1/25/12 OVERVIEWS: REVIEW OF SELECT 2011 COURT DECISIONS

<TARGET><BILL></BILL><SUBJECT>1-25-12 OVERVIEWS REVIEW OF SELECT 2011 COURT DECISIONS</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
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House Judiciary Committee
Agenda
1:00 p.m.

Wednesday, January 25th, 2012
Capitol, Room 120

Review of select 2011 court decisions – Division of Legal and Research Services

1. Williams v. Barbee -- pg. 18

Presumption against custody for domestic violence applies to modifications of custody.

2. Christoffersen v. State -- pg. 24

Absolute quasi-judicial immunity extended to court-appointed investigators acting within the scope of appointment.

3. State v. Alyeska -- pg. 14

Statutory limitations applicable to an owner controlled insurance program for a construction project do not apply to workers' compensation and general liability coverages for work characterized as maintenance.

4. Calvert v. State -- pg. 15

Suitability of work and good cause for quitting interpreted for purposes of unemployment benefits.

5. Monzulla v. Voorhees -- pg. 17

Workers' compensation appeals commission has authority to review non-final orders of the workers' compensation board.

6. Marathon Oil v. State -- pg. 22

Agreement to accept a contract price as the value of the state's royalty share of gas production may not be applied retroactively.

Presenters:

JEAN MISCHEL, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA)

DENNIS BAILEY, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA)

DON BULLOCK, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA)

Melanie Lesh

From: MaryEllen Duffy
Sent: Thursday, January 19, 2012 5:06 PM
To: Melanie Lesh
Subject: 2011 Oversight Report mtg -- 1/25/12

Mel,
Jerry gave me the list below after speaking with you. It appears our attorneys will meet with HJUD on Wednesday, Jan. 25th at 1:00 p.m. to discuss the following cases from the 2011 Oversight Report:

1. Williams v. Barbee -- pg. 18 (Jean)
2. Christoffersen v. State -- pg. 24 (Jean)
3. State v. Alyeska -- pg. 14 (Dennis)
4. Calvert v. State -- pg. 15 (Dennis)
5. Monzulla v. Voorhees -- pg. 17 (Dennis)
6. Marathon Oil v. State -- pg. 22 (Don)

Take care,
Mel

MaryEllen Duffy
Special Assistant
LAA Legal Services
907-465-6651 direct
907-465-2029 fax

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(GAVEL IN) Call this meeting of the House Judiciary Committee to order.

First, as a matter of housekeeping, I ask that all cell phones and miniature computer devices be placed in the stun mode and remain silenced throughout the hearing. Thank You.

"It's 1 PM on Wednesday, January 25, 2012.

Present today are:

___ Representative Lynn

___ Representative Keller

___ Representative Pruitt

___ Representative Gruenberg

___ Representative Holmes

___ Vice Chair, Representative Thompson

___and Myself, Chair Gatto"

Susan is doing the recording so speak your name clearly.

Today's Agenda includes the overview of six court decisions, which can be found in the Legislative Legal Services report dated December 2011 (the yellow book):

1. Williams v. Barbee -- pg. 18
2. Christoffersen v. State -- pg. 24
3. State v. Alyeska -- pg. 14
4. Calvert v. State -- pg. 15

5. Monzulla v. Voorhees -- pg. 17

6. Marathon Oil v. State -- pg. 22

We will devote fifteen minutes to each case. If the committee's business with a case cannot be completed in the allotted time, we will table the discussion until our next meeting. I will also entertain motions to send letters to the committees of jurisdiction on these issues if we determine that it would be more appropriate to have the discussion in those venues.

We have Legal Services attorneys here to explain the history/reason for the report and to answer questions about specific cases.

- Jean Mischel
- Dennis Bailey
- Don Bullock (in that order)

Williams v. Barbee

- Legal Services summarizes.
- Committee discusses.
- Motions?

Christoffersen v. State

- Legal Services summarizes.
- Committee discusses.
- Motions?

State v. Alyeska

- Legal Services summarizes.
- Committee discusses.
- Motions?

Calvert v. State

- Legal Services summarizes.
- Committee discusses.
- Motions?

Monzulla v. Voorhees

- Legal Services summarizes.

- Committee discusses.
- Motions?

Marathon Oil v. State

- Legal Services summarizes.
- Committee discusses.

Motions?

Thank you all for being here today.

"At ___ PM, I adjourn this interim meeting of the House Judiciary Committee." (GAVEL OUT)

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January 26, 2012

Representative Kurt Olson
Chairman, House Labor
and Commerce Committee
Capitol, Room 24
Juneau, Alaska 99811

Dear Chairman Olson,

The House Judiciary Committee met January 25, 2012 to discuss the 2011 Oversight Report examining court decisions and Opinions of the Attorney General construing Alaska Statutes' assembled by Legislative Legal Services. We discussed six cases from the report, three of which the Judiciary committee agreed fall within the jurisdiction of the Labor and Commerce committee. These cases: *State of Alaska v. Alyeska Pipeline Service Co.*; *Calvert v. State; Monzulla v. Voorhees*; (all attached) also received recommendations by Legislative Legal Services for further legislative review.

The *Alyeska* case revealed that the Legislature may want to review whether AS 21.36.475 was intended to, or otherwise should, apply to an owner controlled insurance program (OCIP) for maintenance or another activity other than "working on a construction project" or whether on OCIP for non-construction purposes should be regulated in another manner. *Calvert v. State* analysis by Legislative Legal Services recommended legislative review to determine whether the department's benefit policy manual – for unemployment insurance compensation – correctly interprets legislative concepts of suitability and good cause. In *Monzulla* review is similarly recommended to determine whether the court properly interpreted legislative intent to include that the Workers' Compensation Appeals Commission has the authority to review non-final decisions of the board.

As a courtesy to you and your members, I have attached relevant materials from our meeting and discussion of these cases. Please contact my office if you have any questions or concerns.

Sincerely,

Carl Gatto
Chairman
House Judiciary Committee

Enclosures

cc: House Labor & Commerce Committee members
House Judiciary Committee Members

file copy

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January 31, 2012

Representative Eric Fiege
Co-Chair House Resources Committee
State Capitol, Room 126
Juneau, Alaska 99811

Representative Paul Seaton
Co-Chair House Resources Committee
State Capitol, Room 126
Juneau, Alaska 99801

Dear Chairmen,

The House Judiciary Committee met January 25, 2012 to discuss the 2011 Oversight Report examining court decisions and opinions of the attorney general construing Alaska Statutes' compiled by Legislative Legal Services. We discussed six cases from the report, one of which the Judiciary Committee agreed falls within the jurisdiction of the House Resources committee. The case: *Marathon Oil v State of Alaska* (attached) received recommendations by Legislative Legal Services for further legislative review.

The *Marathon* case revealed that the Legislature may want to review to determine whether the court's interpretation of the statute disallowing retroactive application is consistent with the legislative intent. As a courtesy to you and your members, I have attached relevant materials from our meeting and discussion of this case. Please contact my office if you have any questions or concerns.

Sincerely,

Carl Gatto, Chairman
House Judiciary Committee

cc: House Resource Committee members
House Judiciary Committee members

Rep. Gatto

STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-SEVENTH STATE LEGISLATURE

Listing Alaska Statutes with
Delayed Repeals or Delayed Amendments
and
Examining Court Decisions
and Opinions of the
Attorney General
Construing Alaska Statutes

Prepared by
Legal Services
Division of Legal and Research Services
Legislative Affairs Agency
State Capitol
Juneau, Alaska 99801-1182

DECEMBER 2011

A REPORT TO THE TWENTY-SEVENTH STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals or Delayed Amendments and Examining Court Decisions and Opinions of the Attorney General Construing Alaska Statutes

The report lists Alaska Statutes that will be amended or repealed between February 29, 2012, and March 1, 2013, according to laws enacted before the 2012 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2010, and September 30, 2011,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2010, and September 30, 2011.

Prepared by
Legal Services
Division of Legal and Research Services
Legislative Affairs Agency
State Capitol
Juneau, Alaska 99801-1182

December 2011

INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

(1) the courts and agencies are properly implementing legislative purposes;
(2) there are court or agency expressions of dissatisfaction with state statutes or the common law of the state;
(3) the opinions, decisions, or regulations indicate unclear or ambiguous statutes;
(4) the courts have modified or revised the common law of the state.

Under AS 24.20.065(b) the Council is to make a comprehensive report of its findings and recommendations to the members of the Legislature at the start of each regular session.

This edition of the review by the attorneys of the Legislative Affairs Agency examines the opinions of the Alaska Supreme Court, the Alaska Court of Appeals, the United States Court of Appeals for the Ninth Circuit, and the United States District Court for the District of Alaska. As in the past, those cases where the court construes or interprets a section of the Alaska Statutes are analyzed. Those cases where no statute is construed or interpreted or where a statute is involved but it is applied without particular examination by the court are not reviewed. In addition, those major cases that have already received legislative scrutiny are not analyzed. However, cases that reject well-established common law principles or reverse previously established case law that might be of special interest to the legislature are analyzed. Because the purpose of the report is to advise members of the legislature on defects in existing law, we have generally not analyzed those cases where the law, though it may have been criticized, has been changed since the decision or opinion was published.

The review also covers formal and informal opinions of the Attorney General. As with court opinions, we have only analyzed those opinions where a provision of the Alaska Statutes is construed or interpreted, or which might otherwise be of special interest to the legislature.

The review of administrative regulations is the responsibility of the Administrative Regulation Review Committee under AS 24.20.460 and is not included in this report.

This report also includes a list of Alaska Statutes that, absent any action by the 2012 Legislature, will be repealed or amended before March 1, 2013, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

Reviews of state court decisions were prepared by Jean Mischel, Don Bullock, and Dan Wayne, Legislative Counsel, and Jerry Luckhaupt, Assistant Revisor of Statutes. Dennis Bailey, Legislative Counsel, reviewed federal court decisions and opinions of the Attorney General. Kathryn Kurtz, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

December 2011

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DELAYED REPEALS, ENACTMENTS OR AMENDMENTS

taking effect between February 29, 2012 and March 1, 2013 according to laws enacted before the 2012 legislative session

Laws enacted in 2004

Ch. 70, SLA 2004, as amended by ch. 61, SLA 2009, ch. 48, SLA 2010, and ch. 13, 2011 -- Sport Fishing

AS 16.05.340(a)(26)	repealed effective January 1, 2013
AS 16.40.260	repealed effective January 1, 2013
AS 16.40.270	repealed effective January 1, 2013
AS 16.40.280	repealed effective January 1, 2013
AS 16.40.290	repealed effective January 1, 2013
AS 16.40.299	repealed effective January 1, 2013
AS 25.27.244(s)(2)(A)(xviii)	repealed effective January 1, 2013
AS 25.27.244(s)(2)(A)(xix)	repealed effective January 1, 2013
AS 41.21.506(b)	amended (conditionally) effective January 1, 2013 by secs. 22 and 31, ch. 58, SLA 2010 contingent on repeal of AS 16.40.260 and 16.40.270 under ch. 70, 2004

Laws enacted in 2007

Ch. 27, SLA 2007 -- Requiring Electronic Monitoring as a Special Condition of Probation and Parole for Offenders Whose Offense Was Related to a Criminal Street Gang

AS 12.55.100(f)	repealed effective December 31, 2012
AS 33.16.150(g)	repealed effective December 31, 2012

Laws enacted in 2008

Ch. 71, SLA 2008 -- Report to the Legislature on Teacher Preparation, Retention, and Recruitment by the Board of Regents

AS 14.40.190(b)	amended effective July 1, 2012

2008 Legislative Resolve No. 35 -- Amending the Uniform Rules of the Alaska State Legislature Relating to Standing Committees

Uniform Rule 20	removes the Education Committees from the list of standing committees effective on the first day of the first regular session of the Twenty Eighth Legislature, and adds education to the jurisdiction of the Health and Social Services Committees, renaming them the Health, Education, and Social Services Committees

Laws enacted in 2010

Ch. 10 and 71, SLA 2010 -- Municipal Property Tax Exemptions

AS 29.45.030	amended effective November 30, 2012

Ch. 24, SLA 2010 -- Concealed Handgun Permits

AS 18.65.725	enacted effective July 1, 2012

Ch. 93, SLA 2010 -- School Construction and Major Maintenance

AS 14.11.025	enacted effective July 1, 2012
AS 14.11.030	enacted effective July 1, 2012
AS 14.11.035	enacted effective July 1, 2012

Laws enacted in 2011

Ch. 23, SLA 2011 -- Health Care Insurance and Related Matters

AS 21.54.180	repealed effective July 1, 2012

PLEASE NOTE: "Sunsets" of boards and commissions under AS 08.03.010 and AS 44.66.010 are not reflected in the list above. Also, the list does not include repeals of uncodified law, including sunsets of advisory boards and task forces and pilot projects of limited duration created in uncodified law.

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

FRAUDULENT CONCEALMENT OF EVIDENCE, AS DISTINGUISHED FROM SPOLIATION, IS AVAILABLE CAUSE OF ACTION FOR INTENTIONALLY CONCEALED EVIDENCE.

A construction worker was injured on a homeowner's staircase that had no railing and was icy. The insurer investigated and made photographs available during discovery without the investigator's notes on them about the condition of the staircase, believing the notes to be privileged. The homeowner's testimony about the condition of the staircase contradicted the investigator's notes. The insurer later realized that the notes were not privileged and produced them and offered to pay for a new deposition of the homeowner. The court sanctioned the insurer. The construction worker then filed a separate lawsuit alleging spoliation of evidence by the insurer. The Alaska Supreme Court for the first time defined the tort of spoliation as a destruction of evidence. In cases where evidence is not actually destroyed the court recognized the alternative common law tort of fraudulent concealment as a separate cause of action in Alaska.

Allstate Insurance Co. v. Dooley, 243 P.3d 197 (Alaska 2010).

Legislative review is not recommended unless the legislature disagrees with the court's definitions of the torts.

IT IS FOR TRIAL JUDGES TO DECIDE CORPUS DELICTI AND CRIMINAL DEFENDANTS ARE ONLY ENTITLED TO A NEW TRIAL FOR A VIOLATION OF THE CORPUS DELICTI RULE.

Police officers were called to Jerry Langevin's apartment to investigate a domestic dispute. Langevin was visibly intoxicated and told officers he was "three sheets to the wind." Langevin stated he had been drinking at a Fairbanks bar and had either driven all the way home or part of the way home. Langevin was arrested and subsequently convicted of drunk driving based solely upon his statements to the police. On appeal, Langevin argued his conviction violated the *corpus*

delicti rule and he was therefore entitled to an acquittal. The *corpus delicti* rule provides that a criminal conviction can not be based solely on a defendant's uncorroborated confession. The Alaska Court of Appeals found that Alaska follows the evidentiary foundation approach to *corpus delicti*, thereby requiring the trial judge to determine if the state has introduced independent evidence that substantially corroborates the confession. The court found that the state had not, reversed Langevin's conviction, and determined that, under *corpus delicti*, the proper remedy is a new trial.

Langevin v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10510, decided June 3, 2011. 2011 Alas. App. LEXIS 49.

Legislative review is not recommended.

Art. I, sec. 24, Constitution of the State of Alaska
AS 12.61.010 - AS 12.61.900

WHEN A CRIMINAL DEFENDANT CHALLENGES A CONVICTION AND DIES WHILE THE CHALLENGE IS PENDING THE CONVICTION MAY STAND.

The Alaska Supreme Court consolidated two otherwise unrelated criminal cases to resolve the question: under Alaska law, what is the effect of the death of a criminal defendant while an appeal is pending in that defendant's case? The court held that when a criminal defendant dies after filing an appeal, or a petition for hearing which has been granted, the defendant's conviction will stand unless the defendant's personal representative elects to continue the appeal. In doing so the court expressly overruled its own prior holding, *Hartwell v. State*, 423 P.2d 282 (Alaska 1967), that the death of a criminal defendant while a conviction is on appeal permanently abates all proceedings in the defendant's case and nullifies the conviction. The court explained that overruling *Hartwell* was necessary because many other state courts have since reconsidered the propriety of abatement and because abatement is inconsistent with the various victims' rights provisions that have been enacted in the last 30 years in Alaska.

Carlin v. State, 249 P.3d 752 (Alaska 2011).

Legislative review is not recommended unless the legislature wishes to examine the issue and adopt a different result. The court noted that no statute or court rule divests the appellate courts of jurisdiction upon the death of a party.

Art. VII, sec. 10, Constitution of the State of Alaska
AS 38.05.035(f)

PREFERENCE FOR PURCHASE OF STATE LAND REQUIRES LESSOR TO ENTER LAND TO QUALIFY.

The Alaska Constitution, art. VIII, sec. 10, provides for the selection, management, and disposal of state lands. In 1984, the legislature provided for a preference right without competitive bid to purchase or lease state land to an individual who has erected a building on the land and used it for a bona fide purpose before and after selection by the state from federal lands. A regulation, 11 AAC 67.053(a)(1) and (2), required written proof of entering the land, and of erecting and using a building there while under federal ownership. In 1989, the plaintiff leased state land and built a sport hunting lodge and business there. In 2005, the state conveyed that land to the borough. The plaintiff challenged the requirement that he had to have entered the land while it was under federal ownership as contrary to the plain meaning of the statutory preference right. The Alaska Supreme Court disagreed and held that the plain meaning of AS 38.05.035(f) required the entry while under federal ownership. The court explained that all land available for selection by the state was under federal ownership, so that the use by the legislature of the phrase "after selection by the state" could only apply to pre-selection use of federal land.

Gillis v. Aleutians East Borough and State of Alaska, ___ P.3d ___ (Alaska 2011).

Legislative review is not recommended since it appears that the court's interpretation is consistent with the statutory construction of the purchase preference.

AS 08.08.210(d)

STATUTE AUTHORIZING RECENT LAW SCHOOL GRADUATES TO PRACTICE LAW FOR A LIMITED PERIOD OF TIME DOES NOT CONFLICT WITH RULES GOVERNING THE PRACTICE OF LAW.

AS 08.08.210(d) authorizes recently graduated law students to be employed by and practice law for the Alaska Public Defender Agency for up to 10 months before they are licensed in Alaska as lawyers. Grove was represented in court by an employee of the Alaska Public Defender Agency, as permitted under AS 08.08.210(d), when he was convicted of assault and eluding a police officer. Grove filed a petition for post-

conviction relief arguing that he had been provided ineffective assistance of counsel because his counsel, like others representing clients under AS 08.08.210(d), was subject to a requirement under Alaska Bar Rule 44 that employees be supervised in-person by a licensed attorney when appearing in a courtroom on a client's behalf. Grove further argued that the Alaska Supreme Court has sole constitutional authority to regulate the practice of law in Alaska, the Alaska Supreme Court adopted Rule 44 for that purpose, and AS 08.08.210(d) is unconstitutional because it conflicts with Rule 44. The Alaska Court of Appeals found that AS 08.08.210(d) does not conflict with Rule 44 but merely creates an alternative method for law school graduates to practice law temporarily before becoming licensed. The court found it significant that the Alaska Bar Association considers AS 08.08.210(d) and Rule 44 alternatives to each other, and that Rule 44 has been subsequently amended to specifically exempt employees practicing law under AS 08.08.210(d).

Grove v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10622, decided May 27, 2011. 2011 Alas. App. LEXIS 36

Legislative review is not recommended.

AS 09.60.010
Alaska R. App. P. 508

THE EPA DECISION TO ALLOW ALASKA TO ADMINISTER PORTIONS OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM UNDER THE CLEAN WATER ACT WAS NOT ARBITRARY OR CAPRICIOUS.

Petitioners challenged the Environmental Protection Agency's (EPA) approval of the state's assumption of responsibility for administering parts of the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act (CWA), arguing that the EPA did not ensure that (1) state law will provide the same opportunities for judicial review of permitting decisions, (2) the state has the necessary enforcement tools to abate permit violations, and (3) the subsistence resources will be protected as mandated by the Alaska National Interest Lands Conservation Act (ANILCA). NPDES allows the EPA to approve state administration of portions of NPDES (subject to EPA oversight) pursuant to CWA if certain criteria are met. The Ninth Circuit Court of Appeals found that the EPA's approval was not arbitrary or capricious and denied the petition for review based on the following:

(1) CWA mandates that the EPA encourage public participation in the development, revision, and enforcement of regulations; NPDES regulations require that states that administer the program shall provide for judicial review of permit approval or denial that is the same as that available to obtain judicial review in federal court; the petitioner questioned whether Alaska law on the award of attorney's fees, including the abrogation of the public interest exception enacted in 2003, interfered with appropriate judicial review; the court compared the effect of the federal "dual standard" for the award of attorney's fees with Alaska law on the award of attorney's fees; the court recognized some uncertainty about the possibility of future attorney's fees awards, but decided that the EPA decision to allow administration of NPDES was not arbitrary or capricious even in light of the attorney's fees issue and concluded that the state provides an opportunity for judicial review of the approval or denial of permits that is sufficient to assist with public participation in the permitting process;

(2) the court also reviewed the state's authority to abate violations of the permit or permit program and other means of enforcement in the context of the EPA's approval of state administration of the program; the EPA has administrative enforcement options while the state must initiate a legal proceeding to impose a civil penalty; the court concluded that the state has adequate enforcement remedies;

(3) finally, the court concluded that the EPA's transfer of the NPDES program to the state did not trigger the requirement of a subsistence evaluation under sec. 810 of ANILCA; the court concluded that a subsistence evaluation is not required because (a) doing so would amend CWA by implication, by adding additional criteria, (b) the more specific provisions of CWA control the general application of ANILCA, and (c) the EPA was not required to conduct subsistence evaluations before it transferred its authority to the state because the EPA does not directly manage public lands and is not a federal land management agency.

Akiak Native Cmty. v. United States EPA, 625 F.3d 1162 (9th Cir. 2011).

Legislative review is not recommended.

AS 10.06.430
AS 10.06.450(d)

DISCLOSURE OF CORPORATE RECORDS TO A SHAREHOLDER DOES NOT REQUIRE DELIVERY TO THE SHAREHOLDER.

Former directors of a corporation who sought re-election sued the corporation for excluding their names on corporate proxy materials for holding a board election and for failure to provide shareholder e-mail information as requested. The board had rejected the former directors' applications for re-election as board-approved candidates. The board informed them of the decision before the election and that they could provide their own proxy materials and run independently. In response, the former directors requested the corporation electronically send them the shareholder list containing the numbers of shares held by each, the shareholders' e-mail addresses, telephone numbers, and addresses in order to mail election materials separately to the shareholders in a subsequent election. The corporation provided all information electronically except e-mail and telephone information. The former directors did not seek to inspect the records as provided for under AS 10.06.430 and 10.06.450 but sued for failure to provide the records electronically. In a case of first impression, the court held that the statute unambiguously provided a right to inspect, not a right to delivery of, corporate records.

