

HB

6

<TARGET><BILL>HB 6</BILL><SUBJECT>HB
6</SUBJECT><COMM>HEDC27</COMM></TARGET>

27-LS0027\D
Mischel
2/9/11

CS FOR HOUSE BILL NO. 6()

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SEVENTH LEGISLATURE - FIRST SESSION**

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES GRUENBERG, Peggy Wilson

A BILL

FOR AN ACT ENTITLED

1 **"An Act authorizing the governor to remove or suspend a member of the Board of**
2 **Regents of the University of Alaska for good cause; and establishing a procedure for the**
3 **removal or suspension of a regent."**

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

5 *** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
6 to read:

7 **LEGISLATIVE FINDINGS AND PURPOSES.** (a) The legislature finds that
8 (1) the framers of the Constitution of the State of Alaska intended to insulate
9 the University of Alaska and the Board of Regents from politics, but did not intend to
10 immunize the University of Alaska and the Board of Regents from appropriate nonpolitical
11 legislative and executive branch oversight;

12 (2) the legislature has the power to pass laws that pertain to the University of
13 Alaska; and

14 (3) under AS 14.40.170(b)(1), the legislature has delegated to the Board of

1 Regents the power to regulate itself, but the Board of Regents has not adopted self-
2 governance rules that authorize the board to remove or suspend a regent in appropriate
3 circumstances.

4 (b) The purposes of AS 14.40.155, added by sec. 2 of this Act, are to

5 (1) clarify that the governor may remove a regent only with good cause;

6 (2) prescribe a due process procedure under which the governor may remove a
7 regent for good cause;

8 (3) prescribe a due process procedure under which, in certain circumstances,
9 the governor may suspend a regent; and

10 (4) accomplish each of the above purposes in a manner that ensures the
11 University of Alaska and the Board of Regents remain insulated from politics.

12 * **Sec. 2.** AS 14.40 is amended by adding a new section to read:

13 **Sec. 14.40.155. Suspension and removal of regents.** (a) The governor may,
14 after providing notice and an opportunity for a hearing, suspend a member of the
15 Board of Regents while final disposition is pending on

16 (1) a criminal complaint, presentment, information, or indictment
17 involving a felony in any jurisdiction;

18 (2) an information or formal criminal charges of a misdemeanor
19 described under (g)(3) of this section;

20 (3) allegations of an ethics violation described under (g)(1) of this
21 section under consideration by the Alaska Public Offices Commission; or

22 (4) allegations of malfeasance or nonfeasance in office described under
23 (g)(4) of this section under consideration by the governor.

24 (b) The governor may remove a member of the Board of Regents for good
25 cause by providing to the member an accusation and an opportunity for a hearing and
26 judicial review.

27 (c) Notwithstanding the procedure under AS 44.62.390, a regent who has been
28 suspended under (a) of this section may, at any time, request a hearing to

29 (1) defend against the grounds for the suspension stated in the
30 accusation; or

31 (2) lift the suspension.

1 (d) The governor may delegate the conduct of a hearing under this section to
2 the office of administrative hearings under AS 44.64.030(b). If a hearing is requested,
3 the hearing officer may prepare a proposed decision under AS 44.62.500(b) to

4 (1) remove a regent based on clear and convincing evidence of good
5 cause for removal;

6 (2) not remove a regent; or

7 (3) continue a suspension or lift a suspension of a regent.

8 (e) AS 44.62.330 - 44.62.630 applies to all proceedings under this section.

9 (f) After a final decision by the governor that removes a regent for good cause
10 under (b) of this section, the governor shall file with the lieutenant governor a copy of
11 the allegations made against the former regent, the governor's findings on each of the
12 allegations, and a complete record of the removal proceedings.

13 (g) In this section, "good cause" means

14 (1) a violation of AS 39.52 (Alaska Executive Branch Ethics Act);

15 (2) conviction of a felony in any jurisdiction;

16 (3) conviction of a misdemeanor in any jurisdiction if the misdemeanor

17 involves

18 (A) dishonesty;

19 (B) breach of trust; or

20 (C) the University of Alaska;

21 (4) malfeasance or nonfeasance in office, including

22 (A) misconduct in office;

23 (B) an inability to serve;

24 (C) neglect of duty;

25 (D) incompetence;

26 (E) unjustified failure to perform the duties of the Board of

27 Regents;

28 (5) misconduct resulting in the revocation or suspension of a
29 professional or occupational license issued under state law;

30 (6) failure to possess the qualifications of a regent under AS 14.40.130.

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

1 read:

2 APPLICABILITY. AS 14.40.155, added by sec. 2 of this Act, applies to all conduct
3 and acts occurring before, on, or after the effective date of this Act.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number 2
 Bill Version CSHB 6(EDC)
 (H) Publish Date 2/23/11

Identifier (file name) HB006-UA-Sysbra-2-9-11 Dept. Affected University of Alaska
 Title Removing a Regent Appropriation University of Alaska
 Allocation Sysbra
 Sponsor Representative Gruenberg
 Requester House Education OMB Component Number 1296

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information						
		FY 2012	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
OPERATING EXPENDITURES								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants								
Miscellaneous								
TOTAL OPERATING		0.0	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES								
-----------------------------	--	--	--	--	--	--	--	--

CHANGE IN REVENUES								
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other (please identify)								
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time								
Part-time								
Temporary								

