrative remedies with the Commission. The Commissioners do not believe that 180 days is an inadequate amount of time for complainants to choose between these alternatives.

Proposal to Allow Recovery of Non-Economic Damages

The Commissioners are also concerned about the proposed amendment to the bill that would provide for the recovery of non-economic damages. The Commissioners oppose the passage of this amendment. As noted above, the Commissioners believe that the Commission is intended to be an alternative forum to filing a civil action in court. The Commissioners believe that the appropriate avenue to seek redress for non-economic damages is to pursue a civil action. The Commissioners believe that the Commission's remedial authority, as set forth in the bill, is sufficient to protect the public interest and to compensate victims of discrimination who choose the Commission as the place to file a complaint.

Additional Changes to SB 132

The Commissioners reviewed the pending legislation prior to its introduction and agreed to support the bill as a whole in its original form. The present committee substitute, as amended, contains changes in addition to those mentioned above; however, the Commissioners do not believe that these additional amendments sufficiently alter the substance of the legislation. The Commissioners have therefore taken no position on the remaining amendments to the bill.

Conclusion

The Commissioners continue to support the passage of SB 132. However, the Commissioners are concerned that expanding the time to file complaints to 365 days would adversely affect the Commission's ability to resolve discrimination complaints. The Commissioners are also opposed to the proposed amendment to allow for the recovery of non-economic damages. The Commissioners take no position on the other amendments to the bill.

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 5, 2005

SUBJECT: Statutory citation on page 2, line 4 of HCS SB 132(STA)

TO: Representative Paul Seaton
Attn: Louie

FROM: Donald M. Bullock Jr.
Legislative Counsel

Enclosed is HCS SB 132(STA). Please look at page 4, line 2 and the reference to AS 44.64.020. Should this reference actually be to AS 44.64.030(b) instead of AS 44.64.020? AS 44.64.030(b) reads as follows:

> (b) An agency may request the office to conduct an administrative hearing or other proceeding of that agency or to conduct several administrative hearings or other proceedings under statutes not listed in (a) of this section. The office may provide the service after entering into a written agreement with the agency describing the services to be provided and providing for reimbursement by the agency to the office of the costs incurred by the office in providing the services.

If this citation should be changed, please advise the chair of the next committee of referral.

DMB:med
05-350.med

Enclosure

906 P.2d 1365

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

C

Supreme Court of Alaska.
STATE of Alaska, DEPARTMENT OF FISH AND GAME, SPORT FISH DIVISION, Petitioner,
v.
Andrea MEYER and Alaska State Commission on Human Rights, Respondents.
No. S-6036.

Nov. 17, 1995.

State employee who had claimed discrimination sought review of a decision of the State Commission for Human Rights closing her case. The Superior Court, Third Judicial District, Anchorage, Joan M. Woodward, J., determined that the order was appealable and that the Commission abused its discretion in ruling that employee did not produce substantial evidence of pretext/discrimination. Employer petitioned for review. The Supreme Court, Eastaugh, J., held that: (1) closing order was final agency action subject to judicial review, and (2) it was an error of law for Commission staff or executive director to resolve at investigative stage legitimacy of employer's nondiscriminatory reasons for its actions and employee's success in rebutting those reasons.

Affirmed and remanded.

West Headnotes

[1] Appeal and Error ⇨893(1)
30k893(1) Most Cited Cases
The Supreme Court reviews issues of law de novo.

[2] Administrative Law and Procedure ⇨796
15Ak796 Most Cited Cases
On appeal from a decision of administrative agency, the Supreme Court reviews questions of law where no agency expertise is involved under the substitution of judgment test.

[3] Administrative Law and Procedure ⇨683
15Ak683 Most Cited Cases
Supreme Court gives no deference to superior court's decision reviewing an administrative agency decision because that court was acting as an intermediate appellate court.

[4] Administrative Law and Procedure ⇨651
15Ak651 Most Cited Cases
All final administrative actions are presumed to be reviewable, and this presumption controls unless it is rebutted by an affirmative indication of legislative intent that there be no reviewability.

[5] Administrative Law and Procedure ⇨651
15Ak651 Most Cited Cases

[5] Administrative Law and Procedure ⇨704
15Ak704 Most Cited Cases
Under statute providing that a complainant or a person against whom a complaint is filed or other person aggrieved by an order of an agency, may obtain judicial review of the order, agency decisions are presumed reviewable if they have requisite finality. AS 18.80.135(a).

[6] Administrative Law and Procedure ⇨704
15Ak704 Most Cited Cases
Administrative agency's decision's reviewability does not turn on whether it is labeled an "order"; rather, determinative question in deciding whether decision is reviewable is whether it ended case at agency level and this constituted final agency action. AS 18.80.135(a), 44.62.560(e).

[7] Administrative Law and Procedure ⇨704
15Ak704 Most Cited Cases
Court question in determining when an agency action is final and reviewable is whether agency has completed its decisionmaking process, and whether result of that process is one that will directly affect the parties.

[8] Administrative Law and Procedure ⇨704
15Ak704 Most Cited Cases
An agency determination need not be one which ends litigation on the merits and leaves nothing for court to do but execute the judgment in order to be ripe for judicial review.

[9] Administrative Law and Procedure ⇨704
15Ak704 Most Cited Cases

[9] Civil Rights ⇨1712
78k1712 Most Cited Cases
(Formerly 78k447)
A decision of Commission on Human Rights staff or executive director closing employment discrimination claimant's case was ripe for judicial review; the case-closing order was final action taken by the agency, and legislature intended to allow courts to determine whether an agency's withholding of action was unreasonable or unlawful. AS 18.80.135(a), 44.62.560(e).