Heinrichs v. Chugach Alaska Corp., ___ P.3d ___ (Alaska 2011).

Legislative review is not recommended unless the legislature would like to provide a right to electronic delivery of specified corporate records such as e-mail contact information of shareholders.

AS 11.56.310

PRISONER DOES NOT COMMIT ESCAPE IN THE SECOND DEGREE IF THE PRISONER MERELY LEAVES AN UNSECURED CORRECTIONAL FACILITY.

Bridge, charged with a misdemeanor and unable to make bail, was confined at the Fairbanks Correctional Center and after classification was transferred to a halfway house to await trial. Bridge left the facility without permission and was eventually caught 15 months later and charged with a violation of AS 11.56.310(a)(1)(A), escape in the second degree. Escape in the second degree is committed when a person removes oneself from a correctional facility while under official

detention. Bridge argued that the halfway house was not a correctional facility. The Alaska Court of Appeals found that while Bridge was at the halfway house and in the custody of the commissioner of corrections awaiting trial, Bridge was not *confined* at the halfway house because the halfway house did not have staff whose duty is to prevent prisoners from leaving the facility. The court concluded that, under AS 11.56.310(a)(1)(A), a person may only be convicted of escape from a correctional facility if the correctional facility has guards or other staff who have a duty to prevent prisoners from leaving the correctional facility.

Bridge v. State, __ P.3d __ (Alaska App. 2011).

Legislative review is recommended. The decision appears to disregard that the legislature has defined "official detention" to include "actual or constructive restraint" and seems to always require that a prisoner be actually restrained at a correctional facility to be convicted under AS 11.56.310(a)(1)(A).

AS 11.61.128

AMENDMENTS TO CRIMINAL STATUTE PROSCRIBING DISTRIBUTION OF INDECENT MATERIAL TO MINOR UNCONSTITUTIONAL UNDER FIRST AMENDMENT.

Plaintiffs challenged the constitutionality of AS 11.61.128 as modified in SB 222, secs. 9 - 12, enacted by the 26th Alaska State Legislature. SB 222 amended the elements of the crime of distribution of indecent material to minors by adding "material harmful to a minor" to the existing "censorship law" and defining "harmful to minors."

The court analyzed the amended statute using the strict scrutiny standard applicable to free speech issues, which requires that the statute must (1) serve a compelling governmental interest, (2) be narrowly tailored to achieve that interest, and (3) be the least restrictive means of advancing that interest. The court acknowledged the compelling governmental interest in protecting minor children but questioned the compliance with the additional tests under the strict scrutiny standard. The court said that if the legislature intends the statute to only criminalize the grooming of children for sexual abuse, as argued by the state, the legislature could do so without violating the constitutional rights of the average citizen. The court noted that AS 11.61.125 applies the "harmful to minors" test approved by the U.S. Supreme Court.

But the court also stated that the language of the statute in other areas, particularly in regard to Internet communications, lacked the precision the First Amendment requires when a statute regulates the content of speech. The court concluded that the statute violates the First Amendment to the United States Constitution because it is not narrowly tailored to achieve the state's compelling interest.

American Booksellers Found. For Free Expression v. Sullivan, Civil Action No 3:10-cv-0193-RRB, 2011 U.S. Dist. Lexis 70414 (D.C. Alaska 2011).

Legislative review is recommended because the court suggested that alternatives might be available depending on the intent of the legislature.

AS 11.71.020(a)

MULTIPLE FELONY COUNTS OF POSSESSION OF INGREDIENTS INTENDED FOR THE MANUFACTURE OF METHAMPHETAMINE IN A SINGLE CONTINUING EFFORT CONSTITUTE A SINGLE CRIME FOR SENTENCING.

Wiglesworth was convicted of six separate counts of misconduct involving a controlled substance in the second degree (MICS2) (AS 11.71.020(a)(2) - (6)). Wiglesworth's convictions related to his possession of various listed chemicals important to the manufacture of methamphetamine and immediate precursors of methamphetamine, with the intent to manufacture methamphetamine. Wiglesworth argued that his six counts of misconduct involving a controlled substance actually was a continuing attempt to manufacture methamphetamine and his separate counts should merge for sentencing as a single count. After examining the various forms of MICS2, the Alaska Court of Appeals agreed, and found that a defendant that violates two or more provisions of AS 11.71.020(a)(2) - (6) during the course of a single, continuing effort to manufacture methamphetamine is guilty of only one act of MICS2 for purposes of conviction and punishment. The court noted that the legislature: "did not perceive a separate societal interest in the defendant's possession of each separate chemical, or in the defendant's accomplishment of each separate state in the manufacturing process. Rather, the societal interest at stake is to prevent the illicit manufacturing of methamphetamine."

The court noted that separate convictions and punishments

would be proper when there are separate discrete attempts to manufacture methamphetamine and when the requisite facts have been expressly pleaded by the state and found by the jury.

Wiglesworth v. State, 249 P.3d 321 (Alaska App. 2011).

The decision seems reasonable. Legislative review is not recommended unless the legislature perceives that there is a different societal interest involved in the different forms of misconduct involving a controlled substance in the second degree discussed here and wants to ensure separate punishments for these different forms.

AS 12.55.090

COURT NOT LIMITED TO SENTENCE AGREED TO IN PLEA BARGAIN AFTER SUBSEQUENT PROBATION VIOLATION.

In separate prosecutions, two defendants entered into plea bargains with the state for resolution of criminal charges against them. Each defendant served a period of incarceration and a subsequent period of probation for a suspended term of imprisonment. Each violated probation and at a revocation hearing each asked to be sentenced to a term of imprisonment (that is, neither wanted to be put back on probation). In each case the judge sentenced the defendant to a term of imprisonment less than the period of suspended imprisonment agreed to in the plea bargain. The state appealed, arguing that the plea bargain was a contract and that the new lesser sentences were a violation of that contract (the plea bargain). The Alaska Court of Appeals disagreed and found the new sentences proper and within the sentencing court's discretion. The court noted the plea bargains did not contain provisions "requiring the defendants to relinquish their right under Alaska law to reject further probation. Nor do the plea agreements contain any express provision requiring the defendants to relinquish their accompanying right . . . to have the superior court assess their sentences of imprisonment . . . rather than automatically imposing the full amount of the defendants' remaining suspended jail time."

State v. Henry, 240 P.3d 846 (Alaska App. 2010).

It appears that the issue presented by this case could be resolved by the Department of Law by including, when warranted, some additional express terms in the department's

plea agreements. Legislative review is still recommended to determine if the department has amended their agreements and whether the issue has been resolved.

AS 15.15.360

ABBREVIATIONS, MISSPELLINGS, AND OTHER MINOR VARIATIONS IN THE NAME ON A BALLOT CAST FOR A WRITE-IN CANDIDATE MUST BE COUNTED IF VOTER INTENT CAN BE DISCERNED.

Lisa Murkowski ran for the United States Senate on a write-in campaign. Joe Miller, one of her opponents, challenged the decision of the state elections division to count ballots cast for Murkowski that contained misspellings or other minor errors. The Alaska Supreme Court interpreted AS 15.15.360's requirement that the write-in ballot include the "name, as it appears on the write-in declaration of candidacy . . . or the last name of the candidate," as allowing minor misspellings and pseudonyms. The court held that voter intent is paramount and that the legislative purpose was not to require perfection but to ensure that ballots are counted and not excluded.

Miller v. Treadwell, 245 P.3d 867 (Alaska 2010).

Legislative review is recommended to determine whether the court correctly interpreted legislative intent.

AS 16.43.150(e)

LIMITED ENTRY PERMIT IS NOT A PROPERTY RIGHT FOR PURPOSES OF COMPENSATION FOR GOVERNMENTAL TAKING.

After the state adopted regulations shortening the fishing year and limiting the number of salmon that commercial fishers could harvest, plaintiffs sued, asking the United States district court to declare those regulations an unconstitutional taking of property without just compensation and as a violation of due process rights. The court held that an entry permit to fish commercially for salmon is not "property" for the purpose of requiring compensation when its value decreases due to state regulation. The court also held that the state's decision to enact a system of licenses or use privileges is not unreasonable, arbitrary, or capricious, and AS 16.43.150(e) bears a substantial and reasonable relationship to Alaska's goals of salmon conservation and maintenance of a sustainable fishery.

Therefore, AS 16.43.150(e) does not violate permit holders' substantive due process rights.

Vandevere v. Lloyd, 644 F.3d 957 (9th Cir. 2011).

Legislative review is not recommended.

AS 18.65.240

PUBLIC POLICY EXCEPTION APPLIES TO ENFORCEMENT OF ARBITRATION AWARDS.

A police officer was terminated for lying about performing a burnout during motorcycle training and an arbitrator reinstated the officer. The state argued that the reinstatement decision was unenforceable as a violation of state policy of not employing dishonest peace officers. The Alaska Supreme Court recognized that a public policy exception applies to arbitration decisions but held that, because there was no explicit, well-defined, and dominant public policy in Alaska against the reinstatement of a law enforcement officer who had engaged in relatively minor dishonesty, the arbitrator's award was not unenforceable as a violation of public policy. None of the sources of law the state cited clearly set out a public policy pertaining to the minimal consequences that had to follow when law enforcement officers committed minor acts of dishonesty that were not directly related to their duties to the public, that were not directed toward superiors in their chain of command, and that did not arise in the context of a formal investigation. The court further held that the arbitrator did not commit gross error in determining that the state lacked just cause to terminate the trooper because: (1) the trooper was not convicted of a crime; (2) a more experienced trooper who was also found to be deceptive, misleading, or evasive received only a reprimand; and (3) the state did not make it clear how the decision constituted an obvious mistake.

State v. Public Safety Employees' Association, ___ P.3d ___ (Alaska 2011).

Legislative review is recommended to determine whether the court correctly recognized a public policy exception to enforcing an arbitration decision, whether the court correctly failed to apply that exception in the present case involving dishonesty by a law enforcement officer, and whether the policy is or should be explicit.

AS 18.66.990
Alaska Rule of
Evidence 404(b)(4)

THE TERM "CRIME INVOLVING DOMESTIC VIOLENCE" AS DEFINED BY AS 18.66.990 AND INCORPORATED BY ALASKA RULE OF EVIDENCE 404(b)(4) IS NOT UNCONSTITUTIONALLY VAGUE.

Bates was convicted of attempted murder for an attack upon his former girlfriend. At his trial, evidence was presented of Bates' prior assault on his former girlfriend and on another former girlfriend. The evidence was admitted under Alaska Rule of Evidence 404(b)(4), which allows, in a domestic violence case, the introduction of a defendant's other crimes of domestic violence. Rule 404(b)(4) incorporates the definition of "household member" contained in AS 18.66.990(3) to determine what is a crime of domestic violence. Bates asserted that the definition of "household member" is unconstitutionally vague as it includes persons who are "dating" or in a "sexual relationship" without defining those terms. The Alaska Court of Appeals found "sexual relationship" to be sufficiently descriptive. The court had a harder time determining what the legislature meant by "dating" and finally determined that it should be interpreted to mean: "a relationship that either is marked by emotional intimacy or whose purpose is to allow two people to evaluate each other's suitability as a partner in an intimate relationship or in marriage." When interpreted in this manner, the court concluded that Rule 404(b)(4) was constitutional.

Bates v. State, __ P.3d __ (Alaska App. 2011), Ct. App. No. A-10350, decided June 3, 2011. Alas. App. LEXIS 48

Legislative review is not recommended unless the legislature determines that the court determined meaning of "dating," as used in the definition of the term "household member" found in AS 18.66.990(3), is incorrect or insufficient.

AS 21.36.475

STATUTORY LIMITATIONS APPLICABLE TO AN OWNER CONTROLLED INSURANCE PROGRAM FOR A CONSTRUCTION PROJECT DO NOT APPLY TO WORKERS' COMPENSATION AND GENERAL LIABILITY COVERAGES FOR WORK CHARACTERIZED AS MAINTENANCE.

The division of insurance issued a cease and desist order to Liberty Mutual Group (Liberty) because the owner controlled insurance program (OCIP) written by Liberty was designed to cover ongoing maintenance and was not restricted to a large

construction project. The division contended that an OCIP for anything other than a large construction project was prohibited by AS 21.36.475 (originally enacted as AS 21.36.065 and renumbered in 2010). The Alaska Supreme Court rejected the division's position that the OCIP for ongoing maintenance was prohibited by the definition of "an owner controlled insurance program" in AS 21.36.475. The court stated that AS 21.36.475(c)(4) defines "owner controlled insurance program," in relevant part, as "an insurance program where one or more insurance policies are procured on behalf of a project owner," and "project owner" is defined in AS 21.36.475(c)(5) as "a person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project." The court declined to look beyond the plain meaning of the statute and held that an OCIP written for ongoing maintenance, such as the one written by Liberty, is not prohibited by AS 21.36.475 and is therefore unregulated.

State v. Alyeska Pipeline Service Co., __ P.3d __ (Alaska 2011).

Legislative review is recommended to consider whether AS 21.36.475 was intended to, or otherwise should, apply to an owner controlled insurance program (OCIP) for maintenance or another activity other than "working on a construction project" or whether an OCIP for non-construction purposes should be regulated in another manner.

AS 23.20.379
AS 23.20.385

SUITABILITY OF WORK AND GOOD CAUSE FOR QUITTING INTERPRETED FOR PURPOSES OF UNEMPLOYMENT BENEFITS.

An employee quit her job voluntarily and applied for unemployment benefits claiming reasons for quitting that included transportation difficulties and personality conflicts with coworkers. She also expressed concern about workplace safety and described one incident of unsafe practices. When the hearing officer asked the claimant what efforts she had made to keep her job, the claimant replied that she had tried to use public transportation but that her work schedule had been too unpredictable. The claimant acknowledged that she had not discussed the personality conflicts or her transportation difficulties with management and had not asked for an adjustment to her work schedule that would have enabled her to use the transit system and continue working. The court held

that the claimant failed to show good cause for quitting under AS 23.20.379(a). That section disqualifies an employee from receiving unemployment benefits if the employee leaves "suitable work voluntarily without good cause." As a separate inquiry, the court found that the employee did not show that the work was unsuitable under AS 23.20.385 because the workplace hostility and safety concerns she described did not provide evidence of significant health and safety risks. Because she did not exhaust all reasonable alternatives with regard to her transportation problems and workplace hostility, she did not show good cause for leaving work. The court relied heavily on the Department of Labor and Workforce Development's benefit policy manual for interpretations of the concepts of suitability and good cause, including a finding that reductions in work hours and pay did not constitute good cause for quitting.

Calvert v. State, 251 P.3d 990 (Alaska 2011).

Legislative review is recommended to determine whether the department's benefit policy manual correctly interprets legislative concepts of suitability and good cause.

AS 23.30.008(d)

"SUCCESSFUL CLAIMANT" INTERPRETED FOR PURPOSES OF AWARDING ATTORNEY'S FEES IN WORKERS' COMPENSATION APPEAL.

A successful workers' compensation claimant requested attorney's fees. The Alaska Workers' Compensation Board reduced the claimant's attorney's fees request by 30 percent. The claimant disagreed with this reduction and appealed to the Workers' Compensation Appeals Commission. The commission reversed the board's decision and ordered the board to reconsider the award of attorney's fees to the claimant. The claimant then sought attorney's fees for the successful appeal from the commission but the commission refused, finding that the claimant was not a "successful" party under AS 23.30.008. The Alaska Supreme Court reversed, interpreting the statutory concept of "successful claimant" in workers' compensation appeals for the first time. The court found that the legislature intended for attorney's fees awards under AS 23.30.008 to follow the same rules as appellate court attorney's fees awards. See Rule 508, Alaska Rules of Appellate Procedure. Therefore, the claimant was entitled to an award of attorney's fees as the claimant prevailed on a significant issue in the appeal.

Lewis-Wlaunga, et. al. v. Municipality of Anchorage, 249 P.3d 1063 (Alaska 2011).

The decision appears reasonable. Legislative review is recommended if the legislature wishes to reexamine the standard for awarding attorney's fees in workers' compensation appeals.

AS 23.30.007
AS 23.30.125(b)
AS 23.30.128(b)

WORKERS' COMPENSATION APPEALS COMMISSION HAS AUTHORITY TO REVIEW NON-FINAL ORDERS OF THE WORKERS' COMPENSATION BOARD.

An employer asked the Workers' Compensation Appeals Commission to review and to stay the Workers' Compensation Board's non-final order denying a change of venue from Fairbanks. The commission issued an order preventing the hearing from being held in Fairbanks and later reversed the board's denial of a change of venue. The employee challenged the commission's authority to review a non-final decision. The Alaska Supreme Court interpreted the various statutes that established the commission's jurisdiction to hear board appeals "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." Although nothing in the statutes explicitly gave the commission jurisdiction over discretionary review of non-final board decisions, the court held that such authority was implied based on its quasi-judicial function and the effect of delay of some decisions until a final order is issued. The court relied upon the legislative purpose in establishing the commission to increase efficiency and flexibility and to reduce costs.

Monzulla v. Voorhees, 254 P.3d 341 (Alaska 2011).

Legislative review is recommended to determine whether the court properly interpreted legislative intent to include that the Workers' Compensation Appeals Commission has the authority to review non-final decisions of the board.

AS 25.24.150(h)

PRESUMPTION AGAINST CUSTODY FOR DOMESTIC VIOLENCE APPLIES TO MODIFICATIONS OF CUSTODY.

Parents of a child entered a negotiated agreement to share physical and legal custody of their child despite a 2007 arrest and other alleged incidents involving domestic violence perpetrated by a father. The agreement was included in a 2009 divorce decree. Two weeks after the divorce decree was entered, the father pleaded guilty to third-degree assault from the 2007 charge of domestic violence and agreed to attend a domestic violence intervention program and to have no contact with his former wife. Four months after the guilty plea, the ex-wife filed a motion to modify the custody agreement based on two changed circumstances: (1) the domestic violence offense made the father ineligible for joint custody based on the statutory presumption against awarding custody to a person with a history of perpetrating domestic violence and the no contact order made co-parenting impossible; and (2) the ex-wife intended to move out of state to remarry. The Alaska Supreme Court held that the rebuttable presumption for domestic violence applied in modification proceedings after reviewing the legislative history for the presumption. The court also found that applying the statutory presumption in a modification proceeding was appropriate where the presumption was not addressed in the initial custody determination.

Williams v. Barbee, 243 P.3d 995 (Alaska 2010).

Legislative review is recommended to clarify that the applicability of the rebuttable presumption against the award of child custody in domestic violence circumstances applies in custody modification proceedings.

AS 25.24.170(a)

18-YEAR-OLD MUST BE SUPPORTED THROUGH HIGH SCHOOL EVEN IF IN THE CUSTODY OF A GUARDIAN.

A father refused to pay child support to a legal guardian for the benefit of his 18-year-old son, who was in high school, on the basis that the legal custody under the guardianship order had expired at the age of majority. In a case of first impression, the court held that child support is not linked to the legal custody of the child and that the support obligation continued through high school.

Brotherton v. Warner, 240 P.3d 1225 (Alaska 2010).

Legislative review is not recommended since the court's interpretation of the statute appears to be consistent with the statutory purpose of providing for support through high school.

AS 29.45.110(d)

PROPERTY ASSESSMENT ON FULL AND TRUE VALUE MAY INCLUDE EFFECT OF LOW INCOME RENTAL RESTRICTION WITHOUT CONSIDERATION OF FEDERAL TAX CREDITS.

The federal low income housing tax credit (LIHTC) program provides a 10-year amortized tax credit for a commitment to restrict rental rates for not less than 30 years. AS 29.45.110(a) provides that property shall be assessed at its "full and true value," defined as "the estimated price that the property would bring in an open market and under the then prevailing market conditions in a sale between a willing seller and a willing buyer both conversant with the property and with prevailing general price levels." Subsection (d)(1) of the statute provides for consideration of actual income derived from the property and excludes consideration of federal tax credits for the property before 2001. After January 1, 2001, subsection (d)(2) directs local governments to choose whether to apply (d)(1)'s mandatory income approach or to provide for a parcel-by-parcel appraisal method. Kenai Peninsula Borough chose the parcel-by-parcel option. The owner of a 30-unit apartment complex that qualified in 2003 for LIHTC requested the application of the mandatory income approach and was denied, resulting in a much higher tax assessment than for an appraisal based on mandatory income. The owner appealed the assessment and the local board reduced the assessment by 40 percent because the original approach resulted in an assessment that was "overvalued and was grossly disproportionate as compared to similar projects." States are split on the question of whether and how the LIHTC commitment is accounted for in tax assessments on the property affected by a rental restriction. The Alaska Supreme Court held that state law and the local assembly decision do not prohibit a taxing authority from considering restricted rental rates, without the commensurate tax credit, in another valuation method if it is reasonable to do so.

Horan v. Kenai Peninsula Borough, 247 P.3d 990 (Alaska 2011).

Legislative review is recommended to clarify the statutory choice available to a taxing authority when considering rental restrictions and tax credits.

AS 33.20.010
AS 33.20.030
AS 33.20.040

PRISONERS ON MANDATORY PAROLE ARE ENTITLED TO GOOD TIME REDUCTIONS OF THEIR SENTENCES WHEN RELEASED TO CORRECTIONAL RESTITUTION CENTERS OR HALFWAY HOUSES AND WHEN CONFINED PENDING REVOCATION OF THEIR PAROLE.

The legislature has authorized the Department of Corrections to award a prisoner a good time reduction of the prisoner's sentence when confined in a correctional facility. The Alaska Court of Appeals has noted that "the legislative purpose of this statute is 'to reward prisoners for good behavior during their terms of confinement . . . [and to] give [correctional officials] a means of enforcing discipline within correctional facilities.'" *Valencia v. State*, 91 P.3d 983, 984 (Alaska App. 2004). The amount of good time earned is deducted from the prisoner's sentence and the prisoner is released on mandatory parole for the period of the good time deduction. In this case, the Alaska Court of Appeals determined that a prisoner who has been released on mandatory parole is entitled to an additional good time deduction when the prisoner (1) is serving some or all of that period of mandatory parole in a correctional restitution center or a halfway house, and (2) has been arrested for violation of terms of mandatory parole and is incarcerated in a correctional restitution center or halfway house pending revocation of parole.

State v. Shetters, 246 P.3d 332 (Alaska App. 2010), *on rehearing at, reaffirmed* 246 P.3d 338 (Alaska App. 2010).

Legislative review is recommended to determine if the awarding of good time mandated by the court in these two situations is consistent with the overall legislative intent for the awarding of good time in AS 33.20.010.

AS 33.30.028

PRISONER'S LIABILITY FOR COSTS OF MEDICAL CARE.