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by Michelle Rizk
 Division Statewide Budget, University of Alaska
 Approved by Michelle Rizk
Statewide Budget, University of Alaska

Phone 450-8187
 Date/Time 2/9/11 1:00 PM
 Date 2/9/11 1:00 PM

FISCAL NOTE #2

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 6(EDC)

Analysis

HB6 will have a zero fiscal impact on the Univeristy of Alaska

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number _____
Bill Version HB 6
() Publish Date _____

HB006-DOA-OAH-02-07-11
Title An Act authorizing governor to remove university regent
Sponsor Representative Gruenberg & Representative Wilson
Requester House Education
Dept. Affected Administration
Appropriation Centralized Administrative Services
Allocation Office of Administrative Hearings
OMB Component Number 2771

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	Appropriation Required	Information					
	FY 2012	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other (please identify)	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time	0.0	0.00	0	0	0	0	0
Part-time	0.0	0	0	0	0	0	0
Temporary	0.0	0	0	0	0	0	0

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version.

Prepared by Terry L. Thurbon, Chief Administrative Law Judge
Division Office of Administrative Hearings
Approved by John Cramer, Deputy Commissioner
Department of Administration

Phone 465-1886
Date/Time 02/07/2011 11:39 a.m.
Date _____

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 6

Analysis

This bill authorizes the governor to remove a member of the University of Alaska Board of Regents for good cause and establishes procedures for removal. The procedures include an opportunity for a hearing. Under section 2, the hearing function could be delegated by the governor to the office of administrative hearings. Removals likely would be infrequent. OAH, therefore, does not anticipate that this bill would result in an appreciable increase in caseload and expects to be able to provide any hearing-related services required with existing authorized personnel. The cost to OAH of performing the services would be recovered from the Office of the Governor through interagency receipts, based on the time commitment required for hearings.

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: January 18, 2011

FURTHER REFERRALS: Judiciary

Date of Committee Action: 2/21/11

The EDUCATION Committee considered:

HB 6

HOUSE BILL NO. 6

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

HB 6 REMOVING A REGENT

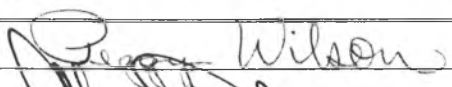
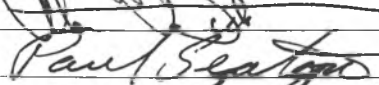
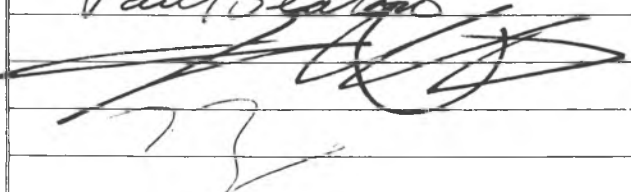

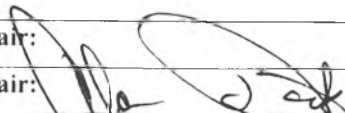
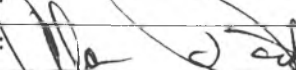
Recommends it be replaced with [] HCS or [] CS for House Bill 6 (EDC)
For Senate Bills with new title: [] Technical Title [] New Title: HCR _____ [] Same Title [] New Title

- [] attach amendments
- [] add new referral to _____ Committee
- [] Letter of Intent _____ Committee

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

<u>NEW FISCAL NOTES</u>				
*FN# is assigned by Chief Clerk's Office				
*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	UA			✓
	ADM			✓

<u>PREVIOUS FISCAL NOTES</u>				
FN#	List by Dept(s):	Fiscal	Indet.	Zero

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	WILSON	X			
	Seaton	X			
	KAWBAM	X			
	FEIG	X			
Chair: 	Dick	X			
Chair: 					

Member

Standing Committees:

Judiciary
Rules
State Affairs
Transportation

Alaska State Legislature

House of Representatives



Representative Max F. Gruenberg, Jr.

House District 20

Anchorage (Mountain View, Russian Jack, East Anchorage)
House Minority Floor Leader

Interim:
716 W 4th Avenue, Rm 350
Anchorage, Alaska 99501-2133
Phone: (907) 269-0123
Fax: (907) 269-0124

Session:
Alaska State Capitol, Rm 110
Juneau, Alaska 99801-1182
Phone: (907) 465-4940
Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6: Removing a Regent Sponsor Statement

This bill creates a statutory due process procedure under which the governor may suspend or remove a University of Alaska regent for good cause.

This bill is in response to a 2007 incident in which a regent was federally indicted on multiple counts of fraud. He refused to resign his position until impeachment proceedings began. The board of regents' by-laws do not set forth a procedure remove a regent. The legislative legal counsel has concluded that regents serve at the pleasure of the governor and thus can be removed. An informal attorney general's opinion states that the governor does not have the authority to remove a regent without cause. That AG opinion concluded that the governor does have the authority to remove a regent so long as cause is established and due process granted.

It should be noted that during the 25th legislature letters were sent to the board of regents asking that it, under the authority of 14.40.170(b)(1), adopt procedures for the removal and/or suspension of a regent, but it has not done so.

It is important to acknowledge that the constitution does bear upon this bill due to the governor's powers being enumerated in Article III of the Alaska Constitution while the board of regents is established in Article VII, section 6. The Alaska Supreme Court has ruled that the UA is subject to a degree of legislative control. For example, the legislature can, without approval of the regents, dispose of UA land. Additionally, the legislature has, through law, provided the UA with a broad degree of autonomy; however, this implies the UA is still subject to laws enacted by the legislature. The legislature has been given broad authority under the constitution, indeed the only constitutional constraints on the power of the legislature to make laws regarding other agencies of the State of Alaska deal with the rules of court and the repeal of initiatives. In effect this legislation provides a check upon the powers of the university.