[10] Administrative Law and Procedure ⇨701
15Ak701 Most Cited Cases

[10] Civil Rights ⇨1712
78k1712 Most Cited Cases
(Formerly 78k447)
Fact that determination of Commission on Human Rights that an employment discrimination case was not supported by substantial evidence was an exercise of prosecutorial discretion did not render agency's determination unreviewable; if Commission wanted its staff to have discretionary prosecutorial authority, it had to be obtained from the legislature, not the judiciary, and opportunity for judicial review was necessary because federal Equal Employment Opportunity Commission (EEOC) might, and in some circumstances had to, accord substantial weight to findings by state authorities, and the anti-discrimination statutory scheme was a mandate to seek out and eradicate discrimination in employment and did not simply create a complaint-taking agency. Civil Rights Act of 1964, § 706(a), as amended, 42 U.S.C.A. § 2000e-5(b).

[11] Civil Rights ⇨1710
78k1710 Most Cited Cases
(Formerly 78k445)
Employee claiming discrimination must introduce evidence raising an inference of employer's discriminatory intent, and once employee has established this prima facie case of disparate treatment, burden rests with employer to articulate a legitimate, nondiscriminatory reason, supported by evidence, for the treatment.

[12] Civil Rights ⇨1744
78k1744 Most Cited Cases
(Formerly 78k453)
If employer establishes a legitimate reason for its actions, burden shifts back to employee claiming discrimination to persuade court that discriminatory reasons more likely motivated the employer, and employee usually satisfies this burden by showing that employer's explanation is pretextual.

[13] Administrative Law and Procedure ⇨470
15Ak470 Most Cited Cases

[13] Civil Rights ⇨1709
78k1709 Most Cited Cases
(Formerly 78k442.1)

[13] Civil Rights ⇨1711
78k1711 Most Cited Cases
(Formerly 78k446)
It was an error of law for staff or executive director of Commission on Human Rights to resolve at investigative stage legitimacy of employer's nondiscriminatory reasons for its alleged discriminatory action and employee's success in rebutting those reasons; by offering objective evidence of facts which established a prima facie case of discrimination and which raised a genuine dispute about employer's explanation of its decisions, employee established substantial evidence of discrimination sufficient to warrant a hearing. AS 18.80.110, 18.80.120.

[14] Administrative Law and Procedure ⇨470
15Ak470 Most Cited Cases

[14] Civil Rights ⇨1711
78k1711 Most Cited Cases
(Formerly 78k446)

Burden required to compel a hearing for the Commission on Human Rights on an employment discrimination complaint is less than burden required to prevail on the merits at hearing's conclusion. AS 18.80.110, 18.80.120.

[15] Administrative Law and Procedure ⇐796
15Ak796 Most Cited Cases

[15] Civil Rights ⇐1712
78k1712 Most Cited Cases
(Formerly 78k447)
Commission on Human Rights' failure to conduct a hearing mandated by statute in employment discrimination case once employee established a prima facie case of discrimination included a question of law to which the Supreme Court applied independent judgment. AS 18.80.110, 18.80.120.
***1366** Marie Sansone, David M. Weingartner, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Petitioner.

Randall G. Simpson, Jermain, Dunnagan & Owens, P.C., Anchorage, for Respondent Andrea Meyer.

Mark Ertischek, Anchorage, for Respondent Alaska State Commission for Human Rights.

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

***1367** *OPINION*

EASTAUGH, Justice.

I. *INTRODUCTION*

Andrea Meyer filed a discrimination complaint with the Alaska State Commission for Human Rights (Commission) against her employer, the Alaska Department of Fish and Game (ADF & G). We hold that the Commission's order closing Andrea Meyer's case is judicially reviewable. We further hold that Meyer's claim of discrimination is supported by substantial evidence.

II. *FACTS AND PROCEEDINGS*

Andrea Meyer began working for ADF & G in 1977 as a seasonal field researcher for the Russian River Sockeye Salmon Fishery. Her job title was Fisheries Biologist I (FBI). Meyer had substantial previous experience as a biologist as well as a B.A. in biology. During her employment with ADF & G, Meyer's primary duty was the creel census. She also computed fisheries data, operated the weir at Lower Russian Lake, assisted in the production of area surveys, conducted salmon spawning escapement counts, enforced Fish and Game regulations, and conducted group tours in which she explained the fishery and the wildlife of the area.

In March 1987 Meyer filed a discrimination complaint against ADF & G with the Alaska State Commission for Human Rights. [FN1] The complaint alleged four specific instances which caused Meyer to believe her employer had discriminated against her on the basis of gender and also asserted that no women employed in the Sport Fish Division for Region II held the position of Fish Biologist II (FBII) or higher.

> FN1. AS 18.80.100 authorizes any person aggrieved by discriminatory conduct prohibited by statute to file a complaint with the Commission.
> Under AS 18.80.110 the executive director or a member of the Commission's staff
> shall informally investigate the matters set out in a file complaint promptly and impartially. If the investigator determines that the allegations are supported by substantial evidence, the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion.
> If these informal efforts are unsuccessful, the executive director is required to hold a hearing before the Commission. AS 18.80.120.

In March 1989 the Commission's executive director issued a closing order, finding that Meyer's allegations were not supported by substantial evidence and dismissing the case. Meyer requested reconsideration of the closing order. The

Commission's chairperson, Katie Hurley, ordered the case reopened for further investigation because she believed that the investigation was insufficient to conclude that ADF & G had provided legitimate nondiscriminatory reasons for denying Meyer employment extensions or job assignments. In March 1991, after further investigation and review by the Commission staff, the executive director again closed the file on Meyer's complaint, summarizing the additional investigation as follows:

> [T]he additional investigation conducted by Commission staff determined that respondent's defense to complainant's prima facie case is legitimate and nondiscriminatory and that complainant has failed to rebut respondent's legitimate nondiscriminatory reason. Therefore, I find that complainant's allegations are not supported by substantial evidence.

Meyer again asked for reconsideration; Commissioner Esther A. Wunnicke denied her request in an order which contained an entry which read as follows:

> A person dissatisfied with a Commission Order dismissing the complaint may obtain judicial review by Superior Court in accordance with AS 44.62.560-44.62.570. An aggrieved person must file an appeal with the Superior Court within 30 days of the issuance of the Order of the Commission.