AS 33.30.028 provides that "liability for payment of the costs of medical, psychological, and psychiatric care provided or

made available to a prisoner . . . is the responsibility of the prisoner and" certain other persons. A superior court judge ruled that this statute only imposed liability for payment on a prisoner while the prisoner was incarcerated and that the liability for payment and the state's ability to seek reimbursement ends when the prisoner is released. The Alaska Supreme Court reversed, finding that the statute imposed liability for payment on a prisoner who has had health care provided or made available to the prisoner regardless of whether the prisoner is still incarcerated when reimbursement is sought. The plaintiff (the prisoner's estate) also argued that the state can only seek reimbursement from a prisoner under AS 33.30.028 for health care that has been "provided to them by the department." The plaintiff argued that "provided to them by the department" means only in-house prison medical care and that the state cannot seek payment for medical care that was made available to the prisoner through outside providers (regardless of whether the state paid the outside providers for the care). The court found that AS 33.30.028 "may be ambiguous" as it pertains to outside providers and remanded the case to the superior court.

State v. Hendricks-Pearce, 254 P.3d 1088 (Alaska 2011).

Legislative review is recommended. The Alaska Supreme Court's decision that liability for the costs of health care provided to a prisoner continue after the prisoner's release is correct. The confusion regarding reimbursement seems misplaced. In AS 33.30.028(a), it appears that the legislature was making a clear statement that a prisoner (and certain other people and entities) is responsible for the costs of health care provided to the prisoner (that is, paid for by the department) or made available to the prisoner (that is, facilitated by the department but not provided at department expense). In AS 33.30.028(b), the legislature required the commissioner of corrections to require a prisoner who is provided health care by the department (that is, paid for by the department) to pay for the costs of that health care, if the department did not pay for the health care then there is no need for the prisoner to reimburse the department. The legislature could add language that clarifies that the prisoner is liable and must pay the costs incurred by the department in providing or making available health care to the prisoner.

AS 38.05.180(aa)

AGREEMENT TO ACCEPT A CONTRACT PRICE AS THE VALUE OF THE STATE'S ROYALTY SHARE OF GAS PRODUCTION MAY NOT BE APPLIED RETROACTIVELY.

Gas lessees must pay a royalty to the state. AS 38.05.180 sets the value of the gas at the highest of four possible prices but allows lessees to request of the Department of Natural Resources (DNR) to instead use or accept the price for gas established in a contract with a gas or electric utility as the basis for determining the value of the state's royalty share of gas production. Marathon requested contract pricing and further requested that DNR apply the contract pricing retroactively as well as prospectively. DNR entered into the agreement to accept contract pricing under AS 38.05.180(aa), but denied its retroactive application based on DNR's longstanding interpretation that retroactive application was prohibited because of the use of the word "prospective" in the statute and the Alaska Land Act's purpose of maximizing revenue. Although the Alaska Supreme Court found the statute to be ambiguous, the court upheld DNR's interpretation on the basis that DNR's determination was longstanding, was within the department's area of jurisdiction, and had a reasonable basis in the statute. The court also decided that DNR was not required to promulgate its interpretation as a regulation.

Marathon Oil Co. v. State, 254 P.3d 1078 (Alaska 2011).

Legislative review is recommended to determine whether the court's interpretation of the statute disallowing retroactive application is consistent with the intent of the legislature.

AS 39.52.170

PUBLIC EMPLOYEE NOT REQUIRED TO REPORT UNION RELATED SERVICES AS CONFLICTING OUTSIDE EMPLOYMENT UNDER ETHICS ACT.

The Alaska Executive Branch Ethics Act, AS 39.52.170(a), prohibits a public employee from rendering services or accepting employment outside of the employee's agency if the outside employment is incompatible or in conflict with the proper discharge of the employee's official duties. AS 39.52.170(b) requires an employee to report outside employment annually for review and approval. The attorney general opined that union activities (1) are associated with and are a right of state employment, (2) are not outside services or

employment under AS 39.52.170(a), and (3) need not be reported under AS 39.52.170(b).

2011 Op. Alaska Att'y Gen. (July 26, 2011).

Legislative review is not recommended.

AS 42.30.020

THE FEDERAL MARITIME COMMISSION HAS PRIMARY JURISDICTION OF THE REGULATION OF WHARFAGE AND DOCKING FEES IN THE SHIPPING INDUSTRY UNDER THE SHIPPING ACT.

Minto, a British Columbia mining company that ships ore concentrate through Skagway, Alaska, sued Pacific and Arctic Railway and Navigation Company (PARN), the owner of a shipping dock where ore is loaded on ships, claiming that the wharfage and docking fees being charged to Minto by PARN were higher and different than those charged other shippers and were discriminatory under AS 42.30.020 and under the federal Shipping Act, 46 U.S.C. 41106. The federal district court held that, as the parties were engaged in shipping, the discrimination claim is governed by the Shipping Act. The court determined that Minto must first bring its claim of discrimination to the Federal Maritime Commission and that AS 42.30.020 does not apply.

Minto Explorations Ltd. v. Pac. & Arctic Ry. & Navigation Co., 3:11-cv-00031, August 12, 2011.

Legislative review is not recommended.

AS 45.50.471

UNFAIR TRADE PRACTICES ACT DOES NOT APPLY TO RESIDENTIAL LEASES.

A tenant challenged late fees due under her residential lease agreement as a violation of the Unfair Trade Practices and Consumer Protection Act (UTPA). The court held that the UTPA was not intended to apply to residential leases for two reasons: (1) the legislature has not extended the Act to include real estate transactions, including residential leases; and (2) another Act, the Uniform Residential Landlord and Tenant Act, AS 34.03.010 - 34.03.380, regulates residential leases.

Roberson v. Southwood Manor Associates, 249 P.3d 1059 (Alaska 2011).

Legislative review is not recommended unless the legislature desires to extend the application of the UTPA to real estate transactions.

AS 47.17.050

ABSOLUTE QUASI-JUDICIAL IMMUNITY EXTENDED TO COURT-APPOINTED INVESTIGATORS ACTING WITHIN THE SCOPE OF APPOINTMENT.

A child custody investigator appointed by a court failed to report to the child's parents or the Office of Children's Services an allegation of sexual misconduct by the child contained in a police report reviewed as part of the investigation. The investigator included the allegation in her report to the court but in the meantime, the child had assaulted a half-sibling with whom the child had been placed. The parents asserted that the investigator had a duty to warn them regarding the allegation of sexual misconduct. The Alaska Supreme Court held that court-appointed child custody investigators are entitled to absolute quasi-judicial immunity from suits arising from the performance of their duties and further that the immunity extended to the state as the employer.

Christoffersen v. State of Alaska, 242 P.3d 1032 (Alaska 2010).

Legislative review is recommended to determine whether immunity may be extended vicariously to the state or other employer.

AS 47.30.735

EVIDENCE OF MENTAL ILLNESS RELEVANT IF SYMPTOMS EXIST AT THE TIME OF AN INVOLUNTARY COMMITMENT HEARING, NOT ON ADMISSION, AND COURT MAY CONSIDER RECENT SYMPTOMS.

A woman was admitted involuntarily to a psychiatric facility based, in part, on her symptoms on the day of and prior to admission to the facility. At the commitment hearing the woman argued that her symptoms were diminished, that she was compliant with her treatment plan, and that a court could only consider symptoms that existed on the day of the commitment hearing, not when she was admitted to the hospital. The Alaska Supreme Court disagreed. The Court found that while AS 47.30.735 provides a court may grant an

involuntary commitment petition only if the court finds the person mentally ill and likely to harm herself or others or is gravely disabled at the time of the commitment hearing, in making this determination a court may consider recent behavior and conditions, as well as the patient's symptoms on the day of the hearing.

In the Matter of Tracy C., 249 P.3d 1085 (Alaska 2011).

The court's interpretation of the statute appears correct, therefore legislative review is not recommended.

SUBJECT INDEX
FOR COURT CASES AND
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243 P.3d 995
Supreme Court of Alaska.

Shayla WILLIAMS, f/k/a Shayla Barbee, Appellant,
v.
Jomell BARBEE, Appellee.

No. S-13604. | Dec. 8, 2010.

Synopsis

Background: Mother, who had separated from father, requested change in shared custody on grounds that she planned to move to Washington with child and because father had pleaded guilty to an assault involving an act of domestic violence toward mother. The Superior Court, Third Judicial District, Anchorage, Craig Stowers, J., continued shared custody but awarded primary physical custody to mother if and when child relocated out of state. Mother appealed.

Holdings: The Supreme Court held that:
1 rebuttable presumption against awarding custody to a parent who has a history of perpetrating domestic violence applies in custody modification proceedings;
2 was required to make explicit findings on whether choking incident, standing alone, amounted to a history of domestic violence; and
3 mother was entitled to present evidence and testimony regarding individual domestic violence incidents as alleged in motion.

Reversed and remanded.

West Headnotes (17)

1 **Child Custody** ⇐ Discretion
Child Custody ⇐ Discretion
Child Custody ⇐ Questions of Fact and Findings of Court

A superior court has broad discretion in determining child custody matters, and the Supreme Court will not reverse a superior court's custody determination unless convinced that the trial court abused its discretion or that its controlling factual findings are clearly erroneous.

1 Cases that cite this headnote

2 **Child Custody** ⇐ Discretion

A superior court abuses its discretion in the child custody context when it fails to consider statutorily mandated factors, weighs factors improperly, or includes improper factors in its decision. AS 25.24.150(c).

3 **Appeal and Error** ⇐ Clearly erroneous findings

A factual finding is "clearly erroneous" when a review of the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made.

4 **Child Custody** ⇐ Credibility of witnesses

The Supreme Court does not readily second-guess a trial court's child custody determination because it is the function of the trial court, not of the Supreme Court, to judge witnesses' credibility and to weigh conflicting evidence.

1 Cases that cite this headnote

5 **Child Custody** ⇐ Welfare of child and material change in circumstances

The parent seeking modification of child custody must first establish that there has been a significant change in circumstances affecting the child's best interests. AS 25.20.110.

2 Cases that cite this headnote

6 **Child Custody** ⇐ Grounds and Factors

Child Custody ⇐ Parent or custodian's relocation of home

As a matter of law, both the occurrence of a crime involving domestic violence and one parent's relocation out of state constitute significant changes in circumstances for child custody purposes. AS 25.20.110(c).

2 Cases that cite this headnote

7 **Child Custody** ⇐ Decision and findings by court

Once a party seeking a change in child custody demonstrates a qualifying change in circumstances, the court will determine whether modification is in the best interests of the child. AS 25.20.110.

1 Cases that cite this headnote

8 **Child Custody** ⇐ Parent or custodian's relocation of home

In child custody modification cases involving a parent's relocation out of state, as long as the relocating parent's reasons for moving are legitimate, the trial court must examine the best interests of the child. AS 25.20.110.

9 **Child Custody** ⇐ Presumptions

The rebuttable presumption against awarding custody to a parent who has a history of perpetrating domestic violence applies in custody modification proceedings. AS 25.24.150(g, h).

1 Cases that cite this headnote

10 **Child Custody** ⇐ Misconduct or status affecting presumption

The primary purpose of statute creating a rebuttable presumption against awarding custody to a parent who has a history of perpetrating domestic violence is to protect children from potentially adverse custody determinations in response to growing evidence that domestic violence has severe and long-lasting effects on children. AS 25.24.150(g).

1 Cases that cite this headnote

11 **Child Custody** ⇐ Decision and findings by court

Trial court considering mother's request for change in shared custody, which was based in part on fact that father had pleaded guilty to an assault involving an act of domestic violence toward mother, was required to make explicit findings on whether choking incident, standing alone, amounted to a history of domestic violence for purposes of

rebuttable presumption against awarding custody to a parent who has a history of perpetrating domestic violence. AS 25.24.150(g, h).

2 Cases that cite this headnote

12 **Child Custody** ⇐ Decision and findings by court

Where a superior court considering a child custody modification request finds that domestic violence occurred, it must make express findings regarding whether the incident or incidents of domestic violence constitutes a statutory history of perpetrating domestic violence. AS 25.24.150(g, h).

2 Cases that cite this headnote

13 **Child Custody** ⇐ Hearing and Determination

Mother, who alleged as part of child custody modification request that father had a history of domestic violence, was entitled to present evidence and testimony regarding individual incidents as alleged in her motion to modify custody in order to allow court to determine whether the alleged events were acts of domestic violence which created rebuttable presumption against awarding custody to father. AS 25.24.150(g).

14 **Child Custody** ⇐ Welfare and best interest of child

Child Custody ⇐ Decision and findings by court

In making a custody decision based on the best interests of the child, a superior court must consider each statutory factor and must discuss the factors that it deems relevant to the case before it. AS 25.24.150(c).

1 Cases that cite this headnote

15 **Child Custody** ⇐ Welfare and best interest of child

Though a trial court, when considering the best interests of the child for custody purposes, cannot assign disproportionate weight to particular statutory factors while ignoring others, it has considerable discretion in determining the importance of each statutory factor in the context of a specific case and is not required to weigh the factors equally. AS 25.24.150(c).

1 Cases that cite this headnote

16 **Child Custody** ⇐ Parent or custodian's relocation of home

The interest in stability and continuity, as a statutory factor when considering the best interests of the child in a custody modification proceeding, cannot categorically favor the non-relocating party purely due to geographic stability. AS 25.24.150(c)(5).

17 **Child Custody** ⇐ Presentation and reservation of grounds of review

Mother failed to argue in Superior Court that it was inappropriate to allow father to have unsupervised visitation with child, and thus Supreme Court would decline to decide that issue on appeal in child custody modification action.

Attorneys and Law Firms

***996** Shayla Williams, pro se, Anchorage, Appellant.
Justin R. Eschbacher, Law Offices of G.R. Eschbacher, Anchorage, for Appellee.

Before: CARPENETI, Chief Justice, FABE, WINFREE, and CHRISTEN, Justices.

Opinion

OPINION

PER CURIAM.

I. INTRODUCTION

Jomell Barbee and Shayla Williams both seek primary physical custody of their young son De'Shawn. Barbee and Williams have shared custody of De'Shawn since their separation in February 2008. In April 2009 Williams requested a change in custody because she planned to move to Washington ***997** and because Barbee had pleaded guilty to an assault involving an act of domestic violence toward Williams. After a hearing in June 2009, the superior court concluded that it was in De'Shawn's best interests to continue the shared custody arrangement as long as both parents remained in Anchorage but awarded primary physical custody to Barbee if and when Williams relocated out of state. Williams appeals the superior court's custody award, arguing primarily that the court should not have granted custody to Barbee because Barbee had a "history of domestic violence" that raised a rebuttable statutory presumption against custody and he had not overcome the presumption.

Because the trial court was presented with multiple allegations of abuse and found that at least one incident of domestic violence had been perpetrated by Barbee, it was required to make an express finding as to whether Barbee had a "history of perpetrating domestic violence" under AS 25.24.150(h). Failure to make this finding was plain error. We thus reverse and remand for the superior court to make an express determination whether there is a "history of perpetrating domestic violence." If the superior court finds that Barbee has this history, it must address the statutory presumption against awarding custody to Barbee under AS 25.24.150(g) before awarding any custody to Barbee. [1]

II. FACTS AND PROCEEDINGS

A. Barbee And Williams's Relationship And Divorce

Jomell Barbee and Shayla Williams (f/k/a Shayla Barbee) are the parents of De'Shawn Barbee. De'Shawn was born on November 30, 2005. Barbee and Williams married on April 14, 2006 in Anchorage.

Williams alleges that Barbee was abusive during the parties' marriage; she claims that Barbee had "anger issues" and that arguments would "always turn into something bigger than expected and would eventually end with him abusing [her]." According to Williams, Barbee would "choke ... hit ... kick ... [and] throw [her] on the ground" and several times she called the police.

On the night of December 17, 2007, Barbee allegedly "tackled [Williams] from behind and put her in a headlock." Williams stated that Barbee "used both arms and strangled [Williams] to the point she thought that she would lose consciousness" and after Barbee "let go" Williams experienced vomiting, difficulty breathing, and trouble swallowing. Williams later alleged that she had to fight for her life and thought that she was going to die. Williams called the police the next morning; when the police arrived they observed that Williams had "pet[e]chia [2] on her neck and behind both ears" and "what appeared to be blood pooled behind both of her lower eyelids and red marks on her right arm and wrist." Barbee was arrested and charged with assault in the second degree on December 20.

On February 15, 2008, while the criminal charge against him was pending, Barbee filed for divorce. Barbee and Williams, acting pro se, came to an agreement regarding custody and property division at a December 10, 2008 status hearing. On February 11, 2009, the superior court entered a decree of divorce stating that Barbee and Williams had been able to negotiate a settlement regarding property and child custody. Barbee and Williams agreed to have joint legal custody and shared physical custody of De'Shawn; De'Shawn would spend Friday afternoon through Monday morning with Barbee and Monday morning through Friday afternoon with Williams, with alternating holiday arrangements.

On February 27, 2009, Barbee pleaded guilty to the third-degree assault charge that ***998** arose from the December 2007 incident. He was sentenced to 24 months imprisonment with 23 months suspended and three years probation. As part of his probation, Barbee agreed to enroll in and complete a 24-week state-approved Domestic Violence Intervention Program and not to have any contact with Williams.

B. Williams's Request For Custody Modification

On April 27, 2009, Williams filed a motion to modify the custody arrangement based on two distinct changed circumstances. She first argued that Barbee's guilty plea to a felony assault charge stemming from an act of domestic violence warranted a change in custody. Specifically citing AS 25.24.150(g) and (h), Williams contended that Barbee's plea proved that he had engaged in domestic violence, making him ineligible for a physical custody award unless he overcame the statutory presumption against custody. Williams added that co-parenting was no longer an option because Barbee was prohibited from having contact with Williams and because Williams did not "feel comfortable or safe sharing custody" with Barbee.

Williams also argued for custody modification because she planned to move to Washington with her soon-to-be husband. She stated that it would be in De'Shawn's best interests to move with her. Williams allowed that De'Shawn had always lived in Alaska and had ties to Barbee's family in the state, but argued that because De'Shawn was only three years old, he would easily be able to adapt to a new environment.

Barbee opposed Williams's motion, arguing that pleading guilty to a single act of domestic violence did not constitute a "history of perpetrating domestic violence." Barbee stated that it would be "mentally and emotionally devastating" to De'Shawn to leave Barbee's extended family in Alaska. Barbee then asked for full legal and physical custody of De'Shawn.

C. The Modification Hearing And The Superior Court's Custody Award

On June 24, 2009, the superior court held a hearing on Williams's motion to modify custody. The court initially found that Williams's reasons for leaving the state were "a legitimate change in circumstances" such that the court would determine what custody arrangement would be in De'Shawn's best interests if and when Williams moved out of state.

The court heard testimony from both parties. Barbee argued that it would be best for De'Shawn to stay in Alaska because De'Shawn had been born and raised in Anchorage and Barbee's extended family members in Anchorage provided care and support to both Barbee and De'Shawn. Barbee explained how he provides for De'Shawn's financial, physical, and mental needs. He also testified that De'Shawn had been in a "stable" environment and that despite the parties' divorce he had encouraged the relationship between De'Shawn and Williams. When asked about the assault, Barbee admitted that he "choked" Williams, calling it "a terrible mistake." He disputed that he ever "beat" Williams as she alleged. Barbee testified that he was taking domestic violence classes and planned to complete them within the month.

Williams also testified that she provides for De'Shawn's needs. She agreed that De'Shawn was in a "stable" environment in Anchorage, but explained that he was "still pretty young" and "very adaptable to changes." She also detailed how she would make sure that De'Shawn stayed in touch with Barbee if she moved out of state. Williams believed that it would be best for De'Shawn to move with her to Washington because she and her husband could provide a "family structure" including future siblings and financial security, and neither of them had any type of criminal or domestic violence background.

After Barbee and Williams testified, the superior court observed that this was "a close case" and summarized the best interests factors under AS 25.24.150(c). The superior court found that De'Shawn had the typical needs of any child of his age, that both Barbee and Williams were capable of meeting those needs, that the child's preference was not a factor because of De'Shawn's ***999** young age, and that there was love and affection between De'Shawn and both of his parents.[3] These factors weighed evenly between Barbee and Williams.

The superior court then turned to the fifth statutory factor, the desire to maintain continuity,[4] and found that De'Shawn had "been in a stable, satisfactory environment" and that Barbee's extended family in Anchorage was "an important factor." The court determined that it would be in De'Shawn's best interests to "continue the stability" and weighed the fifth factor in favor of Barbee.

Examining the sixth factor, willingness and ability to foster a relationship between the other parent and the child,[5] the court first noted that the factor might not apply to the case in light of the domestic violence between the parties,[6] but ultimately concluded that the factor did not favor either party.

Finally, the superior court touched on the seventh factor, evidence of domestic violence,[7] and found that the factor weighed in favor of Williams because of Barbee's felony assault conviction. The superior court acknowledged that Williams had alleged other instances of abuse and filed other domestic violence petitions that were denied but suggested that none of the additional incidents had been proved. Thus, the court evaluated the seventh factor based on "this one really big deal incident here where you choked her terribly" and found that the seventh factor weighed against Barbee.

Summarizing its best interests analysis, the superior court found "one factor favoring [Williams] fairly strongly [and] one factor favoring [Barbee] somewhat strongly, and the rest of the factors [ ] equally balanced." The court concluded that "the factor of stability and the existence of the extended family on Mr. Barbee's side ... suggest that De'Shawn's best interest would be best served by having Mr. Barbee exercise what would probably be called the custodial period." The court ruled that it would maintain the current custody arrangement if Williams remained in Alaska, but Barbee would be awarded primary physical custody if Williams moved to Washington.

On July 22, 2009, the superior court entered a written order memorializing its decision:

1. Shayla Williams'[s] Motion to Modify Custody is denied.

2. If and when Shayla Williams relocates out of state, Jomell Barbee shall exercise primary physical custody of the parties' child De'Shawn....

3. As long as Ms. Williams continues to reside in Anchorage, the parties shall exercise shared physical custody under the current (previously ordered) schedule.

4. The parents shall continue to exercise shared legal custody. However, if Ms. Williams relocates out of Anchorage, Mr. Barbee may make all decisions regarding De'Shawn's education.

***1000** Williams asked the superior court to reconsider the custody ruling on July 6, 2009; her motion was denied on July 22. Williams appealed the superior court's decision.