This bill secures the state's interest and the university's interest. This legislation will keep a cloud from hovering over the UA in a future scenario in which a regent must be removed or suspended for cause.

AS 14.40.155(e) states that the Administrative Procedures Act (AS 44.62.330-44.62.630) applies to all of the proceedings of this section.

AS 14.40.155(f) sets out that the governor must file a copy of the allegations against the regent, the findings of the governor, and a complete record of the removal proceedings with the lieutenant governor.

Because this law deals with the conduct of the board of regents during their entire term in office it must apply retroactively to ensure that past violations do not go unchecked. **Section 3**³ is an applicability clause that allows AS 14.40.155 to apply to conduct occurring before, on or after the effective date of this Act.

³ Page 3, line 31 through page 4, lines 1-3

Member

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Judiciary
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Email:
Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6: Removing a Regent Sectional Analysis

Section 1¹ sets forth the legislative findings and purposes of the bill. The legislature finds that the framers of the Alaskan Constitution intended to insulate the University of Alaska from politics, that the legislature delegated the power of self-governance to the UA under AS 14.40.170(b), and that the legislature has the power to create a statutory procedure for the to remove a regent for good cause. The purposes of the bill are to clarify that the governor may remove a regent for good cause, and that the governor may not remove a regent in the absence of good cause. Finally, the legislative findings in this section affirm the political insulation of the university and the board of regents.

Section 2² adds a new section, AS 14.40.155, to AS 14.40 the chapter that governs the University of Alaska's Board of Regents. AS 14.40.155 is patterned after other statutory removal procedures for other boards, including the workers compensation appeals commission. See AS 23.30.007(j).

AS 14.40.155(a) sets forth the procedure for the governor to remove a regent for good cause. The governor must provide the regent with the reasons for removal, and an opportunity for a hearing with at least 30 days notice. Good cause is defined in subsection (g) to include a violation of the Executive Branch Ethics Act, a conviction of a felony, conviction of a misdemeanor involving a crime of dishonesty or the University of Alaska, nonfeasance in office, or failure to continue to meet the qualification requirements of a regent.

AS 14.40.155(b) requires the governor to file with the lieutenant governor a complete record of the removal proceedings, including a decision detailing the governor's findings.

AS 14.40.155(c) and (e) detail the procedure for the governor to suspend a regent. The governor must provide the regent with notice and an opportunity to be heard. The governor may suspend a regent who has been indicted for a felony, charged with a misdemeanor for a crime involving dishonesty or the University of Alaska, or for allegations of nonfeasance in office. However, the suspension may be lifted following a dismissal of the allegations at the hearing.

¹ Page 1, lines 5-14 through page 2, lines 1-16

² Page 2, lines 17-31 through page 3, lines 1-28

AS 14.40.155(d) allows a suspended regent to request a hearing to lift the suspension.
AS 14.40.155(f) permits the governor to delegate the conduct of the hearing to the Office of Administrative Hearings.

Because this law deals with the conduct of the board of regents during their entire term in office it must apply retroactively to ensure that past violations do not go unchecked. **Section 3³** is an applicability clause that allows AS 14.40.155 to apply to conduct occurring before, on or after the effective date of this Act.

³ Page 3, lines 29-31 through page 4, line 1

Member

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Judiciary
Rules
State Affairs
Transportation

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Email:
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House Bill 6: Removing a Regent Sectional Analysis for CS for HB 6 () (27-LS0027\D)

Section 1¹ sets forth the legislative findings and purposes of the bill. The legislature finds that the framers of the Alaskan Constitution intended to insulate the University of Alaska from politics, that the legislature delegated the power of self-governance to the UA under AS 14.40.170(b), and that the legislature has the power to create laws that pertain to the university. The purposes of the bill are to clarify that the governor may only remove a regent with good cause and that the governor must afford a regent due process in the proceedings dealing his or her removal or suspension. Finally, the legislative findings in this section affirm the political insulation of the university and the board of regents.

Section 2² adds a new section, AS 14.40.155, to AS 14.40 the chapter that governs the University of Alaska's Board of Regents. AS 14.40.155 is patterned after other statutory removal procedures for other boards, including the workers compensation appeals commission. See AS 23.30.007(j).

AS 14.40.155(a) sets forth the procedure for the governor to suspend a regent for good cause. The governor must provide the regent with notice and an opportunity for a hearing. Good cause is defined in subsection (g) to include a violation of the Executive Branch Ethics Act, a conviction of a felony, conviction of a misdemeanor involving a crime of dishonesty or the University of Alaska, malfeasance or nonfeasance in office, or failure to continue to meet the qualification requirements of a regent.

AS 14.40.155(b) allows the governor to remove a regent for good cause by providing the regent with an accusation and opportunity for a hearing and judicial review.

AS 14.40.155(c) details the procedure for a regent to either defend against a possible suspension or lift a suspension once it has been imposed.

AS 14.40.155(d) permits the governor to delegate the conduct of the hearing to the Office of Administrative Hearings. The standard of proof to be used in the hearing for removal for "good cause" is "clear and convincing," one of the highest standards.