Meyer appealed the closing order to superior court. ADF & G argued that judicial review of a case-closing order is not available and that even if available, the Commission did not abuse its discretion by finding that Meyer's complaint was not supported by substantial evidence. The superior court determined that such orders are appealable to the superior court and that the Commission abused its discretion in ruling that Meyer did not produce substantial evidence of "pretext/discrimination." It consequently reversed the Commission's decision and remanded "for *1368 further proceedings under AS 18.80.110 and, if appropriate, 18.80.120." We granted ADF & G's petition for review under Alaska Rule of Appellate Procedure 402. [FN2]

> FN2. Although the Alaska State Human Rights Commission is listed as a co-respondent with Andrea Meyer, the Commission was granted permission to submit a brief in support of ADF & G's position. Meyer was permitted to submit a reply to the Commission's brief.

III. *DISCUSSION*

The Alaska Civil Rights Act permits a person aggrieved by discriminatory conduct to file a complaint with the Alaska State Commission for Human Rights. AS 18.80.100. The executive director or a staff member must then investigate the complaint to determine whether the allegations of the complaint are supported by substantial evidence. AS 18.80.110. If the investigator determines that the allegations are supported by substantial evidence, "the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion." *Id.* By implication, if the investigator determines that the allegations of the complaint are not supported by substantial evidence, the complaint is dismissed. If the investigator determines that substantial evidence does exist and informal efforts to eliminate the discrimination do not succeed, a hearing before the Commission is required. AS 18.80.120. At the conclusion of the hearing, the Commission is required to enter an order. AS 18.80.130. The order is reviewable in court in accordance with Alaska's Administrative Procedure Act. AS 18.80.135(a). [FN3]

> FN3. The following are the relevant sections of the Civil Rights Act.
>
> Sec. **18.80.100.** Complaint.
>
> A person who is aggrieved by any discriminatory conduct prohibited by this chapter may sign and file with the commission a written, verified complaint stating the name and address of the person alleged to have engaged in discriminatory conduct, and the particulars of the discrimination. The executive director may file a complaint in like manner when an alleged discrimination comes to the attention of the director.
>
> Sec. **18.80.110.** Investigation and

conciliation. The executive director or a member of the commission's staff designated by the executive director shall informally investigate the matters set out in a filed complaint, promptly and impartially. If the investigator determines that the allegations are supported by substantial evidence, the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion.

Sec. **18.80.120.** Hearing.

If the informal efforts to eliminate the alleged discrimination are unsuccessful, the executive director shall inform the commission of the failure, and the commission shall provide the respondent and the complainant with notice of the failure and shall serve written notice together with a copy of the complaint, requiring the person, employer, labor organization, or employment agency charged in the complaint to answer the allegations of the complaint at a hearing before the commission. The hearing shall be held by the commission at the place where the unlawful conduct is alleged to have occurred unless the person, employer, labor organization, or employment agency requests a change of venue for good cause shown. The case in support of the complaint shall be presented before the commission by the executive director or a designee who shall be a bona fide resident of the state. The person charged in the complaint may file a written answer to the complaint and may appear at the hearing in person or otherwise, with or without counsel, and submit testimony. The executive director has the power reasonably and fairly to amend the complaint, and the person charged has the power reasonably and fairly to amend the answer. The commission is not bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and shall be transcribed at the request of any party to the hearing.

Sec. **18.80.130.** Order.

(a) At the completion of the hearing, if the commission finds that a person against whom a complaint was filed has engaged in the discriminatory conduct alleged in the complaint, it shall order the person to refrain from engaging in the discriminatory conduct. The order must include findings of fact, and may prescribe conditions on the accused's future conduct relevant to the type of discrimination. In a case involving discrimination in

(1) employment, the commission may order any appropriate relief, including but not limited to, the hiring, reinstatement or upgrading of an employee with or without back pay, restoration to membership in a labor organization, or admission to or participation in an apprenticeship training program, on-the-job training program, or other retraining program;

(2) housing, the commission may order the sale, lease, or rental of the housing accommodation to the aggrieved person if it is still available, or the sale, lease, or rental of a like accommodation owned by the person against whom the complaint was filed if one is still available, or the sale, lease, or rental of the next vacancy in a like accommodation, owned by the person against whom the complaint was filed; the commission may award actual damages which shall include, but not be limited to, the expenses incurred by the complainant for obtaining alternative housing or space; for storage of goods and effects; for moving and for other costs actually incurred as a result of the unlawful practice or violation.

(b) The order may require a report on the manner of compliance.

(c) If the commission finds that a person against whom a complaint was filed has not engaged in the discriminatory conduct alleged in the complaint, it shall issue and cause to be served on the complainant an order dismissing the complaint.

> (d) A copy of the order shall be filed in all cases with the attorney general of this state.
> (e) The commission may order payment of reasonable expenses, including reasonable attorney fees to any private party before the commission when the commission, in its discretion, determines the allowance is appropriate.
> Sec. **18.80.135.** Judicial review and enforcement.
> (a) A complainant, or person against whom a complaint is filed or other person aggrieved by an order of the commission, may obtain judicial review of the order in accordance with AS 44.62.560-44.62.570.