III. STANDARD OF REVIEW

1 2 3 4 A superior court has broad discretion in determining child custody matters.[8] We will not reverse a superior court's custody determination unless we are "convinced that the trial court abused its discretion or that its controlling factual findings are clearly erroneous."[9] A superior court abuses its discretion in the custody context when it "fails to consider statutorily mandated factors, weighs factors improperly, or includes improper factors in its decision."[10] A factual finding is clearly erroneous when

a review of the entire record leaves us with the "definite and firm conviction" that a mistake has been made. [11] We do not "readily second guess a trial court's custody determination because it is the function of the trial court, not of this court, to judge witnesses' credibility and to weigh conflicting evidence." [12]

IV. DISCUSSION

5 6 7 Alaska Statute 25.20.110 provides that the superior court may modify child custody or visitation "if the court determines that a change in circumstances requires the modification of the award and the modification is in the best interests of the child." [13] The parent seeking modification must first establish that there has been a "significant change in circumstances affecting the child's best interests." [14] As a matter of law, both the occurrence of a crime involving domestic violence and one parent's relocation out of state constitute significant changes in circumstances. [15] Once a party demonstrates a qualifying change in circumstances, the court will determine whether modification is in the best interests of the child. [16]

8 In cases involving a parent's relocation out of state, as long as the relocating parent's reasons for moving are legitimate, the trial court must examine the best interests of the child. [17] Here, the superior court found that Williams's reasons for relocating were "totally legitimate" and proceeded to analyze De'Shawn's best interests.

A. Domestic Violence And The Presumption Against Custody

Alaska Statute 25.24.150(g), enacted by the legislature in 2004, directs that "[t]here is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child." [18] The statute provides that a person has a "history of perpetrating domestic violence ... if the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence." ***1001** [19] We define "serious physical injury" under subsection (h) as "physical injury caused by an act performed under circumstances that create a substantial risk of death; or physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy." [20] We have held that once the trial court determines that a party has a "history of perpetrating domestic violence" as defined by subsection .150(h), "the path charted in subsection .150(g)-(i) must be followed," *i.e.*, the rebuttable presumption against custody applies. [21]

At the June 24, 2009 hearing and in its July 22, 2009 order the superior court granted primary physical and shared legal custody to Barbee should Williams relocate out of state. Williams's main argument on appeal is that it was error for the superior court to award custody to Barbee because Barbee has a history of domestic violence and failed to rebut the statutory presumption against custody. Specifically, Williams asserts that "despite recognizing that Mr. Barbee had engaged in serious domestic violence the court failed to make a specific finding or clearly address the presumption that Mr. Barbee could not be awarded physical or legal custody of the child pursuant to AS 25.24.150(g)." Barbee responds that the superior court found that he did not have a history of domestic violence and so did not have to address the presumption of AS 25.24.150(g).

1. The statutory presumption against custody applies in modification proceedings.

9 As a threshold matter, we must determine whether the rebuttable presumption against awarding custody to a parent who has "a history of perpetrating domestic violence" applies in custody modification proceedings. [22] We have held that the "ultimate focus" in the custody modification context "is the best interests of the children." [23] We conclude that applying the statutory presumption against custody is appropriate and necessary in light of this focus.

10 First, the legislative history behind AS 25.24.150(g) strongly indicates that the legislature intended for the presumption to apply in modification proceedings. Alaska Statute 25.24.150(g) was enacted in 2004 by House Bill 385. [24] The primary

purpose of H.B. 385 was to protect children from potentially adverse custody determinations in response to growing evidence that domestic violence has severe and long-lasting effects on children. [25] The bill sought to decrease the likelihood that children would be placed in the custodial household where domestic violence exists by ensuring that domestic violence was adequately and specifically included when courts analyzed a child's best interests. [26] This purpose is equally valid at a ***1002** modification hearing where, just as in making an initial custody determination, a court should fully address any existence of domestic violence and avoid making a custody determination that will place a child in the custody of an abusive parent.

To accomplish its goal, H.B. 385 refined the best interests analysis by requiring that courts consider the existence of domestic violence not only as part of the traditional "best interests" factors laid out in AS 25.24.150(c) but also as triggering a rebuttable presumption against custody where a history of domestic violence exists. [27] It follows that the presumption is properly a part of the "best interests" analysis in modification proceedings just as it is in initial custody determinations. [28]

Adding support to our conclusion that the presumption applies in modification cases, we observe that AS 25.20.110 does not limit a superior court to consideration of *only* the factors under subsection (c) when determining whether modification is warranted. [29] Nor have we so limited courts making any custody determinations-our guiding concern has long been the best interests of the child and not strict adherence to the factors enumerated in the statute. [30] In addition, we recently assumed that the statutory presumption applies to a proceeding to modify visitation; there is no reason why it should not similarly apply to a proceeding to modify custody. [31] And employing the presumption where one party seeks modification is a logical extension of our cases applying the other subsections of AS 25.24.150 to modification proceedings. [32] Moreover, given that a finding that a crime involving domestic violence has occurred since the last custody determination is, as a matter of law, a changed circumstance that warrants a modification proceeding, it would make little sense to exclude the presumption against custody in modification cases. [33] The statutory purpose of protecting children would be completely unfulfilled if, in a modification hearing triggered by the occurrence of a crime involving domestic violence, the court could ignore the statutory presumption against awarding custody to the perpetrator of domestic violence.

Finally, we believe that applying the statutory presumption against custody is undoubtedly ***1003** appropriate in a case such as this one, where the presumption was not addressed at the initial custody determination because the custody award was made pursuant to an agreement of the parties. [34] Applying the presumption is especially necessary where the settlement agreement awarding custody was made by parties with a history of domestic violence during the marriage. [35]

2. The superior court must make express findings regarding whether Barbee has a "history of perpetrating domestic violence."

11 Williams maintains on appeal that Barbee "has a history of domestic violence as evidenced by his conviction and his own testimony" and that the trial court "recognized that Mr. Barbee has a history of domestic violence." Citing to the same page of the transcript as Williams, Barbee responds that the superior court found that he *did not* have a history of domestic violence, and so did not have to address the statutory presumption against custody. The transcript suggests that neither party is entirely correct-the superior court did not make any express finding regarding a "history of perpetrating domestic violence" under AS 25.24.150(h). While the trial court's dialogue did include the phrase "history of domestic violence," read in context, it appears that the term "history of domestic violence" referred to the best interests of the child criteria found at AS 25.24.150(c)(7) rather than a separate analysis under subsection .150(h). [36]

We have held that "when the record shows that domestic violence has occurred and the trial court so finds, it is plain error for the court not to make findings as to whether the domestic violence amounted to a history of perpetrating domestic violence." [37] In *Puddicombe v. Dreka,* we concluded that it was error for the superior court to fail to evaluate whether there was a history under AS 25.24.150(h) after the court found when discussing the seventh best interests factor that both parties had engaged in domestic violence. [38] The evidence of domestic violence in *Puddicombe* consisted of plaintiff's allegations (presented without

witness testimony) that defendant punched, sexually assaulted, choked, and threatened to kill her along with extensive testimony about several altercations that occurred between the parties, though "most of the evidence regarding physical violence was from the parties themselves and was highly contested."[39] Even so, because the superior court found that domestic violence had occurred, it was required to "explicitly address whether it was serious enough to be a history of perpetrating ***1004** domestic violence under the definition set out in subsection .150(h)."[40]

12 Addressing this same issue, we recently concluded that a trial court must determine whether domestic violence amounted to a history under AS 25.24.150(h) even when evidence of domestic violence is less "overwhelming" than in *Puddicombe.*[41] In *Michele M. v. Richard R.* the superior court did not find any relevant, recent domestic violence incidents and "may have *implicitly* determined that [defendant's] past acts of domestic violence were neither numerous nor significant and so did not amount to a 'history of perpetrating domestic violence.' "[42] Still, we remanded, stating that "it was plain error for the court not to further determine whether [defendant's] previous acts of domestic violence constituted" a history under the statute.[43] We hold today that where a superior court finds that domestic violence occurred, it must make express findings regarding whether the incident or incidents of domestic violence constitute a "history of perpetrating domestic violence" under AS 25.24.150(h).

At the June 24, 2009 hearing, the superior court made some comments about both the single substantiated incident and Williams's other alleged incidents but did not expressly state whether they amounted to a statutorily defined history of abuse. First, the court referred to the incident that resulted in Barbee's assault conviction and recognized that it was "one really big deal incident here where you choked her terribly." Crucially, however, the superior court did not explain whether "chok[ing] her terribly" amounted to causing a "serious physical injury" such that the single incident constituted a history under subsection .150(h).

"Serious physical injury" in the context of the presumption against awarding custody means "physical injury caused by an act performed under circumstances that create a substantial risk of death; or physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."[44] The absence of a finding in this case is especially problematic because Williams claimed that she feared for her life during the incident, and the charging document, which was "based upon a review of [the] police report" indicates:

> [Williams] reported that her husband tackled her from behind and put her in a headlock. She said that he used both arms and strangled her to the point she thought she would lose consciousness. She stated that after he let go, she began vomiting and had difficulty breathing. She stated that her voice was hoarse and continued to have trouble swallowing on the morning of the 18th when she called the police. The officer observed that she had pet[e]chia on her neck and behind both ears. The officer noted what appeared to be blood pooled behind both of her lower eyelids and red marks on her right arm and wrist.
> On remand the superior court must make an explicit finding whether this choking incident, standing alone, amounts to a history of domestic violence under AS 25.24.150(h).

We next turn to Williams's many additional allegations of domestic violence in her pleadings to the superior court. Even if the superior court determines on remand that the single choking incident did not amount to a history of domestic violence, if Williams's evidence warrants a finding that there were additional incidents of domestic violence, then there was a "history of perpetrating domestic violence," and the superior court must address the rebuttable presumption against custody.

3. If pro se parties make allegations of domestic violence the superior court must inquire into the allegations and allow the parties to present evidence regarding the allegations.

13 In *Parks v. Parks,* we concluded that AS 25.24.150(g) "requires trial courts to ***1005** consider *alleged incidents* of domestic violence" and that it is appropriate to "question the pro se litigants about facts relevant to the issue" to determine whether an alleged event was an incident of domestic violence.[45] We reaffirm this position here and conclude that it was error not to give Williams an opportunity to put forth evidence to support her allegations.

In *Parks,* a husband admitted during a custody hearing that he had thrown water in his wife's face; the trial court found that this was not an incident of domestic violence for purposes of triggering the statutory presumption against custody because there was no evidence that the wife was afraid. [46] We clarified on appeal that the water-throwing would constitute domestic violence if the husband was attempting to place his wife in fear of imminent physical injury. [47] We then remanded to the superior court for additional findings, explaining:

> Alaska Statute 25.24.150(g) requires trial courts to consider alleged incidents of domestic violence, and here the trial court was in a position to question the pro se litigants about facts relevant to the issue. On remand, the trial court should solicit from the parties the information it needs to determine whether the water-throwing incident was an act of domestic violence. [[[[48]]

In this case, Williams's pleadings to the superior court contained numerous allegations of domestic abuse. Williams detailed in her motion to modify custody that during their marriage Barbee had "anger issues" and that arguments would end with Barbee "abusing" Williams, including choking, hitting, kicking, and throwing Williams to the ground. Yet, the superior court did not take testimony from Williams about the individual incidents alleged in her motion to modify custody. [49] Nor did the trial court ask Williams to provide additional information that would have allowed the court to determine whether the alleged events were acts of domestic violence. [50] The superior court should have inquired into the details of the events and provided an opportunity for Williams to present evidence in support of her allegations of abuse in order to determine whether the events were acts of domestic violence. We remand for the superior court to allow and evaluate such evidence.

B. The Best Interests Factors Under AS 25.24.150(c)

14 **15** In making a custody decision based on the best interests of the child, a superior court must consider each statutory factor in subsection .150(c) and must discuss the factors that it deems relevant to the case before it. [51] Though a trial court cannot "assign[ ] disproportionate weight to particular factors while ignoring others," it has "considerable discretion in determining the importance of each statutory factor in the context of a specific case" and is not required to weigh the factors equally. [52]

Here, the superior court specifically discussed each factor under AS 25.24.150(c). The court determined that most of the factors did not favor either party, but that two factors affected its analysis-the interest in maintaining stability and continuity weighed in favor of Barbee under AS 25.24.150(c)(5), [53] ***1006** while the incident of domestic violence weighed in favor of awarding custody to Williams under AS 25.24.150(c)(7). [54]

Williams argues that the superior court improperly weighed the stability and continuity factor equally against the existence of domestic violence. Barbee replies that the superior court properly discussed and weighed the best interests factors, and that it was appropriate for the trial court to focus on the stability and continuity factor in light of Williams's planned move to Washington.

16 Because the superior court will have to reevaluate on remand the relative weights of the continuity and stability factor and the domestic violence factor in light of its findings regarding the alleged domestic violence, we do not reach the issue of whether the superior court properly analyzed the factors. We note, however, that several of our recent decisions addressing custody modification where one parent relocates out of state emphasize that the interest in stability and continuity described in AS 25.24.150(c)(5) cannot categorically favor the non-relocating party purely due to geographic stability. [55] In *Blanton v. Yourkowski,* we explained our reasoning:

> A continuity test centered entirely on the child's geographical stability would always favor placing the child with the non-moving parent. Yet our decisions recognize that courts may properly award primary custody to the relocating parent when that parent offers superior emotional stability. Thus, the continuity and stability factor does not preordain the result in such cases; instead, it commands a comprehensive inquiry into each parent's respective ability to maintain stable and satisfactory relations between themselves and the child. [[56]]

We have concluded that stability and continuity "can encompass a multitude of factors, including, but not limited to, the relationship with the custodial parent, the home provided by the custodial parent, the children's school, the community of friends and family, the cultural community, ... the children's relationship with the non-custodial parent ... [and] stability of place." [57] It is the trial court's task "to examine all of these factors and determine, in each case, which predominate." [58]

C. Unsupervised Visitation

17 On appeal, Williams argues that it was inappropriate for the superior court to allow Barbee to have unsupervised visitation. Barbee urges us not to reach this issue because Williams did not brief the argument. While Williams's briefing on appeal is likely sufficient under our more liberal standards for pro se litigant pleadings, [59] we will not decide this issue because Williams did not raise it in the superior court.

V. CONCLUSION

We REVERSE the award of primary physical and shared legal custody to Barbee ***1007** and REMAND for the superior court to make an express finding regarding whether Barbee has a "history of perpetrating domestic violence" pursuant to AS 25.24.150(h). If the superior court finds that Barbee does have a history of domestic violence, it must address the rebuttable presumption against custody under AS 25.24.150(g) before awarding any custody to Barbee.

STOWERS, Justice, not participating.

Footnotes

1 Though Williams did not appeal the portion of the superior court's order granting shared physical custody to the parties should Williams remain in Alaska, we note that before granting *any* type of custody to Barbee the superior court must address the presumption of AS 25.24.150(g) if it finds that Barbee has a history of perpetrating domestic violence under AS 25.24.150(h).

2 A "petechia" is "a minute reddish or purplish spot containing blood that appears in skin or mucous membrane as a result of localized hemorrhage." MERRIAM-WEBSTER DICTIONARY, available at http://www.merriam-webster.com/dictionary/petechia.

3 The superior court later noted that substance abuse was not an issue for either party.

4 AS 25.24.150(c)(5) ("the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity").

5 AS 25.24.150(c)(6) ("the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child").

6 We have held that the sixth statutory factor might not be relevant where domestic violence has occurred because a victimized parent should not be expected to foster a relationship with the abusive parent. *Puddicombe v. Dreka,* 167 P.3d 73, 77 (Alaska 2007) ("Once the trial court makes an evidence-based finding that domestic violence occurred ... it should explicitly address whether or not the parent is a continuing threat to the health and safety of the other parent [or] the children prior to relying on the parent's willingness to foster a relationship under AS 25.24.150(c)(6)."); *see also* AS 25.24.150(c)(6) (directing courts to consider this factor "except that the court may not consider this willingness and ability if one parent shows that the other parent has ... engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child").

7 AS 25.24.150(c)(7) ("any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents").

8 *Wee v. Eggener,* 225 P.3d 1120, 1124 (Alaska 2010).

9 *Michele M. v. Richard R.,* 177 P.3d 830, 834 (Alaska 2008) (quoting *Valentino v. Cote,* 3 P.3d 337, 339 (Alaska 2000)).

10 *Id.*

11 *Wee,* 225 P.3d at 1124.

12 *Michele M.,* 177 P.3d at 834 (internal quotation marks omitted).

13 AS 25.20.110(a).

14 *Ebertz v. Ebertz,* 113 P.3d 643, 647 (Alaska 2005).

15 AS 25.20.110(c) (stating that a "finding that a crime involving domestic violence has occurred since the last custody ... determination" is a changed circumstance); *Chesser-Witmer v. Chesser,* 117 P.3d 711, 717 (Alaska 2005) (explaining that a change of circumstances "exists as a matter of law when a custodial parent [including a parent with joint custody] moves out of state").

16 *Ebertz,* 113 P.3d at 647.

17 *Eniero v. Brekke,* 192 P.3d 147, 150 (Alaska 2008); *see also Barrett v. Alguire,* 35 P.3d 1, 7 (Alaska 2001) (stating that "the legal standard in custody cases where one parent chooses to relocate is the same whether the superior court has an initial custody determination or motion to modify custody before it").

18 Ch. 111, § 5, SLA 2004.

19 AS 25.24.150(h); *see also* Lisa Bolotin, Note, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence,* 25 ALASKA L.REV. 263, 275 (2008) (explaining that the Alaska statute "requires that a parent perpetrate a certain level of violence ... before the presumption takes effect").

20 *Parks v. Parks,* 214 P.3d 295, 301 (Alaska 2009) (quoting AS 11.81.900(b)(56)).

21 *Wee v. Eggener,* 225 P.3d 1120, 1125 (Alaska 2010).

22 Neither party raised this point on appeal, but Barbee's counsel raised it at oral argument. Moreover, we must answer this threshold question before considering the superior court's obligations in the modification context.

23 *Lashbrook v. Lashbrook,* 957 P.2d 326, 328 (Alaska 1998).

24 House Bill (H.B.) 385, 23d Leg., 2d Sess. (2004).

25 *See* Minutes, House Judiciary Comm. Hearing on H.B. 385, 23d Leg., 2d Sess. (March 1, 2004) (Statement of Chair Lesil McGuire, sponsor) (stating that protection of children is the overarching goal of H.B. 385 and later explaining that similar policies against awarding custody to abusive parents have been widely supported and implemented in other jurisdictions in response to "a growing body of social science literature"); *see also* H.R.REP. NO. 101-737, at 3 (1990) (Congress reporting that domestic violence causes children to "experience shock, fear, guilt, long lasting impairment of self-esteem, and impairment of development and socialization skills").

26 Minutes, Senate Judiciary Comm. Hearing on H.B. 385, 23d Leg., 2d Sess. (April 27, 2004) (Statement of Representative Lesil McGuire, sponsor) (explaining that batterers are often awarded custody and that H.B. 385 seeks to "level the playing field" by requiring that courts consider domestic violence not only as one factor under .150(c) but as raising a rebuttable presumption against custody); *see also* Bolotin, *supra* note 19, at 287-89 (commenting that the benefit of the rebuttable presumption is that it "ensures that courts give adequate weight to the existence of domestic violence in determining the child's best interests" and "is the best way to ensure that domestic violence is always appropriately considered").

27 *See* Minutes, House Judiciary Comm. Hearing on H.B. 385, 23d Leg., 2d Sess. (March 1, 2004) (Statement of Chair Lesil McGuire, sponsor) ("We will ask the court to continue to ... consider[ ] the factors that are in [AS] 25.24.150(c), ... but we're also saying that you have to consider the rebuttable presumption that's now going to be present in what will be a new subsection (g).").

28 In addition, the amendments and additions to AS 25.24.150 were based on a model statute, which directed that "[i]n *every proceeding* where there is at issue a dispute as to the custody of the child" the presumption against custody should apply. Bolotin, *supra* note 19, at 273 (quoting the MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (Nat'l Council of Juvenile and Family Court Judges 1994)) (emphasis added). A modification proceeding is clearly a situation where child custody is in dispute, and so the rebuttable presumption should apply.

29 AS 25.20.110(a) (in modifying a custody award, the court must determine that "the modification is in the best interests of the child"); *see also* Chapter 111, §§ 1, 2, SLA 2004 (showing that H.B. 385 specifically amended statutory provisions directing courts to look to AS 25.24.150(c) to include the presumption under AS 25.24.150(g)).

30 *See Schmitz v. Schmitz,* 88 P.3d 1116, 1122-23 (Alaska 2004) ("The court may consider other factors not listed in the statute if those additional considerations are relevant to the child's best interests.").

31 *See Morris v. Horn,* 219 P.3d 198, 208-10 (Alaska 2009) (remanding for the trial court to independently find whether multiple incidents of domestic violence had occurred rather than invoking issue preclusion but assuming that the presumption would apply to limit visitation under AS 25.24.150).

32 *See West v. Lawson,* 951 P.2d 1200, 1203 (Alaska 1998) (applying subsection .150(d) in the modification context).

33 AS 25.20.110(c).

34 *See Hamilton v. Hamilton,* 42 P.3d 1107, 1115 (Alaska 2002) (clarifying that while a court modifying a custody award should consider findings made at the original hearing, the court does not have to give such deference where "no findings of fact [were] made at the time of the original order as it was entered into pursuant to a settlement agreement").

35 *See Crane v. Crane,* 986 P.2d 881, 889 n. 27 (Alaska 1999) (noting that in certain circumstances a court may examine a custody agreement more closely, such as when there has been domestic violence between the parties); *see also* AS 25.24.220(h)(2) (providing

that a court will use a heightened level of scrutiny in reviewing dissolution agreements if there is evidence of domestic violence during the marriage).

36 In full, the trial court's statement was:

> The next factor is evidence of domestic violence, child abuse or child neglect, and a history of domestic violence between the parents, and this factor weighs in favor of Ms. Williams and against Mr. Barbee, principally because of this conviction. Now, I know that you've argued that there have been other instances.
>
> ....
>
> I also know that there have been other domestic violence petitions filed and denied ... I don't blame people for filing things if they feel that they really have been the victim of domestic violence, but on the other hand it's not been proven. So what we've got is we've got this one really big deal incident here where you choked her terribly, and that factor weighs against you.

37 *Puddicombe v. Dreka,* 167 P.3d 73, 77 (Alaska 2007); *see also* Bolotin, *supra* note 19, at 276-77 (noting that fact finders in Alaska must follow the procedures outlined in subsections .150(g)-(i) "whenever one party presents credible evidence of domestic violence" such that "once the issue of domestic violence is properly raised, the court must address the question" whether there is a history pursuant to the statute's definition).

38 167 P.3d at 75-77.

39 *Id.* at 75-76.

40 *Id.* at 77.

41 *Michele M. v. Richard R.,* 177 P.3d 830, 837-38 (Alaska 2008).

42 *Id.* at 837 (emphasis added).

43 *Id.* at 837-38.