¹ Page 1, lines 5-14 through page 2, lines 1-11

² Page 2, lines 12-31 through page 3, lines 1-30

AS 14.40.155(e) states that the Administrative Procedures Act (AS 44.62.330-44.62.630) applies to all of the proceedings of this section.

AS 14.40.155(f) sets out that the governor must file a copy of the allegations against the regent, the findings of the governor, and a complete record of the removal proceedings with the lieutenant governor.

Because this law deals with the conduct of the board of regents during their entire term in office it must apply retroactively to ensure that past violations do not go unchecked. **Section 3³** is an applicability clause that allows AS 14.40.155 to apply to conduct occurring before, on or after the effective date of this Act.

³ Page 3, line 31 through page 4, lines 1-3

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Toll Free: (866) 465-4940
Fax: (907) 465-3766

Email:
Rep.Max.Gruenberg@legis.state.ak.us

House Bill 6:
Removing a Regent
Explanation of changes between
HB 6 (27-LS0027\A) to CS for HB 6 () (27-LS0027\D)

There are a number of changes between the "A" and "D" versions, including minor grammatical and stylistic changes, and substantive changes.

There was one major change to **Section 1** of the bill. Subsection (a) paragraph (3) of the "A" version (page 2 lines 2-7) was deleted and subsection (a) paragraph (2) of the "D" version (page 1 lines 12-13) was added. The effect of this change is to show that the legislature has legislative authority over the University of Alaska.

There were a few changes to **Section 2** of the bill. Subsection (e) of the "A" version (page 3 lines 7-10) was deleted, as with the addition of new subsections and language in the "D" version it was unnecessary. Specifically, with designation that the proceedings in this section fall under the guidelines of the Administrative Procedures Act, the language in subsection (e) was not needed.

The other major change to **Section 2** of the "A" version was a reordering of the subsections to better reflect the flow of the proceedings.

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

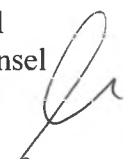
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

January 28, 2011

SUBJECT: Separation of powers issue (HB 6; Work Order No. 27-LS0027\A)

TO: Representative Alan Dick
Chair of the House Education Committee
Attn: Sheila Peterson

FROM: Jean M. Mischel
Legislative Counsel 

You have asked about the possibility of a separation of powers issue resulting from the restrictions and procedures for removal of a member of the University Board of Regents provided for in HB 6. You have also asked about the similarity of the issue for the Board of Trustees of the Alaska Permanent Fund Corporation whose members are subject to removal only for cause as provided under AS 37.13.070(a). The constitutional authority of the legislature to restrict or otherwise control the removal or suspension of a regent appointed by the governor is the subject of considerable debate. Unlike boards and commissions controlled by art. III, sec. 26 of the constitution, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over removal of the regents and, therefore, the governor's removal authority appears to be unrestricted.

Article VII, sec. 3 provides:

The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. . . .

A limitation on removal of some executive officers may be interposed by law, but arguably only as to persons who hold appointment under art. III, sec. 26 of the state constitution. Article III, sec. 26 states:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, *and may be removed as provided by law.* . . .

(Emphasis added) The removal of a public member of the Board of Trustees of the Permanent Fund Corporation is the subject of AS 37.13.070(a), which provides:

The governor may remove a public member of the board from office only for cause. A removal by the governor must be in writing and must state

the reason for the removal. A member who is removed by the governor may not participate in board business and may not be counted for purposes of establishing a quorum after the member receives written notice of removal from the governor.

A 2004 amendment to the statute that was proposed by the governor added the word "public" and the phrase "only for cause" to the first sentence.

In addition, in the past the Board of Trustees of the Alaska Permanent Fund Corporation was subject to legislative confirmation under former AS 24.20.206(1), which provided:

Sec. 24.20.206. DUTIES. The Legislative Budget and Audit Committee shall:

(1) report to the legislature its recommendations relating to the confirmation of appointees to the Board of Trustees of the Alaska Permanent Fund Corporation; . . .

AS 24.20.206(1) was enacted as part of the 1980 Act, ch. 18, SLA 1980, establishing the Alaska Permanent Fund Corporation and providing for legislative oversight of the permanent fund. AS 37.13.050 originally contained the confirmation requirement also, but that was amended out in 1982 and, apparently, a conforming amendment to AS 24.20.206(1) was overlooked until 2003 when it was repealed.

The Alaska Permanent Fund Corporation is established as a public corporation under AS 37.13.040. Our position is that legislative confirmation and removal may not be required for the members of the board of directors of a public corporation because they are not described in art. III, sec. 26 of the state constitution.¹

¹ The Alaska constitutional convention proceedings (ACCP) are helpful in determining whether a public corporation could be considered a "regulatory board," subject to legislative control. The convention specifically addressed the relationship between sec. 26 and the University of Alaska, a public corporation, and public corporations generally. Discussion of sec. 26 includes this statement by Delegate Sundborg:

This whole section applies only to three classes of agencies. It applies to principal departments of the state, to regulatory bodies and quasi-judicial bodies. It is inconceivable to me that no matter what the legislature did it could ever put the University of Alaska under one of those three headings, and I am very much afraid here that if we read in here an exception saying that it shall not apply to the University of Alaska, that it would apply or that it could be construed to apply to any other state corporation because we had not excepted that from the language.