*1369 [1][2][3] ADF & G and the Commission argue that the superior court's decision should be reversed because (1) the decision to close Meyer's case for lack of substantial evidence is not reviewable, and (2) if the decision is reviewable, it should be reviewed under the abuse of discretion standard and should be affirmed because there was no abuse of discretion. Meyer argues that the superior court's opinion should be affirmed in all respects. [FN4]

> FN4. We review issues of law *de novo*. *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979). Thus, in deciding whether judicial review is available and which standard of review to apply, we will adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Id.* We review questions of law where no agency expertise is involved under the substitution of judgment test. *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992). If the agency has not proceeded in the manner required by law, the agency has abused its discretion. AS 44.62.570(b)(3). No deference is given to the superior court's decision because that court was acting as an intermediate court of appeal. *See Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

A. Reviewability of Case-Closing Decisions by Commission Staff or Executive Director

ADF & G and the Commission argue that decision of the Commission staff or executive director is not reviewable because the decision (1) is not an "order" under AS 18.80.135, (2) does not constitute final agency action, and (3) is an enforcement decision committed to the Commission's discretion and thus presumptively unreviewable. Each of these arguments fails.

1. *The decision as an "order" under AS 18.80.135*

The State and Commission first argue that a decision issued before a public hearing is not an "order" under AS 18.80.135 [FN5] and is thus not subject to judicial review. The State and Commission cite *Hotel & Restaurant Union Local 878 v. Alaska State Comm'n for Human Rights*, 595 P.2d 653 (Alaska 1979), in support.

> FN5. We have interpreted the first sentence of AS 44.62.560(e) as allowing a superior court to assert jurisdiction and grant preliminary injunctive relief in cases in which an agency has taken an action which directly and immediately affects the complainant. *See Alaska Pub. Util. Co. v. Greater Anchorage Area Borough*, 534 P.2d 549, 556-58 (Alaska 1975); *A.J. Industries v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 539 (Alaska 1970). Although we have never interpreted the second sentence of AS 44.62.560(e), in *Schnabel v. State*, 663 P.2d 960 (Alaska App.1983), the Alaska Court of Appeals stated that the remedy provided by this sentence "is independent of and in addition to Schnabel's right to judicial review of an adverse administrative adjudication." *Id.* at 966 (dictum) (citing *United States v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 508 (Alaska 1978)).

Alaska Statute 18.80.135(a) expressly permits judicial review of "an order of the commission...." Given the structure of the chapter, and the sequence

apparently contemplated by AS 18.80.120, .130, and .135, it seems likely that § 135 deals only with review of orders issued by the Commission itself at the conclusion of hearings conducted by the Commission pursuant to § 130. Accordingly, § 135 is not concerned with review of some action by the executive director which is not an "order" as that term is used in Chapter 80. In *1370*Hotel and Restaurant Union Local 878*, 595 P.2d at 654-55, we discussed the sequence of events contemplated by §§ 120 and 130. That discussion supports a conclusion that § 135 does not authorize review of a decision of the sort that closed Meyer's case.

[4][5] Assuming § 135 deals only with review of post-hearing Commission orders, it does not follow that § 135 affirmatively bars judicial review of the order closing Meyer's case. Moreover, all final administrative actions are presumed to be reviewable. This presumption controls unless it is rebutted by an affirmative indication of legislative intent that there be no reviewability. *Johns v. CFEC*, 699 P.2d 334, 339 (Alaska 1985); *Sisters of Providence v. Department of Health & Soc. Servs.*, 648 P.2d 970, 976 (Alaska 1982); *Alyeska Ski Corp. v. Holdsworth*, 426 P.2d 1006, 1011 n. 16 (Alaska 1967). Section 135(a) does not express an affirmative legislative intention that file-closing decisions of the executive director or her staff be judicially unreviewable. We consequently apply the presumption of reviewability, and hold that such decisions are reviewable if they have the requisite finality.

[6] We also reject any suggestion that a decision's reviewability turns on whether it is labeled an "order." As AS 44.62.560(e) confirms, the legislature imposed no such prerequisite for judicial review if agency action is "unlawfully withheld or unreasonably withheld." [FN6] Rather, as discussed *infra*, the determinative question in deciding whether the decision is reviewable is whether it ended the case at the agency level and thus constituted final agency action.

> FN6. AS 44.62.560(e) provides:
> The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action.

We also note that when Meyer last sought reconsideration of the executive director's file-closing order, the order of the Commissioner denying reconsideration informed Meyer that "[a] person dissatisfied with a Commission Order dismissing the complaint may obtain judicial review by Superior Court in accordance with AS 44.62.560-44.62.570." It appears the Commissioner then considered that Meyer's order would be judicially reviewable.

2. *The case-closing order as final agency action*

[7] In deciding whether a superior court order possessed the finality essential for appellate review, this court observed that, "[t]he term finality is subject to several definitions." *Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 411 (Alaska 1973). [FN7] The test in Alaska for determining whether a judgment is final is "essentially a practical one." *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 184 (Alaska 1980). As the United States Supreme Court recently noted, "[t]he core question [in determining when an agency action is final] is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S.Ct. 2767, 2773, 120 L.Ed.2d 636 (1992).

> FN7. We noted in *Mukluk* that the United States Supreme Court had stated that, " 'final' in the context of appealability [is] an 'abstruse and infinitely uncertain term.' " *Mukluk*, 516 P.2d at 411, n. 11 (quoting *Will v. United States*, 389 U.S. 90, 108, 88 S.Ct. 269, 280, 19 L.Ed.2d 305 (1967) (Black, J., concurring)).

[8] Contrary to ADF & G's assertions, *Ostman v. State Commercial Fisheries Entry Comm'n*, 678

P.2d 1323 (Alaska 1984), does not stand for the proposition that Meyer's ability to file a separate superior court discrimination claim renders the case-closing decision unreviewable. [FN8] ADF & G notes that we stated in *Ostman* that a final agency determination "must be one which disposes of the entire case ... [or] one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." 678 P.2d at 1327 (quoting *1371 *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1030-31 (Alaska 1972)). However, our quoted statement discusses the finality of a *trial court* decision. 504 P.2d at 1030-31. *See also Mukluk Freight Lines*, 516 P.2d at 411. An *agency* determination need not be "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" in order to be ripe for judicial review. Thus, we held in *Ostman* that agency rejection of a fishing permit application constitutes a final order which is reviewable in superior court where there is no more time to submit evidence or alter the decision through administrative means. 678 P.2d at 1326-28. Our holding in *Ostman* is contrary to ADF & G's argument.