44 *Parks v. Parks,* 214 P.3d 295, 301 (Alaska 2009) (quoting AS 11.81.900(b)(56)).

45 214 P.3d at 302 (emphasis added).

46 *Id.* at 300.

47 *Id.*

48 *Id.* at 302; *see also id.* at 300-01 (remanding for the trial court to also determine whether the husband's alleged violations of a long-term protective order were incidents of domestic violence that would constitute a "history" under AS 25.24.150(h) where the trial court made no findings on the subject).

49 While the superior court did not expressly bar Williams from testifying about her allegations, it is unclear when during the hearing Williams would have had an opportunity to do so.

50 Although the trial court did refer to its earlier rulings denying domestic violence petitions filed by Williams, it is not at all clear that each of the incidents of abuse detailed in Williams's motion to modify custody was the subject of a domestic violence petition.

51 *Park v. Park,* 986 P.2d 205, 207 (Alaska 1999).

52 *Barlow v. Thompson,* 221 P.3d 998, 1005 (Alaska 2009) (citations omitted).

53 AS 25.24.150(c)(5) ("the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity").

54 AS 25.24.150(c)(7) ("any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents").

55 *See, e.g., Blanton v. Yourkowski,* 180 P.3d 948, 954 (Alaska 2008).

56 *Id.* (quoting *Meier v. Cloud,* 34 P.3d 1274, 1279 (Alaska 2001)).

57 *Moeller-Prokosch v. Prokosch,* 99 P.3d 531, 534 (Alaska 2004) (quoting *Barrett v. Alguire,* 35 P.3d 1, 9 (Alaska 2001)) (remanding for the superior court to "fully consider[ ] the effect of [child's] separation from the non-custodial parent" and explaining that "[p]erforming the best interests analysis based on [mother's] assumed move requires symmetric consideration of the consequences to [child] both if she leaves with him and if she leaves without him").

58 *Barrett,* 35 P.3d at 9 (upholding a trial court finding that it was in the children's best interests to stay in Alaska with their mother because maintaining the children's relationships with their school, community of friends and family, cultural community, and mother outweighed maintaining the relationship with their father with whom they had lived for four and a half years).

59 *See Peterson v. Ek,* 93 P.3d 458, 464 n. 9 (Alaska 2004) (concluding that a pro se litigant's briefing was adequate to preserve claims where we "could discern his legal arguments and [defendant] could reply to them"); *see also Breck v. Ulmer,* 745 P.2d 66, 75 (Alaska 1987) ("The pleadings of pro se litigants should be held to less stringent standards than those of lawyers.").

242 P.3d 1032
Supreme Court of Alaska.

Dusty CHRISTOFFERSEN, Appellant,
v.
STATE of Alaska, COURT CUSTODY INVESTIGATOR'S OFFICE, Appellee.

No. S-13539. | Nov. 5, 2010.

Synopsis

Background: Father and stepmother of child who was subject of a custody investigation brought action against the state, seeking damages for court-appointed custody investigator's failure to immediately report that the child had engaged in sexual misconduct with a younger child in the past, and after child thereafter engaged in sexual misconduct with his half-sister. The Superior Court, Third Judicial District, Anchorage, John Suddock, J., entered summary judgment in favor of investigator. Step-mother appealed.

Holdings: The Supreme Court, Winfree, J., held that:
1 court-appointed custody investigator was entitled to absolute quasi-judicial immunity, and
2 that immunity extended to the state, precluding claim of vicarious liability.

Affirmed.

West Headnotes (8)

1 **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews de novo a grant of summary judgment.

2 **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews de novo the legal question of whether immunity exists as a defense to a claim.

3 **Infants**
Societies, agencies, and officers in general

Court-appointed custody investigator was entitled to absolute quasi-judicial immunity from civil suit arising from the performance of investigation, in which investigator failed to immediately report that child, whose custody was being investigated, had engaged in sexual misconduct with a younger child, regardless of whether investigator would not have been entitled to statutory immunity protecting people who make good faith reports of suspected child abuse from civil liability; the reporting statute did not override common-law quasi-judicial immunity. AS 47.17.050.

4 **Judges**
Liabilities for official acts

Judges are absolutely immune from liability for damages for acts performed in the exercise of their judicial functions.

5 **Judges**
Liabilities for official acts

Absolute judicial immunity applies to acts performed in the exercise of judicial functions, no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive, and only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity.

1 Cases that cite this headnote

6 **Judges**
Liabilities for official acts

The doctrine of absolute judicial immunity extends not only to judges but to others who perform duties sufficiently related to the judicial process.

1 Cases that cite this headnote

7 **Torts**
Litigation privilege; witness immunity

In Alaska, neutral court-appointed experts are shielded by absolute quasi-judicial immunity.

8 **Infants**

Societies, agencies, and officers in general

Where a court-appointed custody investigator was entitled to absolute quasi-judicial immunity from suits arising from the performance of her duties, that immunity extended to the state, on claim of vicarious liability.

Attorneys and Law Firms

***1032** Dusty Christoffersen, pro se, Anchorage, Appellant. Laura Fox, Assistant Attorney General, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for Appellee.

Before: CARPENETI, Chief Justice, FABE, WINFREE, CHRISTEN, and STOWERS, Justices.

Opinion

1033** ***OPINION

WINFREE, Justice.

I. INTRODUCTION

In the course of performing her duties, a court-appointed custody investigator received a police report regarding an allegation that the child whose custody was being investigated had engaged in sexual misconduct. The investigator later included this information in her custody report, but did not notify the child's parents or the Office of Children's Services at the time she received the police report. During a period of time that apparently began before the custody investigator received the police report and perhaps continued until the custody investigator issued her report, the child committed further sexual misconduct, this time against his half-sister. The child's father and stepmother filed suit against the State of Alaska for damages, arguing that the custody investigator had a duty to warn them upon learning of the child's previous misconduct. The superior court dismissed the suit on summary judgment. Because court-appointed custody investigators are entitled to absolute quasi-judicial immunity from suits arising from the performance of their duties and because that immunity extends to the State, we affirm.

II. FACTS AND PROCEEDINGS

Mark Christoffersen married Brandi Martin and they had a son, M.C., in 1992. When the couple divorced in 1999, Brandi was awarded primary custody of M.C. and Mark was granted visitation rights. In 2001 Brandi and M.C. moved to Florida and Mark lost contact with them for several years. In March 2006 Mark filed a motion to modify the custody order, seeking primary physical custody of M.C. After the court served Mark's motion on Brandi, the two resumed contact with each other, and Mark resumed visitation with M.C. shortly thereafter. By the time Mark and M.C. were reunited, Mark had married Dusty and the couple had two young daughters.

In May 2006 Master Andrew Brown responded to Mark's motion to modify M.C.'s custody order by directing the Alaska Court System's Custody Investigator's Office (the State) to conduct an investigation and prepare a custody report. The State assigned the case to a custody investigator. The custody investigator interviewed a number of people over the course of her investigation and requested information from collateral resources, including the Anchorage Police Department (APD).

In late June 2006 APD responded to the custody investigator's information request. Included in APD's response was a report concerning an April 2006 incident in which M.C. had inappropriately touched a two-year-old girl. According to the report, M.C. admitted he had touched the child, but the child's mother did not pursue criminal charges.

The custody investigator distributed her completed report to the court, Mark, and Brandi in late October 2006. The custody report addressed a number of custodial issues, including the allegation that M.C. had inappropriately touched the young child. From this report the Christoffersens apparently learned for the first time about M.C.'s inappropriate contact with the young child.

A few days after the custody report was distributed, the Christoffersens contacted the police and told them that M.C. had sexually abused their five-year-old daughter-M.C.'s half-sister-beginning soon after he resumed visitation with Mark. During an interview with police, M.C. admitted perpetrating sexual misconduct against the girl. M.C. was subsequently adjudicated on a charge of sexual assault of a minor in the fourth degree.

In April 2008 the Christoffersens filed suit against the State, seeking ten million dollars in damages. They alleged the custody investigator violated her duty to protect their children by not warning the Christoffersens about the allegations of M.C.'s prior sexual misconduct immediately after she received the APD report. They also alleged the custody investigator violated AS 47.17.020's mandated reporting requirements by not forwarding the APD report about M.C. to the Office of Children's Services (OCS).[1] After ***1034** the State filed its answer to the complaint, the Christoffersens filed a response adding their belief that by not notifying them or OCS as soon as she received the APD report concerning M.C.'s March 2006 misconduct, the custody investigator violated several additional statutes contained in Titles 9 and 47.[2]

The State filed two motions for summary judgment. In its first motion the State argued that (1) custody investigators are entitled to absolute quasi-judicial immunity from civil suits arising out of the performance of their duties, and (2) this immunity bars the Christoffersens's vicarious liability claim against the State. In its second motion the State argued that the custody investigator had no actionable tort duty to warn about or control M.C.'s conduct under the statutes cited by the Christoffersens, Alaska case law, or public policy. The Christoffersens filed a cross-motion for summary judgment, asserting that the custody investigator violated mandated reporting requirements.

In November 2008 the superior court granted both of the State's summary judgment motions, disposing of the Christoffersens's complaint in its entirety and denying their cross-motion for summary judgment *sub silentio.* Dusty appealed the superior court's decision; Mark did not.

III. STANDARD OF REVIEW

1 **2** We review de novo both a grant of summary judgment[3] and the legal question of whether immunity exists as a defense to a claim.[4]

IV. DISCUSSION

A. Overview

This case requires us to determine whether the superior court correctly granted summary judgment to the State on the basis of either (1) absolute quasi-judicial immunity or (2) lack of an actionable tort duty. "We usually consider whether there is a tort duty before deciding sovereign immunity questions, [though] this is not always our practice."[5] We have analyzed immunity first when "doing so clarifies the public policy considerations that also bear on our duty analysis,"[6] and we do so here for that reason. We conclude that (1) a court-appointed custody investigator is entitled to absolute quasi-judicial immunity from civil suits arising from the performance of an investigation, and (2) when a custody investigator is an employee or contractor of the State, that immunity extends to the State. We therefore do not need to address the superior court's ruling on duty.

B. Court-Appointed Custody Investigators Are Protected Under The Doctrine Of Absolute Quasi-Judicial Immunity.

3 **4** **5** Judges are absolutely immune from liability for damages for acts performed in the exercise of their judicial functions.[7] This ***1035** absolute judicial immunity applies "no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive. Only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity."[8]

6 **7** The doctrine of absolute judicial immunity extends not only to judges but to others who perform duties sufficiently related to the judicial process.[9] We have previously stated that the "clearest case for quasi-judicial immunity is presented in instances where some aspect of the court's adjudicative responsibility is delegated to another official such as a master or referee. And in Alaska, as well as in almost all other jurisdictions, neutral court-appointed experts are also shielded by absolute quasi-judicial immunity."[10]

In *Lythgoe v. Guinn*[11] we held that quasi-judicial immunity bars suit against a court-appointed custody investigator.[12] Dr. Janet Guinn, a psychologist, had been appointed in that case "to act as an independent custody investigator" and to make a custody recommendation to the court.[13] A party to the underlying child custody dispute subsequently sued Dr. Guinn, alleging that she committed negligent and intentional torts during her investigation and during the preparation of her report.[14] We held that Dr. Guinn served as an "arm of the court" and performed a function "integral to the judicial process" in her capacity as a court-appointed custody investigator,[15] qualifying her for immunity under

relevant case law. We further held that policy considerations supported granting her absolute quasi-judicial immunity. [16]

We explained that "[e]xposure to liability could deter [court-appointed experts'] acceptance of court appointments" [17] and "may affect the manner in which such court-appointed experts perform their jobs." [18] We noted that individuals appointed by the court to conduct custody investigations exercise discretionary judgment in rendering their evaluations, and that "the *sine qua non* of the exercise of such discretion is the freedom to act in an objective and independent manner." [19] If faced with the threat of personal liability for exercising that discretion, court-appointed experts would be less likely to offer "the disinterested objective opinion the court seeks." [20] Therefore we concluded that extending absolute judicial immunity to quasi-judicial officers is appropriate to prevent a professional who is delegated judicial duties to aid the court from becoming a "lightning rod for harassing litigation." [21]

Nothing distinguishes *Lythgoe* from this case. Custody investigators performing duties pursuant to their employment by or contract with the Alaska Court System's Custody Investigator's Office are quasi-judicial officers. [22] As such they are entitled to absolute quasi-judicial immunity from suits arising out of the performance of those duties. [23] Dusty nonetheless appears to contend that the custody investigator here is not immune from suit because she is not entitled ***1036** to the immunity described in AS 47.17.050, which protects persons who make good-faith reports of suspected child abuse from civil or criminal liability. Although Dusty may be correct in contending that AS 47.17.050 would not immunize the custody investigator from suit in this case, the investigator is nevertheless protected by common-law quasi-judicial immunity. [24] Dusty's contention is therefore without merit.

C. The State May Not Be Held Liable For The Conduct Of Custody Investigators Who Are Acting Through The Custody Investigator's Office And Are Shielded By Absolute Quasi-Judicial Immunity.

8 The Christoffersens named the State as the defendant in their suit, not the custody investigator herself. The Christoffersens have not alleged any separate negligence by the State. Instead they imply that the State is vicariously liable for the court-appointed custody investigator's actions.

We have not previously addressed vicarious liability within the context of absolute quasi-judicial immunity. But we have held that a government employee's official immunity from suit bars vicarious liability claims against government entities for the same conduct. [25] Other courts addressing this issue have consistently held that an employee's quasi-judicial immunity bars any vicarious liability claims brought against the employer. [26] We support this view. The policy considerations that support extending absolute quasi-judicial immunity to court-appointed investigators acting within the scope and capacity of their appointment also support extending that same immunity to their principal, here, the State. To conclude otherwise would merely shift the threat of liability from the agent to the principal and would stifle the "disinterested objective opinion that the court seeks." [27]

We therefore hold that because the court-appointed custody investigator is absolutely immune from suits for actions performed within that capacity, the State cannot be held liable for her conduct.

V. CONCLUSION

We AFFIRM the superior court's grant of summary judgment in favor of the State on the ground that it is shielded by the custody investigator's absolute quasi-judicial immunity.

Footnotes

1 AS 47.17.020 requires certain classes of persons, including doctors, teachers, and peace officers, to report suspected physical, mental, or sexual abuse.

2 The Christoffersens alleged that the custody investigator violated the following statutes: AS 09.10.065 ("Commencement of actions for acts constituting sexual offenses"); AS 09.10.070 ("Action for torts, for injury to personal property, for certain statutory liabilities, and against peace officers and coroners to be brought in two years"); AS 09.15.020 ("Parents or guardian may sue for seduction of child"); AS 09.17.010 ("Noneconomic damages"); AS 09.17.020 ("Punitive damages"); AS 47.05.065 ("Legislative findings related to children"); AS 47.10.020 ("Investigation and petition"); 47.10.082 ("Health and safety of child and other considerations"); AS 47.10.092 ("Disclosure to certain public officials and employees"); and AS 47.10.093 ("Disclosure of agency records").

3 *Snyder v. Am. Legion Spenard Post No. 28,* 119 P.3d 996, 1001 (Alaska 2005) (citing *Native Vill. of Elim v. State,* 990 P.2d 1, 5 (Alaska 1999)).

4 *Greywolf v. Carroll,* 151 P.3d 1234, 1241 (Alaska 2007) (citing *State, Dep't of Transp. & Pub. Facilities v. Sanders,* 944 P.2d 453, 456 (Alaska 1997)).

5 *Kinegak v. State, Dep't of Corr.,* 129 P.3d 887, 888 (Alaska 2006) (citing *Kiokun v. State, Dep't of Pub. Safety,* 74 P.3d 209, 213 (Alaska 2003)).

6 *State, Dep't of Corr. v. Cowles,* 151 P.3d 353, 358 (Alaska 2006) (citing *Kiokun,* 74 P.3d at 213 (proceeding directly to immunity because that analysis "illustrates the public policy issues that would also bear on a duty analysis")).

7 *Trapp v. State,* 53 P.3d 1128, 1129 (Alaska 2002).

8 *Id.* at 1130 (quoting *Cok v. Cosentino,* 876 F.2d 1, 2 (1st Cir.1989)).

9 *Id.*

10 *Id.* (internal footnotes and citations omitted).

11 884 P.2d 1085 (Alaska 1994).

12 *Id.* at 1093.

13 *Id.* at 1086.

14 *Id.*

15 *Id.* at 1088 (quoting *Seibel v. Kemble,* 63 Haw. 516, 631 P.2d 173, 179 (1981)).

16 *Id.* at 1093.

17 *Id.* at 1089 (quoting *Lavit v. Superior Court,* 173 Ariz. 96, 839 P.2d 1141, 1144 (Ariz.App.1992)).

18 *Id.*

19 *Id.*

20 *Id.* at 1090 (citing *LaLonde v. Eissner,* 405 Mass. 207, 539 N.E.2d 538, 541 (1989)).

21 *Id.* (quoting *Lavit,* 839 P.2d at 1144).

22 *See Ogden v. Ogden,* 39 P.3d 513, 516 (Alaska 2001) (noting that "court-appointed custody investigators are officers of the court and perform quasi-judicial functions").

23 *Lythgoe,* 884 P.2d at 1093.

24 *See B.K. v. Cox,* 116 S.W.3d 351, 360-61 (Tex.App.2003) (holding that statutorily created immunity for failure to report abuse of a minor does not override common-law derived judicial immunity in the absence of statutory language explicitly doing so). AS 47.17.050 contains no statement of intent to override common-law quasi-judicial immunity.

25 *See Logusak v. Togiak,* 185 P.3d 103, 108-10 (Alaska 2008); *Pauley v. Anchorage Sch. Dist.,* 31 P.3d 1284, 1285-86 (Alaska 2001).

26 *See, e.g., Ward v. San Diego Cnty. Dep't of Soc. Servs.,* 691 F.Supp. 238, 241 (S.D.Cal.1988) ("Because plaintiff's only theory of liability against defendant ... is respondeat superior, this court also finds that [defendant] is entitled to absolute quasi-judicial immunity."); *Hulsman v. Hemmeter Dev. Corp.,* 65 Haw. 58, 647 P.2d 713, 717 (1982) (holding that under respondeat superior "if the employee has immunity from suit, it follows that the employer would also be immune" and noting "[t]he reasoning which justifies this rule is based primarily on public policy") (internal citations omitted); *S.J.S. v. Faribault Co.,* 556 N.W.2d 563, 566 (Minn.App.1996) ("The policy considerations that support extending absolute immunity to prosecutors also support extending absolute immunity vicariously to the county.... [T]he threat of litigation against the county ... could deter prosecutors from vigorously and fearlessly performing their duties.") (internal citation omitted); *Reddy v. Karr,* 102 Wash.App. 742, 9 P.3d 927, 932 (2000) (holding that custody investigator's quasi-judicial immunity extended to her employer).

27 *Lythgoe,* 884 P.2d at 1090 (citing *LaLonde,* 539 N.E.2d at 541).

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262 P.3d 593
Supreme Court of Alaska.

STATE of Alaska, DEPARTMENT OF COMMERCE, COMMUNITY & ECONOMIC DEVELOPMENT, DIVISION OF INSURANCE, Appellant/Cross–Appellee,
v.
ALYESKA PIPELINE SERVICE COMPANY, Appellee/Cross–Appellant.

Nos. S–13499, S–13520. | June 10, 2011.

Synopsis

Background: Oil pipeline operator appealed decision of the Department of Commerce, Division of Insurance, determining that owner-controlled insurance program (OCIP) issued to oil pipeline operator was prohibited by statute providing that owner-controlled insurance programs shall be allowed only for major construction projects. The Superior Court, Third Judicial District, Anchorage, Peter A. Michalski, J., reversed, and Department appealed.

Holding: The Supreme Court, Winfree, J., held that statute did not apply to operator's OCIP.

Affirmed.

Opinion, 2011 WL 193592, superseded.

West Headnotes (6)

1 **Administrative Law and Procedure**
⇐Scope

When a superior court acts as an intermediate appellate court in an administrative matter, the Supreme Court reviews the merits of the agency's decision.

2 **Appeal and Error**
⇐Cases Triable in Appellate Court

The proper interpretation of a statute presents a question of law that the Supreme Court reviews de novo on appeal, adopting the rule of law most persuasive in light of precedent, reason, and policy.

3 **Insurance**
⇐Miscellaneous Entities
Insurance
⇐Employers' Liabilities
Workers' Compensation
⇐Private Insurance

Owner-controlled insurance program (OCIP) issued to oil pipeline operator, providing workers' compensation and general liability coverages for operator and contractors that provided operator non-construction services including warehousing, mineral mining, security, medical and emergency response, catering, oil spill prevention, and surveying, was not governed by statute providing that owner-controlled insurance programs shall be allowed only for major construction projects, since statute, by its own terms, applied only to construction OCIPs and not non-construction OCIPs; statute applied to OCIPs procured on behalf of a person engaged contractor services for the purpose of working on a construction project. AS 21.36.065 (2005).

4 **Statutes**
⇐Intention of Legislature
Statutes
⇐Policy and purpose of act
Statutes
⇐Meaning of Language

In interpreting a statute a court looks to the plain meaning of the statute, the legislative purpose, and the intent of the statute.

5 **Statutes**
⇐Intention of Legislature

Statutes
⇐Policy and purpose of act
Statutes
⇐Meaning of Language

Courts decline to mechanically apply the plain meaning rule when interpreting statutes, adopting instead a sliding scale approach, under which the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be, even if a statute is facially unambiguous.

6 **Statutes**
⇐Intention of Legislature
Statutes
⇐Policy and purpose of act
Statutes
⇐Meaning of Language

When interpreting a statute, a court applies a sliding scale approach, under which the plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be, even if a statute is facially unambiguous.

Attorneys and Law Firms

***593** Signe P. Andersen, Chief Assistant Attorney General, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for Appellant/Cross–Appellee.
Kenneth P. Eggers and Sarah A. Badten, Groh Eggers, LLC, Anchorage, for Appellee/Cross–Appellant.

Before: CARPENETI, Chief Justice, FABE, WINFREE, CHRISTEN, and STOWERS, Justices.

Opinion

594 *OPINION

WINFREE, Justice.

I. INTRODUCTION

Alyeska Pipeline Service Company (Alyeska) contracted with the Liberty Mutual Group (Liberty Mutual) to write an owner-controlled insurance program (OCIP). The State of Alaska, Department of Commerce, Community and Economic Development, Division of Insurance (Division), issued a cease and desist order stating that Alyeska's OCIP was prohibited by statute. An administrative law judge determined that "the Liberty Mutual program does not fit within the definition of an 'owner controlled insurance program' that the statute supplies." The Division's deputy director, acting as the final agency decision-maker, reversed the administrative law judge's decision. On appeal the superior court reversed the deputy director's decision. Because the superior court correctly ascertained the statute's limits, we affirm the superior court's decision.