Even with the additional legislative authority over sec. 26 boards, the Alaska Supreme Court interpreted that authority very narrowly. When the Court was faced with the question of the extent of legislative authority over sec. 26 boards and commissions, the Court found that the confirmation power of the legislature provided in art. III, secs. 25 (principal department heads) and 26, is merely a limited delegation of the executive appointment power to the legislature and stated:

As to this issue, we think the provision of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26 mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government.

Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976).

The University's status as a "body corporate" does not imply a legislative role in removal of a regent apart from the impeachment process available to the legislature as to all civil officers. Though the University, alone in the constitution, expressly holds corporate status, the Alaska Supreme Court has said that members of other public corporations established by law, such as the Board of Trustees of the Alaska Permanent Fund Corporation, serve at the pleasure of the governor. (Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966)) The Court stated:

The Association's three board members from the Board of Commissioners of the Alaska Housing Authority are appointed by the governor and serve at his pleasure. Therefore, the governor is empowered to remove any member of the governing board of the Association at his pleasure.

Id. at 250 (citations omitted).

I think it is unlikely that the restrictions placed on removal of a member of either the Board of Trustees of the Permanent Fund Corporation or the Board of Regents will be challenged and that a court would uphold them if challenged. The missing language in art. VII, sec. 3 of the constitution and the status as a public corporation both suggest that the membership of the Board of Regents is uniquely controlled by the governor; the public corporation status of the Board of Trustees of the Alaska Permanent Fund Corporation indicates that legislative restrictions on removal are vulnerable under the 1966 Alaska Supreme Court precedent. I am aware, however, of an informal attorney general opinion that suggests in a footnote, without any judicial support, that the legislature currently has some authority over removal of a regent in addition to its

Delegate Walsh stated that after checking with a couple of attorneys he believed that the University of Alaska was not subject to the requirements of sec. 26 because it was a public corporation. ACCP, at p. 2246. Delegate Riley stated the he believed that the University of Alaska was clearly beyond the reach of sec. 26. ACCP, at p. 2248. A similar comment was made by Delegate V. Rivers while entertaining questions about the Committee on the Executive Branch's report. ACCP, at p. 2033-34.

Representative Alan Dick
January 28, 2011
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impeachment authority. I do not know how a court would view the kind of intrusion proposed in HB 6 into the governor's appointment and removal authority, but perhaps the court would be persuaded by the governor's support of this concept.

If I may be of further assistance, please advise.

JMM:ljw
11-047.ljw

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 3101State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329**MEMORANDUM**

April 17, 2007

SUBJECT: Removal of a University Regent (HB 237)
(Work Order No. 25-LS0839A)

TO: Representative Bob Lynn
Attn: Nancy Manly

FROM: Jean M. Mischel
Legislative Counsel

You asked whether the governor may remove a University regent. In my opinion, the answer is yes. In fact, the constitutional authority of the legislature to restrict or otherwise control the removal or suspension of a regent by the governor is the subject of considerable debate. Unlike boards and commissions controlled by art. III, sec. 26 of the constitution, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over removal of the regents and therefore the governor's removal authority appears to be unrestricted.

Article VII, sec. 3 provides:

The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session

A limitation on removal of some executive officers may be interposed by law, but arguably only as to persons who hold appointment under art. III, sec. 26 of the state constitution. Article III, sec. 26 states:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, *and may be removed as provided by law*

Even with the additional legislative authority over sec. 26 boards, the Alaska Supreme Court interpreted that authority very narrowly. When the Court was faced with the question of the extent of legislative authority over sec. 26 boards and commissions, the Court found that the confirmation power of the legislature provided in art. III, secs. 25 (principal department heads) and 26, is merely a limited delegation of the executive appointment power to the legislature and stated:

As to this issue, we think the provision of Sections 25 and 26 of Article III are clear and unambiguous. Thus, we conclude that Sections 25 and 26

Representative Bob Lynn
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mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government. (Bradner v. Hammond, 553 P.2d 1, 7 (Alaska 1976))

The University's status as a "body corporate" does not imply a legislative role in removal of a regent (apart from the impeachment process available to the legislature as to all civil officers). Though the University, alone in the constitution, expressly holds corporate status, the Alaska Supreme Court has said that members of other public corporations established by law serve at the pleasure of the governor. (Walker v. Alaska State Mortgage Association, 416 P.2d 245 (Alaska 1966)) The Court stated:

The Association's three board members from the Board of Commissioners of the Alaska Housing Authority are appointed by the governor and serve at his pleasure. Therefore, the governor is empowered to remove any member of the governing board of the Association at his pleasure.

Id. at 240 (citations omitted).

I am aware of a recent informal attorney general opinion that suggests in a footnote that the legislature has some authority over removal of a regent without any judicial support for that position. The addition of legislative control over suspension of a regent is even more questionable. I do not know how a court would view the kind of intrusion proposed in HB 237 into the governor's appointment and removal authority, but perhaps the court would be persuaded by the governor's support of this concept.

If I may be of further assistance, please advise.

JMM:med
07-247.med

MEMORANDUM

State of Alaska
Department of Law

To: Talis J. Colberg Attorney General	Date: February 2, 2007
Thru: Craig J. Tillery Deputy Attorney General	File No.: 663-06-0103
From: Michael A. Barnhill Assistant Attorney General Labor and State Affairs Section	Tel. No.: (907) 465-3600
	Fax: (907) 465-2520
	Subject: Governor's Power to Remove a University of Alaska Regent

We have been asked whether the Governor has the power to remove a University of Alaska regent without cause. In our view, the answer is no.