> FN8. AS 22.10.020(i) authorizes individuals to bring civil rights actions against the State in superior court. *See Johnson v. Alaska Dept. of Fish and Game*, 836 P.2d 896, 905 (Alaska 1991).

Case law from other jurisdictions is conflicting. New York, New Jersey and Iowa have held that Human/Civil Rights Commission dismissals based on no probable cause are judicially reviewable. *See State Div. of Human Rights v. Blanchette*, 73 A.D.2d 820, 423 N.Y.S.2d 745 (1979) (reviewing a Division finding of no probable cause under substantial evidence test); *Sprague v. Glassboro State College*, 161 N.J.Super. 218, 391 A.2d 558, 561 (App.Div.1978) (holding that the Division on Civil Rignts did not abuse its discretion in finding no probable cause of discrimination and that the Fourteenth Amendment does not require a hearing before finding "no probable cause"); *Oliver v. Teleprompter Corporation*, 299 N.W.2d 683, 686-87 (Iowa 1980) (holding that a finding of no probable cause is a "final decision" and that the complainant was not limited to a thirty-day period in which to file a petition for judicial review of no probable cause finding). [FN9]

> FN9. The Commission argues that *Sprague* and a previous Iowa case, *Estabrook v. Iowa Civil Rights Comm'n*, 283 N.W.2d 306 (Iowa 1979), support its assertion that there is no judicial review of no probable cause determinations in these jurisdictions. However, these cases held only that an administrative complainant is not constitutionally entitled to an evidentiary hearing *before* a human rights commission makes a determination of no probable cause. *See Sprague*, 391 A.2d at 561-62; *Estabrook*, 283 N.W.2d at 309-10. As noted above, *Sprague* itself held that a determination of no probable cause is judicially reviewable. 391 A.2d at 561. The court in *Estabrook* noted that the complainant had only challenged the merits of the commission's finding as not supported by substantial evidence, a standard reserved for "contested cases" (post-hearing cases) under Iowa law. 283 N.W.2d at 311. As *Oliver* indicates, probable cause determinations are judicially reviewable under Iowa law. 299 N.W.2d at 686. Furthermore, Iowa statutory law currently allows explicitly for judicial review of "no-probable-cause decisions and other final agency actions." Iowa Code Ann. § 216.17(1) (West 1994).

In *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392 (D.C.1991), the court held that a determination by the Office of Human Rights that there was no probable cause to believe that the Human Rights Act had been violated was a final agency action subject to judicial review. *Id.* at 397- 99. As ADF & G points out, the District of Columbia court appeared to base its decision in part on the fact that the applicable statute did not authorize a human rights complainant to bring suit on her own behalf if the agency declines or fails to do so for lack of probable cause. 597 A.2d at 398.

However, the District of Columbia has since indicated that this distinction is not pertinent. In *Timus v. District of Columbia Dep't of Human Rights*, 633 A.2d 751 (D.C.1993), the court held that an administrative convenience dismissal (which occurs under District of Columbia law after a finding of probable cause but before a hearing) was subject to judicial review even though the complainant had the right to a trial *de novo* in superior court. *Id.* at 761. Thus, although the court in *Simpson* had indicated that reviewability of an administrative convenience dismissal might depend on whether the complainant had the right to a *de novo* trial, 597 A.2d at 398, *Timus* indicates that judicial review is available in both instances. 633 A.2d at 769 (Ferren, J., concurring).

In *Demetry v. Colorado Civil Rights Comm'n*, 752 P.2d 1070 (Colo.App.1988), the court held that a decision of the Colorado Civil Rights Commission upholding the dismissal of a claim, based on a finding that no probable cause existed to sustain a claim of discrimination on basis of handicap, did not constitute final agency action and was therefore not subject to judicial review. *Id.* at 1072. The court cited federal cases involving claims brought before the Equal Employment Opportunity Commission (EEOC). *Id.* at 1071. The court found the reasoning of *1372 those cases--that an EEOC investigation is merely preparatory to further proceedings--persuasive because the complainant can bring a private cause of action in federal court if the EEOC finds no probable cause. *Id* at 1072.

ADF & G also cites EEOC cases for the proposition that the proper response to an agency's determination of no probable cause at the agency level is filing a *de novo* claim in district court rather than seeking review of the agency's adverse determination. The EEOC cases note that Title VII provides no express or implied cause of action against the EEOC to challenge its investigation and processing of a charge, *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir.1984), and that the federal Administrative Procedure Act (APA) provides no right to judicial review of an adverse EEOC determination, *Stewart v. EEOC*, 611 F.2d 679, 683-84 (7th Cir.1979).

Alaska law is similar to federal law in giving the complainant the right to file an original action in superior court. See *supra*, note 4. However, Alaska's statutory anti-discrimination scheme materially differs from the federal scheme. First, Alaska's anti-discrimination statute gives the Commission a more aggressive mandate than that held by the EEOC. "Clearly the legislature intended the Commission to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in employment...." *Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976). Therefore, the limited role of the federal EEOC is of dubious assistance in ascertaining the scope of powers conferred by the Alaska legislature on the Alaska Commission for Human Rights:

> A cursory comparison reveals that the anti-discrimination legislation enacted in Alaska is not substantially similar to comparable federal laws.... Congress limited the adjudicatory and coercive enforcement of the EEOC powers in favor of reliance on private citizen action....

Id. at 945.

Second, under Alaska law a hearing is mandatory when the Commission's executive director or designated investigator determines that substantial evidence supports a complainant's allegations and informal efforts to eliminate discrimination fail. AS 18.80.120. In comparison, under federal law the EEOC is only required to use informal methods such as private conference, conciliation and persuasion, and "may" bring a civil action if these efforts fail. 42 U.S.C. § 2000e-5(b), (f).