II. FACTS AND PROCEEDINGS

A. Facts

1. Alyeska's Non–Construction OCIP

Alyeska transports crude oil through the Trans–Alaska Pipeline System. Alyeska contracted with Liberty Mutual to write an OCIP to "include[ ] workers compensation and general liability coverages" for Alyeska and several contractors,[1] effective for three years beginning January 2002. Alyeska renewed the program for another three years effective January 2005.

Six contractors enrolled in Alyeska's program. These contractors provided a variety of services for Alyeska, including warehousing, mineral mining, security, medical and emergency response, catering, oil spill prevention, and surveying. It is undisputed that the contractors' work is properly characterized as maintenance and support—not construction. For this reason, we refer to Alyeska's OCIP as a "non-construction OCIP."

2. Alaska Statute 21.36.065

In 2005 the legislature enacted AS 21.36.065 which, in subsection (a), states that "[a]n owner controlled insurance program or a contractor controlled insurance program ... shall be allowed only for a major construction project."[2] The statute defines "owner controlled insurance program" in relevant part as "an insurance program where one or more insurance policies are procured on behalf of a project owner,"[3] and in turn defines "project owner" as "a person who, in the course of the person's business,

engages the service of a contractor for the purpose of working on a construction project."[4] The statute became effective on June 25, 2005.[5]

The legislative history of AS 21.36.065 is undisputed. In March 2005 the House Labor and Commerce Committee met to discuss House Bill 147, a bill generally relating to insurance regulation.[6] Mike Combs, a representative of Alaska Independent Agents and Brokers, Inc., suggested that the Committee adopt his trade group's proposed amendment "to clarify its position regarding [OCIPs]."[7] According to the Committee Minutes, Combs testified that "there are several problems with using [the OCIP] insurance method for maintenance and repair programs" and that "[t]he [proposed] amendment would limit ***595** [OCIPs] to construction projects in excess of $50 million only and not include any repair or maintenance operations."[8] Representative Tom Anderson, Committee Chair, stated the Committee would consult with the Division's director and consider Combs's proposal.[9]

When the House Labor and Commerce Committee met again, Chairperson Anderson introduced a committee substitute for House Bill 147 containing the amendment language Combs proposed.[10] After explaining that the Division "is ultimately the bill's sponsor" he asked the Division's director to "give ... a closing with this amendment, what it does and the change to the bill...."[11] The Division's director testified with respect to OCIPs:

> There have been times when that ability [to have an OCIP] has been attempted to expand into other than construction projects, for example, maintenance projects, ongoing things that in our mind OCIPs were never intended to do, and our concern with the ability to do that for things other than large, one-time construction projects is that it takes one premium out of an already fragile marketplace.[12]

The Committee approved the committee substitute.[13]

The Division's director also testified before the House Finance Committee.[14] The director stated that OCIPs "are designed for major construction projects" and that the proposed amendment "is a prohibition against expanding them into other types of things than large construction projects."[15] The amendment was adopted and the bill was moved out of committee.[16]

The Division's director made additional statements about OCIPs before two Senate committees. The director expressed concern to the Senate Labor and Commerce Committee about OCIPs expanding into non-construction projects.[17] Similarly at the Senate Finance Committee meeting the director testified that OCIPs were appropriate only for large construction projects and not for non-construction projects.[18] Senator Lyda Green, the Committee co-chairperson, understood the director's testimony to mean that an OCIP " 'should not morph' into an ongoing insurance program."[19]

The legislative history includes neither committee reports nor statements by non-committee-member legislators indicating the full legislature's intent in passing the final bill.

B. Proceedings

In November 2006 the Division issued Liberty Mutual a cease and desist order listing seven compliance issues. Count One stated that Alyeska's OCIP was prohibited under Alaska law because "[i]n its present form, the OCIP is designed to cover on-going maintenance and is not restricted to a large construction project in violation of AS 21.36.065." Liberty Mutual requested an administrative hearing. The administrative law judge granted Alyeska's request to intervene.[20]

***596** Alyeska filed a motion for partial summary adjudication arguing that (1) by its express language AS 21.36.065 applies only to construction OCIPs and therefore does not apply to its non-construction OCIP, and (2) even if AS 21.36.065 did govern non-construction OCIPs, Alyeska's OCIP falls within a statutory exception.[21]

The administrative law judge granted Alyeska's motion, determining "the Liberty Mutual program does not fit within the definition of an 'owner controlled insurance program' that the statute supplies." Based on the statute's plain language, the administrative law judge concluded AS 21.36.065 "addresses only construction OCIPs," and therefore does not govern Alyeska's non-construction OCIP. The administrative law judge was not persuaded that the statute's legislative history compelled a different conclusion. According to the administrative law judge, the legislation proposed by the trade group "was misdrafted. While the surrounding documentation makes perfectly clear the group's intent to 'prohibit[ ] the use of OCIP[s] ... outside the construction industry,' the group's private attorney wrote language that instead defined non-construction OCIPs out of the scope of the legislation, leaving them unregulated."

After the Division and Alyeska filed proposals for agency action,[22] the Division's deputy director, acting as the final agency decision-maker, issued a decision and final order in October 2007. Determining that the statute is ambiguous and that the legislative history supported the Division's position, the deputy director found that Alyeska's OCIP is governed by and in violation of AS 21.36.065. The deputy director reversed the administrative law judge's decision with respect to AS 21.36.065 and affirmed Count One of the cease and desist order.

Alyeska then appealed to the superior court, which determined the deputy director's decision was "contrary

to the plain language of the statute." The superior court reasoned that notwithstanding the legislative history, AS 21.36.065 restricts only construction OCIPs. It stated that:

> It [is] one thing to use legislative history to correct a drafting error when that error is obvious or the error imposes a restriction on the persons subject to the legislation that was never intended by the legislature. It is another to expand a restriction to persons plainly excluded by language of the statute. In these instances, the remedy must lie with the legislature, not the court.

The superior court also rejected Alyeska's argument that its OCIP falls within two exceptions under AS 21.36.065(b).

The Division appeals regarding the application of AS 21.36.065(a). Alyeska cross-appeals regarding the application of an exception under AS 21.36.065(b).

III. STANDARD OF REVIEW

1 **2** When a superior court acts as an intermediate appellate court in an administrative matter, we review the merits of the agency's decision.[23] The proper interpretation of a statute presents a question of law that we review de novo, "adopting the rule of law most persuasive in light of precedent, reason, and policy."[24]

IV. DISCUSSION

3 The Division claims the superior court erred because AS 21.36.065 applies to non-construction OCIPs. The Division makes three arguments in support of its position. First, the Division contends the court failed to interpret AS 21.36.065 in conjunction with AS 21.36.190(f).[25] Second, the ***597** Division claims the court failed to interpret AS 21.36.065 in a manner consistent with the legislature's intent, as evidenced by the statute's legislative history. Third, the Division argues the court's interpretation does not comply with the maxim *expressio unius est exclusio alterius.*[26]

4 **5** **6** In interpreting a statute we "look to the plain meaning of the statute, the legislative purpose, and the intent of the statute."[27] We have declined to mechanically apply the plain meaning rule when interpreting statutes, adopting instead a sliding scale approach: "The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."[28] We apply this sliding scale approach even if a statute is facially unambiguous.[29] Canons of interpretation can also provide useful aids in our efforts to interpret a statute.[30]

Based on its plain language, AS 21.36.065 does not govern non-construction OCIPs such as Alyeska's. When the statutory definitions provided in AS 21.36.065(c) are substituted for the relevant terms in AS 21.36.065(a), the statute provides:

> An insurance program [where one or more insurance policies are procured on behalf of a person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project ... for the purpose of insuring that person] ... shall be allowed only for a major construction project.

Through its incorporation of specifically defined terms, the statute simply was not drafted to govern non-construction OCIPs.[31] The Division argues that extratextual sources or canons of interpretation reveal a legislative intent requiring us to disregard the statute's plain language. Alyeska argues that the Division seeks to reform the statute, not interpret it. We agree with Alyeska. Taking into account AS 21.36.190(f) and *expressio unius,* AS 21.36.065 remains unsusceptible to the Division's interpretation.[32] On the record before us, including the limited legislative committee history, we must conclude that the statute was either (1) intended by the full legislature to govern only construction OCIPs,[33] or (2) misdrafted through reliance ***598** on the industry trade group's proposal. Even if the latter, we will not invade the legislature's province by extending the plain language of AS 21.36.065 to govern non-construction OCIPs.[34] The Division's remedy lies with the legislature, not this court.[35]

V. CONCLUSION

We AFFIRM the superior court's decision.[36]

Footnotes

1 Contractors typically acquire insurance to protect themselves and others who might be injured while working on a project. Jacqueline P. Sirany & James Duffy O'Connor, *Controlled Construction Insurance Programs: Putting a Ribbon on Wrap-ups,* 22 CONSTRUCTION LAW. 30, 30 (2002). An OCIP "centralizes the insurance program for all of the construction entities" and is "managed by one for the use and benefit of all." *Id.* As the administrative law judge explained, the purpose of Alyeska's OCIP "is to save contractor insurance costs that would otherwise be billed or passed through to Alyeska. By purchasing coverage collectively, Alyeska achieves cost savings."

2 AS 21.36.065(a); ch. 1, § 23, SLA 2005.

3 AS 21.36.065(c)(4).

4 AS 21.36.065(c)(5).

5 Ch. 1, SLA 2005.

6 Committee Minutes, House Labor & Commerce Committee hearing on House Bill (HB) 147 (Mar. 18, 2005).

7 *Id.* (testimony of Combs).

8 *Id.*

9 *Id.* (statement of Chairperson Anderson).

10 *See* Transcript of House Labor & Commerce Committee Meeting, at 1–2, (Mar. 30, 2005) (statement of Chairperson Anderson).

11 *Id.* at 4.

12 *Id.* at 7–8 (testimony of Division Director Linda Hall).

13 Committee Minutes, House Labor & Commerce Committee hearing on HB 147 (Mar. 30, 2005).

14 Transcript of House Finance Committee Meeting, at 1, 10 (Apr. 15, 2005).

15 *Id.* at 11–12 (testimony of Division Director Hall).

16 *Id.* at 12.

17 Committee Minutes, Senate Labor & Commerce Committee, at 7 (Apr. 12, 2005) (testimony of Division Director Hall).

18 Committee Minutes, Senate Finance Committee, at 26–27, (May 1, 2005) (testimony of Division Director Hall).

19 *Id.* at 27 (statement of Co–Chairperson Green).

20 The Division and Liberty Mutual subsequently entered into a stipulation settling all compliance issues except those relating to Count One.

21 *See* AS 21.36.065(b)(2).

22 *See* AS 44.64.060(e) (outlining procedure for filing proposal for action with agency after administrative law judge issues decision).

23 *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.,* 171 P.3d 1110, 1115 (Alaska 2007) (citing *Alaska Trademark Shellfish, LLC v. State,* 91 P.3d 953, 956 (Alaska 2004)).

24 *L.D.G., Inc. v. Brown,* 211 P.3d 1110, 1118 (Alaska 2009) (citing *Alaskans for Efficient Gov't, Inc. v. Knowles,* 91 P.3d 273, 275 (Alaska 2004)).

25 AS 21.36.190(f) states: "Except as provided in AS 21.36.065, an insurer, whether authorized or unauthorized, may not underwrite an owner controlled insurance program or contractor controlled insurance program. In this subsection, 'owner controlled insurance program' and 'contractor controlled insurance program' have the meanings given in AS 21.36.065."

26 *Expressio unius* is a doctrine of statutory construction, instructing "that when the legislature expressly enumerates included terms, all others are impliedly excluded." *Vanvelzor v. Vanvelzor,* 219 P.3d 184, 188 (Alaska 2009) (citing *Ranney v. Whitewater Eng'g,* 122 P.3d 214, 218–19 (Alaska 2005)).

27 *Premera Blue Cross,* 171 P.3d at 1115 (citing *W. Star Trucks, Inc. v. Big Iron Equip. Serv., Inc.,* 101 P.3d 1047, 1050 (Alaska 2004)).

28 *Gov't Emp. Ins. Co. v. Graham–Gonzalez,* 107 P.3d 279, 284 (Alaska 2005) (quoting *Muller v. BP Exploration (Alaska) Inc.,* 923 P.2d 783, 787–88 (Alaska 1996)).

29 *See Curran v. Progressive Nw. Ins. Co.*, 29 P.3d 829, 831–32 (Alaska 2001) (citing *Progressive Ins. Co. v. Simmons*, 953 P.2d 510, 516 (Alaska 1998)). *But see Benavides v. State*, 151 P.3d 332, 335 (Alaska 2006) (quoting *Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 537 (Alaska 2002)) ("*If a statute is ambiguous* 'we apply a sliding scale of interpretation ....' ") (emphasis added).

30 *See McKee v. Evans*, 490 P.2d 1226, 1230 n. 18 (Alaska 1971).

31 *Cf. Anderson v. Alyeska Pipeline Serv. Co.*, 234 P.3d 1282, 1287–88 (Alaska 2010) (interpreting "project owner" under AS 23.30.045 and emphasizing we "look first to see if the word or phrase to be construed has a specific definition") (citing *Ranney*, 122 P.3d at 218).

32 We note that AS 21.36.190(f) states " 'owner controlled insurance program' ... ha[s] the meaning[ ] given in AS 21.36.065." Because AS 21.36.190(f) incorporates the meaning given in AS 21.36.065 generally, and therefore incorporates all of the definitions in subsections .065(c)(1)–(6) and not merely subsections .065(c)(2) and (4), we reject the Division's argument that "[t]he definition of OCIP ... do[es] not include any reference to 'construction.' " Nor does *expressio unius* support the Division's position; that maxim "expresses the concept that when people say one thing they do not mean something else." 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:25 (7th ed. 2007). For the reasons stated, the language expressly adopted by the legislature does not support the Division's interpretation.

33 *See State v. Campbell*, 536 P.2d 105, 111 (Alaska 1975), *overruled on other grounds by Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978) ("At some point, it must be assumed that the legislature means what it says.").

34 *See Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007) (quoting *Campbell*, 536 P.2d at 111) (noting that separation of powers " 'prohibits this court from enacting legislation or redrafting defective statutes' "); *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978) (declining to save overbroad statute "because in doing so we would be stepping over the line of interpretation and engaging in legislation"); *see also* 73 AM.JUR.2D*Statutes* § 121 (2010) ("Generally, courts will not undertake correction of legislative mistakes in statutes notwithstanding the fact that the court may be convinced by extraneous circumstances that the legislature intended to enact something very different from that which it did enact.") (citations omitted).

35 *See Interior Cabaret, Hotel, Rest. & Retailers Ass'n v. Fairbanks N. Star Borough*, 135 P.3d 1000, 1006 (Alaska 2006) (observing legislature mistakenly deleted statutory language, realized error, and enacted new language to correct it).

36 In light of our decision we decline to address Alyeska's cross-appeal.

End of Document

251 P.3d 990
Supreme Court of Alaska.

Carol CALVERT, Appellant,
v.
STATE of Alaska, DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT, EMPLOYMENT SECURITY DIVISION, Appellee.

No. S–13721. | April 15, 2011.

Synopsis

Background: Claimant quit her job and filed for unemployment benefits. The Department of Labor's unemployment insurance claim center determined that claimant was statutorily ineligible for unemployment benefits, and she appealed. The Department of Labor's Appeal Tribunal affirmed the claim center's determination, and claimant appealed. The Commissioner of the Department of Labor affirmed, and claimant appealed. The Superior Court, Third Judicial District, Anchorage, Stephanie E. Joannides, J., affirmed, and claimant appealed.

Holdings: The Supreme Court, Christen, J., held that:
1 claimant did not show that her job was unsuitable;
2 because claimant did not discuss her transportation problems with employer, she did not exhaust all reasonable alternatives prior to quitting and, therefore, left without good cause;
3 claimant did not show good cause for leaving work on basis of personality conflicts; and
4 Department of Labor did not neglect legal duty or deny claimant due process by not informing her of its policies more directly.

Affirmed.

West Headnotes (39)

1 **Administrative Law and Procedure**
Substantial evidence

When reviewing administrative decisions, appellate courts apply substantial evidence test to questions of fact.

2 **Administrative Law and Procedure**
Law questions in general

When reviewing administrative decisions, appellate courts apply reasonable basis test for questions of law involving agency expertise, and when no expertise is involved, questions of law are reviewed under the substitution of judgment test.

3 **Administrative Law and Procedure**
Legislative questions; rule-making

The reasonable and not arbitrary test applies to appellate review of administrative regulations.

4 **Unemployment Compensation**
Voluntary abandonment of employment

Whether unemployment compensation claimant voluntarily quit suitable work for good cause would be reviewed as a question of fact. AS 23.20.379(a)(2).

5 **Administrative Law and Procedure**
Inferences or conclusions from evidence in general
Administrative Law and Procedure
Substantial evidence
Administrative Law and Procedure
Weight of evidence

In applying the substantial evidence test to question of fact, appellate court, when reviewing administrative decision, must determine whether there exists such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; appellate court does not reweigh the evidence or choose between competing inferences.

6 **Administrative Law and Procedure**
⇐Constitutional questions
Administrative Law and Procedure
⇐Law questions in general

Due process and evidentiary arguments in the administrative context raise questions of law which appellate courts review de novo. U.S.C.A. Const.Amend. 14.

7 **Unemployment Compensation**
⇐Good cause in general
Unemployment Compensation
⇐Suitability of work in general

Unemployment compensation claimant who voluntarily leaves unsuitable work leaves with good cause and need not make a separate showing of good cause to quit. AS 23.20.379(a).

8 **Unemployment Compensation**
⇐Good cause in general
Unemployment Compensation
⇐Suitability of work in general

Factors relevant to suitability are distinguishable from those affecting good cause, in that "suitability" is based on circumstances surrounding the job, and usually involves a comparison of the offered work with other similar work in the locality, whereas "good cause" is based on personal circumstances surrounding unemployment compensation claimant and not directly related to the conditions of the work. AS 23.20.379(a).

9 **Unemployment Compensation**
⇐Good cause in general
Unemployment Compensation
⇐Suitability of work in general

While unemployment compensation claimant may leave unsuitable work without further efforts to remedy the situation, establishing good cause for leaving work that is otherwise suitable requires a two-step showing: not only must the underlying reason for leaving work be compelling, but claimant must exhaust all reasonable alternatives before leaving the work. AS 23.20.379(a).

10 **Unemployment Compensation**
⇐Compensation and payment thereof
Unemployment Compensation
⇐Working Conditions or Assignments
Unemployment Compensation
⇐Suitability of work in general
Unemployment Compensation
⇐Voluntary abandonment of employment

Although suitability of work may not be presumed, it need not be analyzed in all unemployment compensation cases, and instead, suitability of work must be examined if: (1) claimant objects to the suitability of wages, hours, or other conditions of work; (2) claimant specifically raises the issue of suitability of work; or (3) facts appear during investigation of claimant's claim that put the Department of Labor on notice that wages or other conditions of work may be substantially less favorable than prevailing conditions for similar work in the locality. AS 23.20.385.

11 **Unemployment Compensation**
⇐Good cause in general
Unemployment Compensation
⇐Suitability of work in general

Good cause for leaving work depends on the precipitating event and the other reasons for unemployment compensation claimant's quitting are irrelevant, and by contrast, the determination of whether work is unsuitable is a separate inquiry that is not similarly limited. AS 23.20.379(a).

12 **Unemployment Compensation**

Suitability of work in general

The fact that a circumstance did or did not precipitate unemployment compensation claimant's decision to quit is not relevant to whether the circumstance may render work unsuitable. AS 23.20.379(a), 23.20.385.

13 **Unemployment Compensation**
Length of commute in general

Unemployment compensation claimant's transportation issues did not give rise to a question of suitability of work; claimant's ten-mile commute was not unreasonably distant by any objective measure, she had easily made the commute by bike during the previous summer and would have had no problem getting to work at other times of year if her means of transportation had been less limited, employer had not asked claimant to relocate or done anything else to change the distance she had to travel to get to work, and claimant's difficulties stemmed from personal circumstances and not from an inherent characteristic of her job. AS 23.20.379(a), 23.20.385.

14 **Unemployment Compensation**
Problems with co-workers
Unemployment Compensation
Dangerousness of work; safety issues

Workplace hostility and safety breaches that unemployment compensation claimant described in her Voluntary Leaving Statement and brief could be considered circumstances surrounding the job, rather than merely personal circumstances surrounding claimant, and thus, hearing officer was obligated to analyze the suitability of claimant's job before determining that she had failed to show good cause for quitting. AS 23.20.379(a), 23.20.385.

15 **Unemployment Compensation**
Criticism by or problems with supervisor
Unemployment Compensation
Problems with co-workers
Unemployment Compensation
Dangerousness of work; safety issues

Unemployment compensation claimant did not show that her job was unsuitable; the level of hostility claimant described, while no doubt uncomfortable, did not rise to the level of unsuitability, claimant's personality conflicts with manager did not pose a risk to her health, safety, and morals, claimant described tensions of the type that commonly develop in a workplace as a result of poor communication and the suspicion that coworkers are receiving preferential treatment, and single incident of unsafe practices did not indicate health and safety risks sufficient to demonstrate unsafe conditions rendering work unsuitable. AS 23.20.379(a), 23.20.385.

16 **Unemployment Compensation**
Good cause in general
Unemployment Compensation
Good cause

If the work that unemployment compensation claimant has left is determined to be suitable, then claimant's eligibility for unemployment benefits depends on whether she left for good cause, and to show good cause, a claimant must demonstrate that the underlying reason for leaving work was compelling, and that claimant exhausted all reasonable alternatives before leaving the work, and burden of demonstrating both elements of good cause is on claimant. AS 23.20.379(a).

17 **Unemployment Compensation**
Voluntary Abandonment of Employment

In order to exhaust all reasonable alternatives to quitting, unemployment compensation claimant must notify the employer of the problem and request adjustment.

1 Cases that cite this headnote

18 **Unemployment Compensation**
⇐Voluntary Abandonment of Employment
Unemployment Compensation
⇐Good cause in general

In order to exhaust all reasonable alternatives to quitting, unemployment compensation claimant must bring the problem to the attention of someone with the authority to make the necessary adjustments, describe the problem in sufficient detail to allow for resolution, and give the employer enough time to correct the problem, and at the same time, claimant is not expected to do something futile or useless in order to establish good cause for leaving employment.

1 Cases that cite this headnote

19 **Unemployment Compensation**
⇐Good cause in general

Whether unemployment compensation claimant has shown good cause for quitting is to be analyzed in reference only to the event that directly led claimant to quit and not to any other events or circumstances.