We acknowledge that this question has been posed to different counsel and different conclusions reached. Legislative counsel has concluded in a written opinion that regents serve at the pleasure of the governor and may be removed at any time. University of Alaska counsel has concluded in a verbal opinion that a regent may be removed only through impeachment by the legislature.

For the reasons set forth below, we do not fully agree with the conclusions of either legislative counsel or university counsel. That being said, we do agree with both legislative counsel and university counsel that impeachment is an option that may be pursued in order to remove a regent. But we disagree with university counsel that it is the only option.

The basis for our views is grounded primarily in the constitution and discussions of the framers regarding the University of Alaska during the constitutional convention. We start there.

I. Historical Background

The University of Alaska was created by the territorial legislature in 1935. ch. 49, SLA 1935. The Board of Regents was created at that time as well, with the governor empowered to appoint regents subject to confirmation by a joint session of the legislature. *Id.* at sec. 3. The term of a regent was eight years and a regent was to serve "until their successors are appointed and have qualified." *Id.* The original statute made no mention

of how a regent should be removed. This law has essentially remained unchanged through today, though the number of regents was increased to eleven in 1975. See AS 14.40.120; 14.40.140; AS 14.40.150.

From the University's inception through statehood we are aware of no instance of a governor removing a regent prior to the end of a regent's term. We recognize that it is possible such could have happened, but it would take further historical research to determine this.

The constitutional convention considered the University of Alaska several times during the course of the convention. Before considering these passages, however, it is important to understand that the territory of Alaska had suffered from a fragmented executive branch with several elected officials and multiple governing boards designed to erode the power of the federally appointed governor. A fundamental goal of the convention was to establish a strong governor who was completely in control of the executive branch of government.¹

During the consideration of the executive branch article, however, concerns were raised regarding the appropriate place for the University of Alaska within the constitutional design for the new government. These concerns were often expressed in terms of the need to insulate education from politics. Alaska Constitutional Convention Proceedings at 2043, 2246. During the discussions of the provisions that ultimately

¹ Delegate Fischer later wrote, "[Territorial] government was neither responsible nor responsive to the people. As a result, convention delegates were ready to make basic structural changes so the people could hold the governor wholly responsible for the conduct of state administration." V. Fischer, Alaska's Constitutional Convention at 106 (1975).

became sections 25 and 26 of Article III,² questions were raised concerning the extent to which these sections governed appointments to the Board of Regents. The chair of the Executive Branch Committee, Victor Rivers, and a member of that Committee, Katherine Nordale, both responded that section 26 of Article III only applied to "principal departments" and that the University of Alaska was not a principal department. Alaska Constitutional Convention Proceedings at 2034, 2037, 2246. Therefore, in their mind, the University of Alaska did not fall under section 26 of Article III.

Other delegates, however, remained concerned that in order to insulate the University from politics it needed to be made explicit that the University was not subject to section 26 of Article III. In particular, certain delegates were concerned that if section 26 did apply to the University, that the Board of Regents' appointment of a president would be subject to approval by the governor. Accordingly, these delegates sought to amend section 26 to state that the provision did not apply to the University of Alaska. Alaska Constitutional Convention Proceedings at 2245-2258. Ultimately, these attempts failed because the members of the Executive Branch committee persuaded the convention that section 26 simply did not apply to the University of Alaska. Alaska Constitutional Convention Proceedings at 2246, 2257. Moreover, several delegates noted that a separate article was being drafted to govern the University of Alaska. *Id.* at 2247-48, 2250, 2255.

During the debate, some delegates expressed observations as to the status of the University. The chair of the Executive Committee, Victor Rivers, stated that the Executive Branch article would have no impact on the University:

² Section 25. Department Heads. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state.

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

Walsh: May I ask a question, Mr. Rivers? I think to clarify in the minds of several people here it might be well for me, that [as] one of those serving on the Board of Regents of the University of Alaska, composed of eight members, and the Board of Regents select the President of the University. The governor, as I understand it, does not have the power of the removal of the president of the University. It is a matter for the Board. Would this situation change that, Mr. Rivers?

Rivers: No, in regard to the University, this would not affect their present setup. They are a private corporation, or rather a nonprofit corporation, and under the specific law providing for their make-up, and you would still have a board of regents appointed by the governor and confirmed by the legislature, and the powers as you now have them would be identical to what they now are as I visualize them.

Id. at 2033-34. Delegate Taylor stated that the "University is not a part of the Territorial government whatsoever; it is an independent agency." *Id.* at 2253. Notably, Delegate Nordale expressed the view that by explicitly putting the University in a separate article it would "make it very clear that it can never be dissolved and that it is not part of the executive branch of government." *Id.* at 2256.

Later in the convention, the Executive Branch committee proposed language regarding the University. Chair Rivers introduced the language as follows:

Mr. President, you have heard the reading of this article and it was considered important that in the constitution there be included an article of this type. It gives the University, as a corporate body, the authority to receive and hold property which will be granted to them under the enabling act. It also gives them the authority for administering and disposing of that according to law. It sets up the board of regents and the governing body of the University, and I think the main point of this article has is that constitutionally the University of Alaska shall be the only state university in Alaska.