[9] Finally, Alaska's APA potentially provides for more expansive judicial review than the federal APA. AS 44.62.560(e). *See* note 5, *supra*. Because the case-closing order was the final action taken by the agency and because the Alaska legislature intended to allow the courts to determine whether an agency's withholding of action is unreasonable or unlawful, the decision of the Commission staff or executive director in this case is ripe for judicial review. AS 44.62.560(e).

3. *The determination as an enforcement decision committed to agency discretion*

[10] Citing *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), and *Vick v. Board of Electrical Examiners*, 626 P.2d 90 (Alaska 1981), ADF & G and the Commission argue that the agency's determination that Meyer's case is not supported by substantial evidence is presumptively unreviewable because that determination is an exercise of prosecutorial discretion. This presumption was first articulated by the Supreme Court in *Heckler*, where the Court reasoned that even where the legislature has expressed no intent to preclude review, review is not available under the federal APA if the statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 831, 105 S.Ct. at 1655. According to the Court, this presumption helps avoid the problem of how to apply an "abuse of discretion" standard when there are "no judicially manageable standards available for judging how and when an agency should exercise its discretion." *Id.* We reject the argument of ADF & G and the Commission ***1373** that the presumption of unreviewability applies here.

In *Vick* the question was whether a board decision not to process an accusation against a licensee was subject to judicial review. We stated concerning this issue: "Questions of law and fact, of policy, of practicality, and of the allocation of an agency's resources all come into play in making such a decision. The weighing of these elements is the very essence of what is meant when one speaks of an agency exercising its discretion." 626 P.2d at 93 . We further stated that "[w]hen a matter falls within an area traditionally recognized as within an agency's discretionary power, courts are less inclined to intrude than when the agency has acted in a novel or questionable fashion." *Id.* Unlike *Vick* or *Heckler*, Meyer's case does not involve the exercise of prosecutorial discretion at all. The statute here provides that if the executive director or designated staff member conducting the investigation finds substantial evidence of discrimination, the investigator "shall ... try to eliminate the discrimination complained of by conference, conciliation, and persuasion." AS 18.80.110. If the problem is not eliminated informally, the Commission "shall" conduct a hearing and issue an order at the completion of the hearing. AS 18.80.120, .130(a). Thus, the statute grants no discretion to discontinue the process once the investigator finds substantial evidence of discrimination, unlike the statutes at issue in *Vick* and *Heckler*. [FN10]

> FN10. In *Vick*, the complainant conceded that the Board had discretion whether to revoke a license even after it found a regulatory violation. 626 P.2d at 92. Likewise, in *Heckler*, the statute did not require the Food and Drug Administration (FDA) to investigate the unapproved use of an approved drug even when that use became widespread or endangered public health. 470 U.S. at 835-36, 105 S.Ct. at 1657-58 (holding statute granted FDA unreviewable discretion to refrain from enforcement despite policy statement stating FDA was obligated to investigate such uses which were widespread or endangered public health).

This case is instead closely akin to *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975), which the Supreme Court reaffirmed in *Heckler*. The statute at issue in *Dunlop* provided:

> The Secretary [of Labor] shall investigate such complaint [by a union member] and, if he finds probable cause to believe that a violation ... has occurred, ... he shall ... bring a civil action....

421 U.S. at 563 n. 2, 95 S.Ct. at 1855 n. 2. After investigating the complainant's claims, the Secretary of Labor declined to file suit and the complainant sought judicial review under the APA. The Supreme Court held that review was available and that the Secretary's decision not to file suit was *not* "an unreviewable exercise of prosecutorial discretion." *Id.* at 567 n. 7, 95 S.Ct. at 1858 n. 7. The *Heckler* Court stated that in *Dunlop*, "[t]he statute being administered quite clearly withdrew discretion from the agency and provided guidelines

for exercise of its enforcement power." 470 U.S. at 834, 105 S.Ct. at 1657. The *Heckler* Court thus found *Dunlop* "consistent with a general presumption of unreviewability of decisions not to enforce." *Id.*

In *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392 (D.C.1991), the court held that prosecutorial discretion was not an obstacle to review:

> In the present case, however, OHR was not purporting to exercise "prosecutorial discretion," nor did it reject Ms. Simpson's complaint on the ground that it lacked resources for enforcement. Rather, OHR found that there was no probable cause to believe that the Human Rights Act had been violated. Whether right or wrong, that determination was not one of the kind to which the doctrine embraced by the District can reasonably be applied. We conclude the OHR's determination is subject to judicial review.

Id. at 398-99. As Meyer correctly argues, the statute now before us provides no reason to dismiss a case other than a lack of substantial evidence.

ADF & G and the Commission argue that the Commission staff and executive director have wide discretion to determine whether an allegation of discrimination is supported by substantial evidence. ADF & G makes the following argument:

> *1374 Whether a violation has occurred, whether the Commission's resources are best spent on one violation or another, whether the Commission is likely to succeed if it acts, whether the particular enforcement action requested best fits the Commission's overall policies, and whether the Commission has enough resources to undertake the action at all are issues that the Commission, and not the courts, should decide.

The Commission also argues that these "discretionary issues" are "policy reasons" why this court should find the decision of the Commission staff or executive director to be unreviewable:

> The Commission must have discretion to decide whether to prosecute. The Commission has an important policy interest in the results of each of its investigations because of its role in developing the body of civil rights law in Alaska and because of its statutory obligation to enforce Alaska's civil rights laws. The Commission must employ its limited resources in the most effective manner possible in order to meet these obligations.

The Commission further argues that it will become nothing more than a "complaint taking agency" if it cannot exercise prosecutorial discretion in deciding whether a claim is supported by substantial evidence.