20 **Unemployment Compensation**
⇐Good cause in general

First element of good cause requires that unemployment compensation have a compelling reason for leaving work, and in contrast to the requirements for determining suitability, there is no requirement that claimant's reasons for leaving work be connected with the work; either work-connected or personal factors may present sufficiently compelling reasons. AS 23.20.379(a).

21 **Unemployment Compensation**
⇐Transportation Issues

Unemployment compensation claimant's transportation problems provided a compelling reason to quit; actual mileage from claimant's home to work was not unusual, but the time and expense involved in her commute were significant, claimant's bike was gradually breaking down to the point where her commute took an hour and a half each way, and taxi fare was prohibitively expensive. AS 23.20.379(a).

22 **Unemployment Compensation**
⇐Transportation Issues

Because unemployment compensation claimant did not discuss her transportation problems with her employer or request an adjustment to her work schedule, she did not exhaust all reasonable alternatives prior to quitting and, therefore, left without good cause. AS 23.20.379(a).

23 **Unemployment Compensation**
⇐Voluntary Abandonment of Employment
Unemployment Compensation
⇐Working Conditions or Assignments

Employer's limited authority or expressed refusal to accommodate unemployment compensation claimant can establish that requesting an adjustment to work conditions would be futile; if the employer has already made it known that the matter will not be adjusted to claimant's satisfaction, or if the matter is one which is beyond the power of the employer to adjust, then claimant is not expected to perform a futile act.

24 **Unemployment Compensation**
⇐Raising contentions below; preservation of claim; exhaustion

Employee's claim that unemployment compensation hearing officer relied on "hearsay" to find that she had not exhausted her alternatives to quitting work was waived, for purposes of appeal, since employee raised this argument for the first time in the superior court.

25 **Unemployment Compensation**
⇐Hearsay

In the absence of a hearsay objection, hearsay evidence is competent evidence which may be considered in unemployment compensation proceedings.

26 **Administrative Law and Procedure**
⇐Judicial procedure; applicability of rules of evidence
Administrative Law and Procedure
⇐Admissibility
Administrative Law and Procedure
⇐Particular Questions, Review of

The strict rules of evidence governing admissibility of hearsay in judicial proceedings do not apply to administrative hearings, and appellate court will not reverse an administrative judgment based on hearsay unless the hearsay was inherently unreliable or jeopardized the fairness of the proceedings.

27 **Unemployment Compensation**
⇐Harmless error

Any error in unemployment compensation hearing officer's admitting witness's hearsay testimony that manager had reported attempting to call claimant after she quit was harmless; hearing officer relied on witness's testimony primarily in support of the general finding that claimant never informed her employers of her transportation problems, a finding that was amply supported by other evidence in the record, including claimant's own testimony, rather than as evidence of manager's willingness to accommodate claimant.

28 **Unemployment Compensation**
⇐Change in time of employment, shift, or days worked

To the extent that the change in unemployment compensation claimant's work schedule motivated her decision to quit, it did not constitute a compelling reason.

29 **Unemployment Compensation**
⇐Change in time of employment, shift, or days worked

Change in unemployment compensation claimant's hours, shifts, or days of work initiated by the employer is seldom a sufficient breach of the contract of hire to give a compelling reason to quit.

30 **Unemployment Compensation**
⇐Reduction or increase in number of hours worked in general

Unemployment compensation claimant who leaves work merely because the work is less than full-time has voluntarily left work without good cause, and a reduction in hours is not good cause for voluntarily leaving work, even where that reduction results in reduced earnings.

31 **Unemployment Compensation**
⇐Problems with co-workers

Unemployment compensation claimant's dislike for co-worker did not constitute good cause for leaving work; co-worker's behavior toward claimant did not endanger her health and, if anything, decreased the amount of work demanded of her, and it did not rise to the level of abuse.

32 **Unemployment Compensation**
⇐Problems with co-workers

Even if unemployment compensation claimant's personality conflicts with co-workers qualified as "abuse," she made only limited efforts to remedy the situation, and because claimant was required to take more active steps to exhaust her alternatives before quitting and she failed to do so, claimant did not show good cause for leaving work on basis of personality conflicts; claimant spoke to manager about reducing her hours but never directly asked him to address the issue of personality conflicts and never described the full extent of her conflicts with co-worker, and by her own admission, claimant never explicitly sought a remedy for her problem.

33 **Unemployment Compensation**
⇐Raising contentions below; preservation of claim; exhaustion

Because unemployment compensation claimant's due process arguments were raised for the first time in her appeal to the superior court, rather than in her initial post-hearing appeal to the Commissioner of the Department of Labor, they were waived for purposes of appeal, and similarly, claimant's argument that the hearing officer improperly admitted hearsay evidence was waived, for purposes of appeal, because she raised it for the first time on appeal to the superior court. U.S.C.A. Const.Amend. 14.

34 **Unemployment Compensation**
⇐Bias of ALJ

To show the bias of unemployment compensation hearing officer, a party must demonstrate that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence.

35 **Unemployment Compensation**
⇐Matters related to compensation proceedings

Unemployment compensation claimant failed to demonstrate bias sufficient to overcome the presumption of the hearing officer's impartiality; claimant did not show that the hearing officer was predisposed to find against her, claimant's assertion that hearing officer selected evidence to support her findings was insufficient to show actual bias, hearing transcript did not suggest that hearing officer interfered in any way with the presentation of evidence, and hearing officer's questions were thorough and objective.

36 **Administrative Law and Procedure**
⇐Substantial evidence
Administrative Law and Procedure
⇐Weight of evidence

In applying the substantial evidence test to review an administrative determination, a reviewing court may not reweigh evidence.

37 **Unemployment Compensation**
⇐Voluntary abandonment of employment

Superior court did not reweigh the evidence when it relied on the hearing officer's findings for its conclusion that there was no evidence that the work was inconsistent with unemployment compensation claimant's physical capability, training, experience, earning capacity, or skill and that the work was therefore suitable.

38 **Unemployment Compensation**
⇐Proceedings

Unemployment compensation had notice of the Department of Labor's basic eligibility requirements and directions for accessing additional information, both prior to her Appeal Tribunal Hearing and throughout the appeals process; Department's Wage and Hour Information brochure included detailed information about the relevant statutes and regulations, as well as directions for accessing past unemployment insurance appeals decisions

online, and the "Voluntary Leaving Statement" that claimant filled out and submitted after she filed for unemployment benefits gave notice to claimants that they had to show reasons for quitting so compelling as to leave no reasonable alternative.

39 **Constitutional Law**
Unemployment compensation
Unemployment Compensation
Proceedings

Department of Labor did not neglect a legal duty or deny unemployment compensation claimant due process by not informing her of its policies more directly; all of the statutes, regulations, and internal policy documents governing eligibility for unemployment insurance benefits were publicly available documents that were easily accessible and identified in Department-published materials, and claimants would be presumed to be familiar with the provisions of those documents. U.S.C.A. Const.Amend. 14.

Attorneys and Law Firms

***994** Carol Calvert, pro se, Soldotna, Appellant.
Erin Pohland, Assistant Attorney General, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for Appellee.

Before: CARPENETI, Chief Justice, FABE, WINFREE, CHRISTEN, and STOWERS, Justices.

Opinion

OPINION

CHRISTEN, Justice.

I. INTRODUCTION

Carol Calvert quit her job at a seafood processing plant and filed for unemployment insurance benefits. Her reasons for quitting included difficulties with transportation to work and personality conflicts with coworkers. The Department of Labor's unemployment insurance claim center determined that Calvert voluntarily left work without good cause; as a result, she was statutorily ineligible for unemployment benefits for the first six weeks of her unemployment, and her maximum potential benefits were reduced by three times the weekly benefit amount.

Calvert appealed to the Department of Labor's Appeal Tribunal where the assigned Hearing Officer found that transportation problems were the "precipitating event" in Calvert's decision to quit. The Hearing Officer concluded that, although Calvert's transportation problems may have provided a compelling reason to quit, Calvert had not "exhaust[ed] all reasonable alternatives prior to quitting," as is required in order to show good cause. The Hearing Officer affirmed the claim center's determination.

The Commissioner of the Department of Labor affirmed the Hearing Officer's decisions, as did the superior court. For the reasons explained below, we affirm.

II. FACTS AND PROCEEDINGS

Carol Calvert was a seasonal employee of Snug Harbor Seafoods in Kenai. She worked there for the first time during the summer of 2007. She was rehired on March 10, 2008, and quit on April 6, 2008. She filed for unemployment benefits on April 6.

The Department of Labor's (Department) unemployment insurance claim center sent Calvert a "Voluntary Leaving Statement" to complete and return in order to provide additional information about her separation from employment. Calvert returned the Voluntary Leaving Statement on May 9. In her explanation of why she quit, she cited conflicts that had begun during the 2007 season with a supervisor, Mike, and his girlfriend, ***995** Hope (also a Snug Harbor employee). Calvert alleged that the conflict began when the plant manager asked Calvert to run the "gear department" and planned to move Hope out of her position in that department. Calvert also described her disappointment at the March 2008 departure of Brandi O'Reagan, who was the plant manager during the 2007 season and who had encouraged Calvert to return for the 2008 season. Calvert reported that Mike cut her hours immediately after O'Reagan left, allegedly in retaliation for Calvert's conflicts with Hope. Calvert was also concerned that Richard King, the plant manager who replaced O'Reagan, was aligned with Mike and Hope, and shared their hostility toward her.

Calvert also described transportation difficulties. She

biked ten miles each way to get to Snug Harbor, so she required ample notice of the start times for her shifts. Work shifts were announced via a "hotline." In 2007, shifts were posted so there was typically a three-hour lead time. According to Calvert, in 2008 the hotline was updated less frequently, later in the day, and sometimes as little as half an hour in advance. Calvert argued, "[i]t became a cruel guessing game whether [she] should start for work on [her] bike." She found the local public transit agency to be "relentlessly uncooperative" in arranging transportation, her bike broke, and she anticipated increased difficulties associated with springtime road construction on her route to work.

In addition, Calvert expressed concern on her Voluntary Leaving Statement about the new plant manager's attitude toward workplace safety. During the 2007 season, a co-worker standing next to Calvert was "badly shocked" after water hit an electric box. When Calvert was asked later that season to coil an extension cord lying in several inches of water, she expressed her safety concerns in King's presence. According to Calvert, King "looked at [her], turned his back on [her], and has not spoken to [her] since," except when she approached him about her hours.

The Department's claim center contacted Calvert on May 13 to ask what "final incident" caused her to quit. Calvert reiterated the reasons cited in her Voluntary Leaving Statement:

> There was really no final incident, just a compilation of everything that happened, the old branch manager quitting without telling me, and then problems with the new manager. I quit because my hours week [sic] being cut, and problems with co-workers, and transportation problems.... I talked to the owner my last day about them cutting my hours, and he didn't seem like he wanted to do anything about it.... I don't know if it was any one thing, just everything piled together.

On May 14, the claim center issued a notice of determination finding that Calvert "quit work at Snug Harbor Seafoods because [she was] unhappy with the new manager's supervisory style and apportionment of work." The claim center reasoned that because Calvert had not provided information demonstrating that the manager's actions were "hostile or discriminatory," she had not established "good cause for leaving." As a result, Calvert was denied waiting-week credit for the first week of employment and benefits for the next five weeks,[1] and her maximum potential benefits were reduced by three times the weekly benefit amount.[2]

On June 16, Calvert filed a Notice of Unemployment Insurance Appeal with the Department of Labor's Anchorage Appeal Tribunal. In her appeal, she argued: (1) the claim center did not establish that the work she left was "sufficient and suitable," and she was therefore not required to show good ***996** cause for leaving it; (2) "good cause" for leaving the job existed in any case based on Calvert's insufficient work hours, transportation issues, lack of notice by the employer regarding work hours, and the patterns of "[w]orkplace violence" she experienced; and (3) the Department of Labor has a duty to better inform employees on the rules and requirements for unemployment insurance benefits. In addition to her brief, Calvert submitted a request for subpoenas to the Appeal Tribunal.

Hearing Officer Kathy A. Thorstad conducted the Appeal Tribunal hearing telephonically on July 29, 2008. The Hearing Officer observed that, under AS 23.20.379, a person who quits a job without good cause is ineligible for full unemployment insurance benefits. She also explained that the burden of showing good cause is on the employee seeking benefits and that a worker has "good cause" when she has a compelling reason for leaving work and has exhausted all reasonable alternatives to quitting.

During the hearing, the Hearing Officer heard testimony from Calvert, Snug Harbor plant manager King, and the president of Snug Harbor, Paul Dale. Calvert testified that she quit her job on April 6 because she was "upset all day long" and made her decision "based on the amount of stress ... [and] based on the problems [she] was having with transportation." In response to the Hearing Officer's questions about her transportation difficulties, Calvert stated that she had not realized that biking to work "would be much more difficult" during March than it had been when she worked at Snug Harbor the previous summer. She noted that her bike broke down and weather conditions were bad in March and April, forcing her to rely on the Central Area Rural Transit System (CARTS). CARTS requires its passengers to book trips hours in advance, which was difficult for Calvert given her unpredictable work schedule and King's habit of posting the hours for the following day after 6:00 p.m., when CARTS had stopped answering its phones for the evening. According to Calvert, her only other transportation option was to take a taxi, which she stated would not be cost-effective given the amount of money she was making at her job.

The Hearing Officer also questioned Calvert about her work-related stress. Calvert stated that Mike cut her hours after O'Reagan's departure and told her that the decision had been sanctioned by Dale. Calvert noted that she had not asked Mike why her hours were being cut but later asked King, the plant manager, who told her he would "see that the work got done." She also recounted a subsequent conversation with Dale, who told her he had not authorized Mike to cut her hours. Calvert told the Hearing Officer that she did not directly ask Dale to address the situation with Mike, explaining that she

"didn't feel that it was necessary" because she assumed someone in Dale's position would "look into it and ... find out exactly what happened." Calvert also stated that she did not directly confront Mike after learning that Dale had not authorized the reduction in her hours.

When the Hearing Officer asked Calvert what efforts she made to keep her job, Calvert responded that she tried to get CARTS to provide her with transportation to work and that she asked King and Dale about the reduction to her hours, "and that's about it." The Hearing Officer asked Calvert whether she explicitly informed King or Dale that Mike's "messing with [her] hours was creating enough of a hardship that [she] would not be able to continue to work if it wasn't corrected"; Calvert confirmed that she did not. The Hearing Officer then asked Calvert whether it was her transportation difficulties or her problems with Mike that caused her to quit. Calvert answered, "It's both of them.... I don't know if one ... had been taken away, if the other one could have been solved and vice versa." The Hearing Officer rephrased her question and asked, "If CARTS had not been giving you any difficulty on that day, would you still have quit your job?" Calvert replied, "I think I would have gone to work, yes. I think I would have given it another week.... I might have complained harder."

Plant manager King testified that he became aware of Calvert's problems with Mike after Mike reported having had a confrontation ***997** with Calvert about her hours. He claimed that Calvert's impression that she was being singled out for reduced hours was incorrect, and that the company was trying to "keep hours at a minimum" based on its "limited product" in April. He also stated that he had not known why Calvert quit her job until he saw the exhibits she presented at the hearing.

Dale testified that he did not recall the conversation Calvert reported having had with him about whether Mike had been authorized to cut her hours, but that he "wouldn't dispute it" and it "sound[ed] plausible." Dale added that, after Calvert quit, he asked King "on at least four occasions" if he had contacted her "to discuss her concerns regarding employment"; King reportedly told Dale that he had left messages for Calvert but had not heard back from her. In subsequent appeals, Calvert denied receiving any calls or messages, but she did not raise this point before the Hearing Officer.

The Hearing Officer affirmed the claim center's determination. Because she found that Calvert's transportation problems were the "precipitating event" in her decision to quit, the Hearing Officer did not address Calvert's conflicts with supervisors and co-workers.[3] The Hearing Officer determined that, although the loss of transportation can create a compelling reason for a worker to quit a job, Calvert had not "exhaust[ed] all reasonable alternatives prior to quitting." She found that "[t]he claimant did not discuss her transportation problems with the employer nor did she request a possible adjustment to her work schedule which would have enabled her to use the transit system and continue working." The Hearing Officer concluded that Calvert had not established that she had "good cause for quitting suitable work." The Hearing Officer ruled that Calvert was not entitled to waiting-week benefits under AS 23.20.379.

Calvert appealed the Hearing Officer's decision to the Commissioner of the Department of Labor. In her appeal, she argued that the Hearing Officer had confused the facts; that her phone bills contradicted King's claim that he had attempted to call her after she quit; that the Hearing Officer's reliance on Calvert's testimony about her decision to quit on April 6 was "sleight of hand"; and that there had been no reason to believe talking to her employer about her transportation problems would lead to an adjustment of hours or other resolution. On October 3, 2008, the Commissioner affirmed the Hearing Officer's decision, finding that any factual errors in the decision were not prejudicial and adopting the Hearing Officer's finding that Calvert did not give Snug Harbor a chance to adjust "by making known her problems in getting to work." The Commissioner upheld the Hearing Officer's conclusion that Calvert failed to show good cause for quitting.

Calvert subsequently appealed to the superior court, which held that "[t]here was substantial evidence to support the Hearing Officer's ... conclusion that Calvert did not exhaust all reasonable alternatives before voluntarily quitting, a requirement for finding good cause." The superior court decision also found that the Department had adequately informed Calvert of the law regarding unemployment benefit eligibility. Calvert appeals.

III. STANDARD OF REVIEW

Calvert appeals the decision of the superior court, which affirmed the decisions of the Commissioner of the Department of Labor and the Appeal Tribunal for the Department of Labor. As we have noted, "when the superior court acts as an intermediate court of appeal, no deference is given to the lower court's decision"; rather, we "independently scrutinize directly the merits of the administrative determination."[4] In this case, our ***998** independent review has led us to substantial agreement with the superior court's carefully considered decision.

1 2 3 We apply four standards of review to administrative decisions. The "substantial evidence" test applies to questions of fact.[5] The "reasonable basis" test is used for questions of law involving agency expertise.[6] Where no

expertise is involved, questions of law are reviewed under the "substitution of judgment" test.[7] Finally, the "reasonable and not arbitrary" test applies to review of administrative regulations.[8]

4 5 We have held that the question of whether a person was dismissed from her job for "misconduct" (one of the grounds for disqualification for waiting-week credits under AS 23.20.379(a)(2)) is a question of fact to be reviewed under the "substantial evidence" test.[9] Consistent with that holding, whether Calvert voluntarily quit suitable work for good cause is reviewed here as a question of fact.[10] In applying this test, we must determine whether there exists "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"[11]; the court "does not reweigh the evidence or choose between competing inferences."[12]

6 "[D]ue process and evidentiary arguments raise questions of law which we will review *de novo.*"[13]

IV. DISCUSSION

A. The Unemployment Insurance Benefits Eligibility Framework

7 8 9 Under AS 23.20.379(a), a worker may be partially disqualified from receiving benefits if she "left ... suitable work voluntarily without good cause" or was "discharged for misconduct." These rules are further detailed in the Department's Benefit Policy Manual.[14] The BPM clarifies that suitability and good cause are independent inquiries. "A worker who voluntarily leaves unsuitable work leaves with good cause"[15] and need not make a separate showing of good cause to quit.[16] The factors relevant to ***999** suitability are distinguishable from those affecting good cause: "[s]uitability is based on circumstances surrounding the job, and usually involves a comparison of the offered work with other similar work in the locality.... Good cause is based on personal circumstances surrounding the claimant ... and not directly related to the conditions of the work."[17] And while a worker may leave unsuitable work without further efforts to remedy the situation, establishing good cause for leaving work that is otherwise suitable requires a two-step showing: not only must "[t]he underlying reason for leaving work ... be compelling," but "[t]he worker must exhaust all reasonable alternatives before leaving the work."[18]

B. The Hearing Officer Correctly Determined That Calvert Left Suitable Work.

1. The Hearing Officer was required to analyze the suitability of Calvert's job at Snug Harbor.

In finding that Calvert failed to establish good cause for quitting suitable work, the Hearing Officer did not explicitly discuss whether Calvert's job at Snug Harbor was suitable. Calvert argues that the hearing officer improperly "abandoned the issue of suitable work" and therefore did not correctly analyze whether she was required to show good cause for leaving. We agree that the Hearing Officer was required to analyze the suitability of Calvert's work. But we hold that the Hearing Officer's decision implicitly found that Calvert's work was suitable.

10 Alaska Statute 23.20.385 provides that the suitability of work depends on a range of factors, including whether wages, hours, or other conditions of work are substantially less favorable than prevailing conditions in the locality; the degree of risk to a claimant's health, safety, and morals; the claimant's physical fitness for the work; the distance of the work from the claimant's residence; "and other factors that influence a reasonably prudent person in the claimant's circumstances."[19] Although suitability of work may not be presumed, it need not be analyzed in all cases.[20] Suitability of work must be examined if: (1) a worker objects to the suitability of wages, hours, or other "conditions of work"; (2) a worker specifically raises the issue of suitability of work; or (3) facts appear during investigation of a worker's claim that put the Department on notice that wages or other conditions of work may be substantially less favorable than prevailing conditions for similar work in the locality.[21]

Calvert raised the issue of suitability in her initial appeal to the Appeal Tribunal, arguing that the Department "makes no claim of sufficient and suitable work from my employer." She did not provide explicit justification for the claim that her work at Snug Harbor was unsuitable, but elsewhere in her appeal and in her initial Voluntary Leaving Statement, Calvert did identify a number of concerns that might be considered objections to "conditions of work" sufficient to place the Hearing Officer on notice that conditions were potentially unfavorable. Specifically, Calvert cited safety concerns, "workplace violence," personality conflicts, and difficulties with transportation to work.

11 12 The Department contends that none of the issues Calvert raised other than transportation could render her work unsuitable ***1000** because they were not found to be the "precipitating event" that led Calvert to quit. We disagree with this reasoning. The "precipitating event" analysis described in the BPM identifies which of a worker's reasons for leaving is to be analyzed for good cause: "good cause depends on the precipitating event and the other reasons [for quitting] are irrelevant."[22] By contrast, the determination of whether work is unsuitable is a separate inquiry that is not similarly limited; if work is unsuitable, a worker has good cause to leave it without

having to make a separate showing.[23] The fact that a circumstance did or did not precipitate a worker's decision to quit is not relevant to whether the circumstance may render work unsuitable.