Id. at 2792. Perhaps notably, the Executive Branch committee saw fit to clear the language of the proposed article with the President of the University prior to bringing it to the floor of the convention.³ *Id.*

II. Analysis

With this summary of the constitutional history of the University in mind, we think it is fair to draw the following conclusions. First, the convention intended to create a very strong governor with full appointive power. Second, despite the strong governor model, the convention nevertheless intended to insulate the University from politics, including the governor. Third, the convention intended that the University would not be subject to section 26 of Article III of the Alaska Constitution. Fourth, the convention intended to constitutionalize the existence of the University. Finally, some members of the convention believed that the University resided outside the executive branch of government in 1955 and that the constitution preserved that status.⁴

Nowhere in the convention minutes is there any discussion regarding removal of a regent.⁵ But the above conclusions are sufficient to give us pause that the governor's power to remove certain executive branch appointees without cause extends to the University Board of Regents. This view is consistent with the views previously expressed by this office. In 1979, we opined:

Under the state constitution, the University of Alaska is 'governed' by the Board of Regents. Alaska Const., art. VII, § 3. The regents are appointed by the governor, subject to confirmation by the legislature. Id. They serve for terms of eight years. Thus, while the regents are appointed by and are responsible to the governor, they do not serve at his pleasure but rather for fixed terms, and they may, therefore, be

³ In other words, it is doubtful that President Patty, the University president at the time, would have approved this language if he thought it allowed the governor to remove a regent without cause.

⁴ By observing this latter point, we do not conclude that in fact the convention succeeded in fully removing the University from the executive branch.

⁵ Though at one point, Chair Rivers states that "[t]he law could provide no doubt for means of removal . . ." *Id.* at 2255-56. He appears to be referring to the chief executive of the University, not the regents, however.

removed from office solely for cause. 67 C.J.S. Officers § 120 (1978); 63 Am. Jur.2d Public Officers and Employees § 189 (1972). As a result, the governor's supervision over the university is made distinctly indirect. Unless the members of the Board of Regents commit acts of malfeasance, misfeasance, or nonfeasance sufficient to constitute cause for their removal, the governor possesses no check upon them and no power to direct their activities.

1979 Inf. Op. Att'y Gen. 1 (Jan. 23; J-66-103-79). We have reiterated this view over the years⁶ and see no reason to stray from it today.

For the reasons expressed above, the University is accorded unique constitutional status. We must be mindful of these reasons when considering the applicability of Alaska Supreme Court precedents. A number of these cases have been cited by other counsel, but we doubt that a court would find them controlling on the issue of whether the governor may remove a regent without cause. For instance, *Walker v. Alaska State Mortgage Assoc.*, 416 P.2d 245 (Alaska 1966) does not involve the University of Alaska, but rather pertains to a board of a public corporation that does not have a unique constitutional status. The cases involving the University do not have issues that directly implicate the political independence of the University, one of the reasons for the University's unique constitutional status. See, e.g., *University of Alaska v. Nat'l Aircraft Leasing*, 536 P.2d 121 (Alaska 1975) (University is instrumentality of state for purposes of sovereign immunity); *McGrath v. University of Alaska*, 813 P.2d 1370 (Alaska 1991) (legislature may subject University to Administrative Procedures Act). Instead, we think a court if faced with the issue of whether the governor may remove a regent without cause would be more likely to focus on the constitutional history of the University set forth above.

Finally, legislative counsel contends that under AS 39.05.060(d) regents serve at the pleasure of the governor and may be removed at any time. This interpretation is at odds with the express intention of the constitutional convention that the University be insulated from politics. Moreover, review of the fairly lengthy legislative history of this statute demonstrates that the legislature never intended AS 39.05.060(d) to reach the

⁶ In 1998, an assistant attorney general stated that, "Regents are considered to be sort of in a class by themselves. We've always advised the governor that it's inadvisable to remove the regents at a change of an administration. Legal complications may ensue." 1998 Anchorage Daily News (quoting AAG James Baldwin).

Attorney General Colberg
Re: Removal of University Regent

February 2, 2007
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Board of Regents. This statute was originally enacted as part of the State Organization Act of 1959, under which the executive branch of the new State of Alaska was formed. *See* ch. 64, SLA 1959. The University of Alaska is not within the scope of this Act—it was not mentioned in the Act and was left out of the organization of the executive branch accomplished by this Act. *Id.* When initially enacted, AS 39.05.060 only referred to boards that were explicitly mentioned in the State Organization Act of 1959. While the scope of AS 39.05.060 has both expanded and contracted over the years, it has never been broadened to include the Board of Regents.⁷

In summary, we conclude that the Governor may only remove a regent if cause is established, preferably at a hearing prior to removal. We would be happy to address in another memo the evidence necessary to establish cause, and the criteria for an appropriate hearing process.

MAB:ajh

⁷ We note, however, that it may be possible for the legislature to provide for removal of a regent through enactment of a statute consistent with the constitution. Such a statute would have to preserve the University's politically independent constitutional status and probably could only provide for removal if it were for some cause that was established at a hearing prior to removal.

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AS 31.05.007

C

ALASKA STATUTES

Title 31. Oil and Gas.

Chapter 05. Alaska Oil and Gas Conservation Act.

Article I. Administration.

Sec. 31.05.007 Term of office; vacancy; removal.

(a) The term of office of each member is six years. A commissioner, upon the expiration of a term, shall continue to hold office until a successor is appointed and qualified.

(b) A vacancy arising in the office of a commissioner shall be filled by appointment by the governor and confirmed by the legislature in joint session, and, except as provided in AS 31.05.080(4), an appointee selected to fill a vacancy shall hold office for the balance of the full term for which the predecessor on the commission was appointed.