These arguments strongly support judicial review of staff or executive director determinations that there is no substantial evidence. These passages indicate, as the Commission confirmed during oral argument, that the staff or executive director, contrary to statutory mandate, is closing cases not for lack of evidence of discrimination but to control budget and docket. We are sympathetic to the Commission's claim of lack of resources. We recognize that it might be highly desirable for the Commission staff to have the power to administratively dismiss cases which have individual merit but no widespread impact. However, if the Commission wants its staff to have this discretionary authority, it must be obtained from the legislature, not the judiciary. We cannot import these social, political, and economic concerns into the clear scheme of the existing statute.

An opportunity for judicial review is also necessary because the federal EEOC may, and in some circumstances must, accord substantial weight to findings made by state authorities. 42 U.S.C. § 2000e-5(b); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 470 n. 8, 474-75, 102 S.Ct. 1883, 1892 n. 8, 1893- 94, 72 L.Ed.2d 262 (1982); *Cottrell v Newspaper Agency Corp.*, 590 F.2d 836, 838 (10th Cir.1979). [FN11] Furthermore, such findings may affect workers' perceptions of potential employers and vice versa. [FN12] Finally, as noted above, Alaska's anti-discrimination statutory scheme is a mandate to seek out and eradicate discrimination in employment, and did not simply create a complaint-taking agency. *Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976). A human rights

complainant in Alaska has the statutory right to expect that his or her claim will be decided on the merits, not pre-determined by budgetary constraints.

> FN11. The EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination has been given at least sixty days to resolve the matter. 42 U.S.C. § 2000e-5(c).
>
> FN12. Thus, if the complaint was valid, a finding of no substantial evidence may give a "false negative" signal to persons seeking positions with that employer. It may also place the unsuccessful complainant in a bad light when he or she seeks employment elsewhere.

B. *The Finding of No Substantial Evidence*

[11][12] Under Alaska and federal law, a court generally applies a three-part test in determining whether discriminatory treatment has occurred. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981); *Thomas v. Anchorage Telephone Utility*, 741 P.2d 618, 622 (Alaska 1987). In the first stage, the employee claiming discrimination must introduce evidence raising an inference of employer discriminatory intent. [FN13] Once the employee has established ***1375** this prima facie case of disparate treatment, the burden rests with the employer to articulate a legitimate, non-discriminatory reason, supported by evidence, for the treatment. *Burdine*, 450 U.S. at 254-55, 101 S.Ct. at 1094; *Thomas*, 741 P.2d at 623-24. If the employer establishes a legitimate reason for its actions, the burden shifts back to the employee to persuade the court that discriminatory reasons more likely motivated the employer. Usually the employee satisfies this burden by showing that the employer's explanation is pretextual. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095; *Thomas*, 741 P.2d at 622.

> FN13. This inference is usually accomplished by establishing a prima facie case using the four-part test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (prima facie case established by showing: (1) complainant belongs to a racial minority; (2) complainant applied for and was qualified for a job for which employer was seeking applicants; (3) despite qualifications, complainant was rejected; and (4) after rejection, the position remained open and employer continued to seek applications from similarly qualified persons). However, the *McDonnell Douglas* test is not the only means by which a claimant may raise an inference of discrimination. *Haroldsen v. Omni Enterprises, Inc.*, 901 P.2d 426 (Alaska 1995). *Strand v. Petersburg Pub. Schools*, 659 P.2d 1218, 1222 n. 7 (Alaska 1983) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13).

In determining that there was no substantial evidence at the investigative stage, the Commission staff and executive director applied the three-part *Burdine/Thomas* test, concluding that ADF & G had rebutted Meyer's prima facie case of discrimination and that Meyer had failed to show that ADF & G's proffered reasons were pretextual. In the first case-closing decision, the Commission's investigator stated:

> According to the principles of discrimination law, complainant must first establish a *prima facie* case, that is, a set of facts which raises an inference of sex discrimination, before respondent can be required to justify its actions....
>
> Evidence showed that complainant has established a *prima facie* case.... Once complainant has established a prima facie case, the burden shifts to respondent to provide a legitimate non-discriminatory reason for denying complainant the employment extensions.

The investigator concluded:

> I therefore determine that ... respondent's defenses to complainant's *prima facie* case are legitimate and nondiscriminatory and that complainant has failed to rebut respondent's legitimate nondiscriminatory reasons.

The decision upon reconsideration affirmed this determination.

[13] It was an error of law for the staff or executive director to resolve at the investigative stage the legitimacy of ADF & G's non-discriminatory reasons and Meyer's success in rebutting those reasons. By offering objective evidence of facts which established a prima facie case of discrimination and which raised a genuine dispute about ADF & G's explanation of its decisions, Meyer established substantial evidence of discrimination under AS 18.80.110 sufficient to warrant a hearing under AS 18.80.120. [FN14] Although *1376 ADF & G asserted non-discriminatory reasons for offering job extensions and increased responsibility to male employees rather than Meyer, the ADF & G evidence discussed by the Commission staff was insufficient to demonstrate that Meyer's claims were completely lacking in merit, or that a fact finder would be compelled to find for ADF & G. [FN15] Consequently, the staff and executive director could not determine whether discrimination had occurred without resolving the factual disputes between the two parties. These disputes could not be resolved without a hearing.

FN14. The determination that Meyer established a prima facie case was clearly correct. As stated by the Commission's investigator:

Evidence showed that complainant is a member of a protected class; that respondent denied her extensions/job assignments in her employment as [FBI] on four separate occasions during 1985 and 1986; and that respondent awarded the extensions/assignments to male FBI's.... Investigation showed that complainant was qualified for these extended assignments.

Further, Meyer raised a genuine dispute regarding ADF & G's employment decisions. ADF & G argued that the male employees it chose for work extensions were the most qualified for the positions they were given. Meyer offered evidence that at least some of the male employees chosen were not more qualified, that her writing skills were superior to the male applicants chosen to complete written projects, and that if male fish biologists had greater job capabilities, it was a result of a supervisor's consistent efforts to enhance the qualifications of male biologists while making no corresponding effort to enhance the job skills of female biologists.