(c) A vacancy in the commission does not impair the authority of a quorum of commissioners to exercise all the powers and perform all the duties of the commission.

(d) The governor may remove a commissioner from office for cause including but not limited to incompetence, neglect of duty or misconduct in office. A commissioner, to be removed for cause, shall be given a copy of the charges and afforded an opportunity to be publicly heard in person or by counsel in the commissioner's own defense upon not less than 10 days' notice. If a commissioner is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the commissioner and the governor's finding based on the charges, together with a complete record of the proceedings.

(§ 1 ch 158 SLA 1978; am § 10 ch 168 SLA 1990; am § 10 ch 80 SLA 1996)

HISTORICAL NOTES

Opinions of attorney general. -- For a discussion of the effect of the term "appointed and qualified" as set out in (a) of this section to appointment to the commission, see June 8, 1995, Op. Atty. Gen.

A. S. 31.05.007, AK ST § 31.05.007

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ALASKA STATUTES

Title 8. Business and Professions.

Chapter 04. Accountants.

Article 1. Board of Public Accountancy.

Sec. 08.04.030 Removal of members.

The governor shall remove any member of the board whose certificate or license has been revoked or suspended. The governor may, after hearing, remove any member for neglect of duty or other just cause.

(§ 2(2) ch 187 SLA 1960; am § 2 ch 66 SLA 1997)

HISTORICAL NOTES

Delayed amendment of section. -- Under §§ 4 and 58, ch. 16, SLA 2006, effective January 1, 2008, this section will read as follows: "Removal of members. The governor shall remove any member of the board whose license has been revoked or suspended. The governor may, after hearing, remove any member for neglect of duty or other just cause."

HISTORICAL NOTES

Effect of amendment. -- The 1997 amendment, effective July 1, 1997, rewrote this section.

A. S. 08.04.030, AK ST § 08.04.030

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C

ALASKA STATUTES

Title 4. Alcoholic Beverages.

Chapter 06. Alcoholic Beverage Control Board.

Sec. 04.06.070 Appointment and removal of director.

The governor shall appoint a director to serve as the executive officer of the board. The board may remove the director at its pleasure, and the governor may remove the director for misconduct, misfeasance, or malfeasance in office. The governor may not remove the director unless the director is given a copy of the charges and afforded an opportunity to be publicly heard, in person or by counsel, in defense against the charges upon at least 10 days' notice. If the director is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the director and the findings based on the charges, together with a complete record of any hearing.

(§ 1 ch 131 SLA 1980)

A. S. 04.06.070, AK ST § 04.06.070

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ALASKA STATUTES

Title 42. Public Utilities and Carriers.

Chapter 04. Regulatory Commission of Alaska.

Article 1. Commission and Staff.

Sec. 42.04.020 Commissioners.

(a) The commission consists of five commissioners appointed by the governor and confirmed by the legislature in joint session. To qualify for appointment as a commissioner, a person must be a member in good standing of the Alaska Bar Association or have a degree from an accredited college or university with a major in engineering, finance, economics, accounting, business administration, or public administration. Actual experience for a period of five years in the practice of law or in the field of engineering, finance, economics, accounting, business administration, or public administration is equivalent to a degree.

(b) The term of office of each member is six years. A commissioner, upon the expiration of a term, shall continue to hold office until a successor is appointed and qualified.

(c) A vacancy arising in the office of a commissioner shall be filled by appointment by the governor and confirmed by the legislature in joint session, and, except as provided in AS 39.05.080(4), an appointee selected to fill a vacancy shall hold office for the balance of the full term for which the predecessor on the commission was appointed.

(d) A vacancy in the commission does not impair the authority of a quorum of commissioners to exercise all the powers and perform all the duties of the commission.

(e) The governor may remove a commissioner from office for cause, including incompetence, neglect of duty, inability to serve, or misconduct in office or because the member, while serving on the commission, is convicted of a misdemeanor for violating a statute or regulation related to public utilities or is convicted of a felony. A commissioner, to be removed for cause, shall be given a copy of the charges and afforded an opportunity to be publicly heard in person or by counsel in the commissioner's own defense upon not less than 10 days' notice. If a commissioner is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the commissioner and the governor's finding based on the charges, together with a complete record of the proceedings.

(f) Members of the commission are in the exempt service and are entitled to a monthly salary equal to Step C, Range 26, of the salary schedule in AS 39.27.011(a) for Juneau, Alaska. The chair of the commission is entitled to a monthly salary equal to Step C, Range 27, of the salary schedule in AS 39.27.011(a) for Juneau, Alaska.

(g) Each commissioner, before entering upon the duties of office, shall take and subscribe to the oath prescribed for principal officers of the state.

(§ 1 ch 25 SLA 1999)

A. S. 42.04.020, AK ST § 42.04.020

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ALASKA STATUTES

Title 8. Business and Professions.

Chapter 01. Centralized Licensing.

Sec. 08.01.020 Board organization.

Board members are appointed by the governor and serve at the pleasure of the governor. Unless otherwise provided, the governor may designate the chair of a board, and all other officers shall be elected by the board members. Unless otherwise provided, officers of a board are the chair and the secretary. A board may provide by regulation that three or more unexcused absences from meetings are cause for removal.

(§ 1 ch 59 SLA 1966; am § 2 ch 94 SLA 1987)

A. S. 08.01.020, AK ST § 08.01.020

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Decided as of July 1, 2006.

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