Meyer alleged that recipients of "unstructured positions" were always male and always more likely to be promoted or receive extensions. There was evidence that Supervisor Dave Nelson decided who assumed the duty of census creel clerk and who would be put in the "unstructured position." Shortly after the Commission closed Meyer's case the second time, a male FBI who had previously been in the unstructured position was promoted to FBII.

Nelson denied that there was a pattern of "grooming" male fish biologists for promotion.

FN15. Further, even without the benefit of discovery, Meyer offered evidence that could support findings that ADF & G's explanations were pretextual. For example, as of 1987, there were four women in the Division, all of whom were FBI's, and sixty-two males, holding positions of FBI through FBIV; in comparison, there had been a significantly higher percentage of women in the applicant pool of ADF & G registers for FBI and FBII positions than was reflected by the number of women holding those positions. This court has held that once a prima facie case of discrimination is established, statistical evidence of a discriminatory pattern "is to be viewed as evidence that the non-discriminatory justification given by the defendant is in fact a pretext." *Brown v. Wood*, 575 P.2d 760, 770 (Alaska 1978).

> Moreover, the skills which Nelson stated the male FBI's exhibit, such as using tools, were not listed in the job description for fish biologists. Rather, these skills were listed in the job description for fish technicians, a different and less advanced position.

[14] The burden required to compel a hearing is less than the burden required to prevail on the merits at the hearing's conclusion. This distinction is appropriate because of the structural differences between the unilateral investigation conducted by Commission investigators and formal adversarial proceedings before the full Commission. Unlike an adversarial proceeding in which a party has the opportunity to rebut the other's proffered evidence, an investigation by an administrative agency "represents a unilateral inquiry into the facts which are in the possession of the employee and the employer." 10 Marlin M. Volz et al., *West's Federal Practice Manual* § 15,919, at 488 (2d ed. 1970). Thus, at the investigative stage, neither party may conduct discovery. 6 Alaska Administrative Code 30.320(c) (1995). Without access to discovery, in many cases it would be difficult or impossible for a complainant to prove that an employer's proffered reasons are pretextual. Consequently, a staff or executive director finding of no substantial evidence cannot be based on the fact that a complainant "failed" to meet the three-part *Burdine/Thomas* test at the investigative stage. Nor should the staff or executive director attempt to determine at the investigative stage whether the non-discriminatory reasons proffered by the employer are legitimate. The Commission cannot adequately resolve factual disputes if the parties have not been given the opportunity to conduct discovery or cross-examine opposing witnesses.

Other courts have generally not examined what showing must be made to warrant a hearing under similar anti-discrimination statutory programs. However, another jurisdiction which has considered this issue has reached a similar conclusion. New Jersey has defined probable cause (the functional equivalent of "substantial evidence" as that phrase is used in AS 18.80.110) as a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious [person] in the belief that the law is being violated." *Sprague v. Glassboro State College,* 161 N.J.Super. 218, 391 A.2d 558, 561 (1978) (quoting *People v. Marshall,* 13 N.Y.2d 28, 241 N.Y.S.2d 417, 420, 191 N.E.2d 798, 801 (1963)). In expounding on this definition, another court subsequently stated:

> Much the same way as in the administration of criminal justice and probable cause for Fourth Amendment purposes, a proceeding to determine the existence of probable cause [in the discrimination context] is not an adjudication on the merits. Rather, it is an initial threshold procedure to determine whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits. The quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits.... *When deciding probable cause, the Director was not permitted *1377 to resolve disputed facts. The Director was not concerned with whether the information collected during the investigation was true or false-only whether it was reasonable to accept it as true and if so whether it justified consideration on the merits.* A common sense, practical and nontechnical standard is required for the probable cause determination.

Frank v. Ivy Club, 228 N.J.Super. 40, 548 A.2d 1142, 1150 (App.Div.1988) (citations omitted) (emphasis added), *rev'd on other grounds,* 120 N.J. 73, 576 A.2d 241 (1990), *cert. denied,* 498 U.S. 1073, 111 S.Ct. 799, 112 L.Ed.2d 860 (1991). *See also New York State Div. for Youth v. State Human Rights Appeal Bd.,* 83 A.D.2d 972, 442 N.Y.S.2d 813, 814 (1981) (where there is no full investigation with opportunity for confrontation, the complaint must lack merit as a matter of law in order for division to dismiss complaint).

[15] As noted above, the Commission staff determined that Meyer established a prima facie case of discrimination. This determination was correct. ADF & G does not claim that it was error to determine that Meyer established a prima facie

case of discrimination. Instead ADF & G argues that substantial evidence under AS 44.62.570 supported the decision to close Meyer's case and that the superior court erred in reweighing the evidence considered by the staff and director. The deferential standard of review on which ADF & G relies has no bearing in this case, because the staff and executive director incorrectly applied the *Burdine/Thomas* test at the investigative stage and the Commission never conducted the hearing mandated by statute. This error was one of law, to which we apply our independent judgment. *See supra*, note 3. [FN16]

> FN16. The parties dispute the proper standard of review to be applied to a staff or executive director factual determination of no substantial evidence under AS 18.80.110. Because we hold the error was one of law, it is unnecessary to resolve this issue in this case.

IV. *CONCLUSION*

The decision to close Meyer's case is judicially reviewable. We AFFIRM the superior court's decision and REMAND to the superior court for the purpose of remanding this case to the Commission with directions to proceed with Meyer's complaint in accordance with AS 18.80.110-.120.

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

END OF DOCUMENT

Conceptual amendment #2 - WITHDRAWN

to HCS SB 132 (SFA) by Rep Gara

Define "discriminatory practice" to include conduct of one (or more) occurrences.

AMENDMENT #4 - WITHDRAWN

OFFERED IN THE HOUSE

BY: REPRESENTATIVE GARA

TO: HCS SB132(STA)

Page 4, lines 15-19

Delete all material.