The Department also argues that none of the issues Calvert raised can properly be considered "conditions of work" as the term is used in the BPM. It contends that this term should be interpreted to refer not to work conditions generally, but to "an essential aspect of the job."[24] The Department argues that workplace hostility and transportation problems of the type Calvert claims are not properly categorized as "essential aspects" of a job and should instead be considered under the good cause rubric.[25]

13 We find this argument convincing as it applies to Calvert's transportation problems. The BPM provides that "[w]ork that is unreasonably distant from a worker's residence is unsuitable and the worker has good cause for leaving it."[26] The BPM illustrates this rule with a case involving a claimant whose employer assigned him to work in a community 118 miles from his home; the Commissioner found this to be an "unreasonable commuting distance" and concluded that the job was unsuitable, giving the claimant good cause for quitting.[27] But as the Department argues, there is "a subtle but logical distinction" between distance to work and personal factors affecting a commute; "[p]ersonal circumstances that render a reasonable, customary commute no longer feasible cannot make a job unsuitable." Here, Calvert's ten-mile commute was not "unreasonably distant" by any objective measure; she had easily made the commute by bike during the previous summer and would have had no problem getting to work at other times of year if her means of transportation had been less limited. And unlike the case described in the BPM, Calvert's employer had not asked her to relocate or done anything else to change the distance she had to travel to get to work. Her difficulties stemmed from personal circumstances, not from an inherent characteristic of her job at Snug Harbor; they did not give rise to a question of suitability.

14 In contrast with Calvert's transportation issues, the workplace hostility and safety breaches Calvert described in her Voluntary Leaving Statement and Appeal Tribunal brief may be considered "circumstances surrounding the job," rather than merely "personal circumstances surrounding the claimant."[28] By mentioning suitability and raising workplace hostility and safety issues, Calvert objected to conditions of her work, raised the issue of suitability, and put the Department on notice that conditions at Snug Harbor might be less favorable than standard conditions in the locality. Thus, the Hearing Officer was obligated to analyze the suitability of Calvert's job before determining ***1001** that she had failed to show good cause for quitting.

2. Calvert did not show that her job at Snug Harbor was unsuitable.

15 Although the Hearing Officer did not explicitly address the question of suitability in reviewing Calvert's appeal, her determination that Calvert "did not establish that she had good cause for quitting suitable work" implicitly concluded that Calvert's work was suitable. Upon independent review of the evidence, we agree with the Hearing Officer's implied finding that Calvert did not show that her job at Snug Harbor was unsuitable.

Calvert mentioned "workplace violence" in her written appeal to the Hearing Officer, but she neither explained what she meant by this term nor provided any evidence of "physical violence" at Snug Harbor. Construing this phrase in light of Calvert's oral testimony, we understand her to refer to workplace hostility and to the personality conflicts she had with Mike and plant manager King. We hold that the level of hostility Calvert describes at Snug Harbor, while no doubt uncomfortable, did not rise to the level of unsuitability. Calvert's personality conflicts did not pose a risk to her "health, safety, and morals."[29] And she does not claim she experienced threats or even serious verbal altercations. Rather, she describes tensions of the type that commonly develop in a workplace as a result of poor communication and the suspicion that coworkers are receiving preferential treatment based on personal relationships. Although certainly not ideal, these workplace conditions did not render Calvert's job "unsuitable."

Nor does Calvert's description of unsafe practices indicate that her work was unsuitable. The incident Calvert described in her Voluntary Leaving Statement took place in 2007. The BPM provides that "[i]f the conditions of work violate a state or federal law concerning wages, hours, safety, or sanitation, the worker has good cause for leaving, regardless of the length of time that the worker has worked under the objectionable condition."[30] Therefore, the fact that Calvert continued to work at Snug Harbor the following year does not, by itself, imply that the work was suitable. But Calvert did not describe any safety-related incidents in 2008 or offer evidence that unsafe practices were an ongoing condition of work. The single 2007 incident cited by Calvert does not provide evidence of health and safety risks sufficient to demonstrate unsafe conditions rendering work at Snug Harbor unsuitable in 2008.

C. Calvert Did Not Show Good Cause For Voluntarily Leaving Work.

16 If the work a claimant has left is determined to be suitable, that claimant's eligibility for unemployment insurance benefits depends on whether she left for good cause.[31] To show good cause, a worker must demonstrate that the underlying reason for leaving work was compelling, and that the worker exhausted all reasonable alternatives before leaving the work.[32] The burden of demonstrating both elements of good cause is on the worker.[33] The BPM provides that "[a] compelling reason is one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment."[34]

17 **18** The BPM further notes that "[a] reasonable and prudent worker sincerely interested in remaining at work attempts to correct any condition or circumstance that interferes with continued employment."[35] In order to exhaust all reasonable alternatives, the worker must notify the employer of the problem and request adjustment; the worker must also bring the problem to the attention of someone with the authority to ***1002** make the necessary adjustments, describe the problem in sufficient detail to allow for resolution, and give the employer enough time to correct the problem.[36] At the same time, "a worker is not expected to do something futile or useless in order to establish good cause for leaving employment."[37]

We agree with the Hearing Office that Calvert failed to exhaust alternatives to quitting and therefore did not demonstrate good cause for leaving work.

1. We analyze both transportation problems and workplace hostility as potential precipitating causes.

19 The Hearing Officer identified transportation problems as the precipitating cause of Calvert's decision to quit. The BPM provides that, where a worker gives multiple reasons for quitting, "the one reason that was the precipitating event is the real cause of the quit, with the other reasons being incidental. In such cases, good cause depends on the precipitating event and the other reasons are irrelevant."[38] In other words, whether a worker has shown good cause for quitting is to be analyzed in reference *only* to the event that directly led the worker to quit and not to any other events or circumstances.

Throughout her application for unemployment benefits and subsequent appeals process, Calvert identified two major factors—transportation obstacles and workplace hostility—in her decision to quit. During the hearing on her administrative appeal, the Hearing Officer asked Calvert whether it was her transportation difficulties or personality conflicts that caused her to quit. Calvert answered, "It's both of them ... I don't know if one ... had been taken away, if the other one could have been solved and vice versa." The Hearing Officer then asked, "If CARTS had not been giving you any difficulty on that day, would you still have quit your job?" Calvert replied, "I think I would have gone to work, yes. I think I would have given it another week.... I might have tried the new schedule. I might have complained harder." Based on this testimony, the Hearing Officer concluded that the precipitating event in Calvert's quitting was the loss of transportation, and she therefore limited her good cause analysis to transportation issues.

In her brief to our court, Calvert objects that the Hearing Officer took her words out of context, focusing on "[t]he one comment [she] elicited which was speculative, retrospective, and in conflict with prior testimony and actions." While there is no indication that the Hearing Officer's question was intentionally designed to "trick" Calvert—indeed, the question's structure simply reflected the BPM's emphasis on determining which event led a worker to "quit at [a] particular time"[39]—we nonetheless acknowledge that the Hearing Officer's question may have elicited a different answer than Calvert would have provided in response to an alternatively worded or more open-ended inquiry.[40] Therefore, we analyze both transportation problems and workplace hostility to determine whether Calvert demonstrated good cause for leaving work on the basis of either issue.

2. Calvert did not show good cause for leaving work on the basis of her transportation problems.

a. Calvert's transportation problems did provide a compelling reason to quit.

20 **21** The first element of good cause requires that a worker have a "compelling ***1003** reason" for leaving work.[41] In contrast to the requirements for determining suitability, "[t]here is no requirement that [a] worker's reasons for leaving work be connected with the work. Either work-connected or personal factors may present sufficiently compelling reasons."[42] 8 AAC 85.095 provides a limited list of factors the Department may consider in determining the existence of good cause, including those factors identified in AS 23.20.385(b). One such factor is "distance of ... available work from the claimant's residence."[43] The BPM clarifies that, for purposes of determining good cause, "[t]he actual mileage from the worker's residence to work is never the determining factor in establishing compelling reasons. It is the time and expense of commuting which must be considered."[44]

The Hearing Officer concluded in her decision that "[t]he loss of transportation can create a compelling reason for a worker to quit [his or her] job." We agree that Calvert

demonstrated that her transportation difficulties gave her a compelling reason to quit. The "actual mileage" from Calvert's home to Snug Harbor was not unusual, but the "time and expense" involved in her commute were significant: her bike was gradually breaking down to the point where her commute took an hour and a half each way, CARTS would not allow her to schedule open-ended trips or make last-minute arrangements to fit her work schedule, and taxi fare was prohibitively expensive. These facts provide substantial evidence that meets the standard for showing a compelling reason to quit: left unresolved, they would cause a "reasonable and prudent person of normal sensitivity ... to leave employment."[45]

b. Calvert did not exhaust all reasonable alternatives before leaving work due to transportation problems.

22 The Hearing Officer noted in her findings of fact that Calvert had never told her supervisor that her work schedule—and particularly the lack of notice regarding working hours—was creating transportation problems for her. The Hearing Officer also found that Snug Harbor made repeated attempts to contact Calvert after she quit and was not aware of her reasons for quitting until the hearing. The Hearing Officer concluded that, because Calvert did not discuss her transportation problems with her employer or request an adjustment to her work schedule, she did not exhaust all reasonable alternatives prior to quitting and therefore left without good cause. We agree.

Calvert argues that the primary alternative envisioned by the Hearing Officer, i.e., talking to her supervisors and seeking adjustments to her schedule, was "neither reasonable nor proved to be viable." First, she suggests that the Hearing Officer's failure to investigate why Snug Harbor's representatives (presumably King and Dale) "did not talk to [Calvert] when she brought problems to them" casts doubt on whether her employers would have been willing to accommodate her requests. Second, she contends that "her work schedule was reliant upon the schedule of everyone else" and was therefore not amenable to adjustment.[46] Finally, Calvert contends that the Hearing Officer erroneously relied upon Dale's unreliable "hearsay" report that King had attempted to contact Calvert several times after she quit, a claim that Calvert disputed in earlier stages of the proceeding.[47]

***1004 23** An employer's limited authority or expressed refusal to accommodate an employee can establish that requesting an adjustment to work conditions would be futile: "[i]f the employer has already made it known that the matter will not be adjusted to the worker's satisfaction, or if the matter is one which is beyond the power of the employer to adjust, then the worker is not expected to perform a futile act."[48] That does not appear to be the situation here. King and Dale apparently had the authority to assign work hours and adjust employee schedules. Even taking into account the limited flexibility of hours in the gear department, giving Calvert more advance notice of her hours would have significantly mitigated her transportation problems; alternatively, her supervisors may have been able to transfer her to one of the other departments at Snug Harbor where she had worked in the past.

Moreover, neither King nor Dale (or any other Snug Harbor employee) had explicitly "made it known"[49] that they would not accommodate Calvert. Calvert's claim that her employers "did not talk to [her] when she brought problems to them" seems to refer to King's and Dale's failure to follow up on her inquiries about Mike cutting her hours. But as Calvert acknowledged to the Hearing Officer, she did not actually "ask [Dale] to do anything" to address her problems with Mike or the reduction in her hours, on the assumption that to do so would be "presumptuous." When the Hearing Officer asked if Calvert told "Richard [King], Paul [Dale] or Mike that if they didn't stop messing with [her] hours, [she was] going to quit," Calvert said she had not. Nor did she ever raise the issue of her transportation difficulties. There is no indication that Calvert's inquiries about her hours were framed as complaints demanding a response, or that King and Dale would have ignored more direct requests for assistance. Although she reports general "hostility," Calvert presented no evidence beyond her own subjective belief to suggest that her employers' attitudes toward her would make them unwilling to help resolve her transportation problems had they known she was otherwise likely to quit.[50]

24 25 26 27 Calvert's claim that the Hearing Officer relied on "hearsay" to find that she had not exhausted her alternatives is also unconvincing. First, Calvert raised this argument for the first time in the superior court; we therefore consider it to have been waived.[51] Second, even if this argument had not been waived, the hearsay claim would be misplaced. Calvert did not object at the Appeal Tribunal hearing to Dale's testimony that King had reported attempting to call Calvert after she quit. "In the absence of a hearsay objection, hearsay evidence is competent evidence which may be considered."[52] Moreover, "[t]he strict rules of evidence governing admissibility of hearsay in judicial proceedings do not apply to administrative hearings, and [this court] will not reverse an administrative judgment based on hearsay unless the hearsay was inherently unreliable or jeopardized the fairness of the proceedings." ***1005** [53] Here, the admission of Dale's testimony does not appear to have "jeopardized the fairness" of Calvert's appeal proceedings. It is not clear from the Hearing Officer's decision that Dale's testimony was, in fact, used to lay a foundation for the viability of the proposed alternative.

The Hearing Officer stated in her Finding of Facts that "[a]t no time did the claimant approach the supervisor and explain that the new work schedule created transportation issues for her.... [T]he employer made repeated attempts to contact [Calvert] in an attempt to discover why she had not returned." This context suggests that the Hearing Officer relied on Dale's testimony primarily in support of the general finding that Calvert never informed her employers of her transportation problems (a finding that is amply supported by other evidence in the record, including Calvert's own testimony), rather than as evidence of Dale's and King's willingness to accommodate Calvert.

We hold that there is substantial evidence in support of the Hearing Officer's finding that Calvert failed to exhaust all reasonable alternatives to quitting on the basis of transportation problems and therefore did not show good cause for leaving suitable work.

3. Calvert did not show good cause for leaving work on the basis of workplace hostility.

a. Calvert's personality conflicts did not provide a compelling reason to quit.

28 29 30 31 Under the BPM, dislike for a fellow employee may only be considered good cause for leaving work if "[t]he worker establishes that the actions of the fellow worker subjected the worker to abuse, endangered the worker's health, or caused the employer to demand an unreasonable amount of work from the worker."[54] Mike's behavior toward Calvert did not endanger her health and, if anything, decreased the amount of work demanded of her (although with correspondingly decreased wages). Nor did it rise to the level of "abuse" as the Department has used the term in the past. Cases in which the Commissioner has found dislike of a fellow employee to be a compelling reason for quitting involve much more serious conflicts, such as threats of physical violence to the claimant.[55] To the extent that the change in Calvert's schedule motivated her decision to quit, it also did not constitute a compelling reason. "A change in [a] worker's hours, shifts, or days of work initiated by the employer is seldom a sufficient breach of the contract of hire to give a compelling reason to quit."[56] A reduction in hours is rarely considered compelling for purposes of establishing good cause: "a worker who leaves work merely because the work is less than full-time has voluntarily left work without good cause" and a "reduction in hours is not good cause for voluntarily leaving work" even where that reduction results in reduced earnings.[57]

b. Calvert did not exhaust all reasonable alternatives before leaving work due to personality conflicts.

32 Even if the personality conflicts Calvert describes were to qualify as "abuse," she made only limited efforts to remedy the situation. As we have already noted, Calvert spoke to King and Dale about Mike reducing her hours but never directly asked either of them to address the issue or, as far as the ***1006** record indicates, described the full extent of her conflicts with Mike. By her own admission, Calvert never explicitly sought a remedy for her problem. She contended that Dale and King "should have known ... what [she] was saying to them without [her] having to challenge them to do something about [her] problem." But without more information about precisely what Calvert said to her supervisors, there was little basis for a finding that they should have guessed or intuited what Calvert failed to articulate. Calvert was required to take more active steps to exhaust her alternatives before quitting; because she failed to do so, we agree with the Hearing Officer that she did not show good cause for leaving work on the basis of personality conflicts.

D. Calvert Received A Fair Hearing.

33 Calvert makes a number of arguments relating to the procedural adequacy of her administrative hearing. We review these arguments *de novo*.[58] We note at the outset that Calvert has waived a number of her due process arguments by not raising them earlier in the appeals process. For example, she argues that the Hearing Officer "[n]eglected the fair hearing principle of discovery to claimant by employer" and "declined to obtain discovery from the employer, disregarding claimant's request for it." She also contends that "[d]ue [p]rocess requires notice of evidence to be used against claimant and an appropriate amount of time to develop a challenge and answer to any information from any source" and claims that she did not have sufficient notice of the evidence to be presented at the Appeal Tribunal hearing. Because these arguments were raised for the first time in Calvert's appeal to the superior court, rather than in her initial post hearing appeal to the Commissioner, we consider them waived.[59] Similarly, Calvert's argument that the Hearing Officer improperly admitted hearsay evidence is waived because she raised it for the first time on appeal to the superior court.

1. Calvert did not demonstrate actual bias by the Hearing Officer.

34 35 Calvert alleges that the hearing was biased,

claiming that "[t]he hearing officer picked what she wanted out of the evidence and used it to try to prove her point" and that "[t]he reasonings and conclusions of the Tribunal were not fairly and impartially supported by the record." But as the Department notes in its brief, administrative officers are "presumed to be honest and impartial until a party shows actual bias or prejudgment."[60] To show the bias of a hearing officer, a party must demonstrate that the hearing officer "had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence."[61] This is a demanding standard. The United States Supreme Court has found a "probability of actual bias ... too high to be constitutionally tolerable" in cases where "the adjudicator has a pecuniary interest in the outcome" or "has been the target of personal abuse or criticism from the party before him,"[62] but not where a decisionmaker merely performs combined investigative and adjudicative functions.[63] Similarly, we have held that a hearing officer's failure to disclose his position as an AFL–CIO president during a worker's compensation hearing was insufficient to show actual or probable bias.[64]

Calvert has not presented any evidence that the Hearing Officer was predisposed to find against her. The assertion that the ***1007** Hearing Officer selected evidence to support her findings is insufficient to show actual bias. Nor does the hearing transcript suggest that the Hearing Officer interfered in any way with the presentation of evidence. The Hearing Officer's questions were thorough and objective; the only evidence she excluded was related to Calvert's efforts to find work after quitting at Snug Harbor, an issue irrelevant to the question of whether Calvert quit suitable work with good cause. Calvert failed to demonstrate bias sufficient to overcome the presumption of the Hearing Officer's impartiality.

2. The superior court did not improperly reweigh evidence.

36 **37** In applying the substantial evidence test to review an administrative determination, a reviewing court may not reweigh evidence.[65] Calvert argues that "[t]he Superior Court erred when it improperly reweighed evidence concerning transportation: Transportation problems DID present insurmountable difficulties.... This would affect the issue of suitable work." Though the meaning of this argument is somewhat unclear, Calvert seems to be referring to the superior court's conclusion that, notwithstanding Calvert's expressed concerns regarding transportation (among other issues), "the record does not support a finding that the work at Snug was unsuitable." But this statement does not suggest that the superior court "reweighed" evidence. The superior court clearly indicated that its conclusion regarding suitability was based on the record created by the Hearing Officer. And although the Hearing Officer did not explicitly address the question of suitability, her factual findings provide sufficient evidence to support the conclusion that Calvert's work was suitable. The superior court presumably relied on the Hearing Officer's findings for its conclusion that "there is no evidence that the work was inconsistent with Calvert's physical capability, training, experience, earning capacity, or skill" and that the work was therefore suitable; this did not constitute a reweighing of the evidence.

E. The Department Of Labor Did Not Fail To Inform Calvert Regarding Eligibility For Unemployment Insurance Benefits.

Calvert argues that "[t]he Department of Labor & Workforce Development neglected [its] duty" by failing to "inform the public or claimant adequately concerning its requirements for separation from employment regarding eligibility for full benefits before separation takes place." This argument reiterates Calvert's claim in her brief to the Appeal Tribunal that "[t]he DOL neglects to make known its presence [and] expectations ... regarding [unemployment insurance] benefits"[66] and that, although "[a] reasonably prudent person would believe they had been completely informed by orientation, handbook, practices, and notices posted," the materials distributed to new employees do not in fact provide sufficient information on unemployment insurance eligibility.

38 To the extent Calvert is arguing that she lacked access to the policies governing unemployment benefits eligibility, we find her argument unconvincing. The Department's Wage and Hour Information brochure, which Calvert submitted as an exhibit in her appeal to the Commissioner, includes detailed information about the relevant statutes and regulations as well as directions for accessing past unemployment insurance appeals decisions online and reviewing the BPM at Department offices. And as the Department notes, the BPM is also available online. The "Voluntary Leaving Statement" that Calvert filled out and submitted after she filed for unemployment benefits gives notice to claimants that they must show "reasons for quitting ... so compelling" as to leave "no reasonable alternative." The Hearing Officer also explained the eligibility requirements to Calvert at the start of the ***1008** Appeal Tribunal hearing. As a result, Calvert had notice of the Department's basic eligibility requirements and directions for accessing additional information, both prior to her Appeal Tribunal Hearing and throughout the appeals process.

39 To the extent Calvert contends that the Department

had a duty to inform her, while she was working, of how she might quit her job and maintain her eligibility for unemployment benefits, we find this argument equally unavailing. We have held that "[a]s a general rule, people are presumed to know the law" without being specifically informed of it.[67] The United States Supreme Court has required explicit notice of hearing procedures only where "the administrative procedures at issue were not described in any publicly available document."[68]

All of the statutes, regulations, and internal policy documents governing eligibility for unemployment insurance benefits are "publicly available documents" that are easily accessible and identified in Department-published materials, such as the Wage and Hour Information brochure and the unemployment insurance section of the Department's website.[69] Workers may be presumed to be familiar with the provisions of those documents. In this case, Calvert has not demonstrated that any circumstance prevented her from informing herself about the Department's eligibility requirements before she left work. The Department did not neglect a legal duty or deny Calvert due process by not informing her of its policies more directly.

V. CONCLUSION

We AFFIRM the decision of the superior court. Calvert did not demonstrate good cause for leaving suitable work voluntarily.

Parallel Citations

Unempl.Ins.Rep. (CCH) P 8176

Footnotes

1 Under AS 23.20.379(a)(1), "[a]n insured worker is disqualified for waiting-week credit or benefits for the first week in which the insured worker is unemployed and for the next five weeks of unemployment" if the worker left the "last suitable work voluntarily without good cause." "Waiting-week credit" refers to credit received for the initial week of unemployment, during which the worker does not immediately receive unemployment insurance benefits but still accrues benefits eligibility. *See* Alaska Department of Labor, Frequently Asked Questions: Filing for Unemployment Insurance, *available at* http://labor. state.ak.us/esd_ unemployment_insurance/faq.htm.

2 AS 23.20.379(c).

3 The Department of Labor's Benefit Policy Manual (hereinafter BPM) provides that "A worker may give two or more reasons for quitting. However, the one reason that was the precipitating event is the real cause of the quit, with the other reasons being incidental. In such cases, good cause depends on the precipitating event and the other reasons are irrelevant." Department of Labor, BPM at VL 385–2 (Nov.2009), *available at* http://labor.state.ak.us/esd_unemployment_insurance/ui-bpm.htm.

4 *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.,* 746 P.2d 896, 903 (Alaska 1987); *see also Handley v. State, Dep't of Revenue,* 838 P.2d 1231, 1233 (Alaska 1992).

5 *Handley,* 838 P.2d at 1233 (citing *Jager v. State,* 537 P.2d 1100, 1107 n. 23 (Alaska 1975)).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Smith v. Sampson,* 816 P.2d 902, 904 (Alaska 1991) (applying the substantial evidence test to the "factual determination" of whether an employee was dismissed from his job for "misconduct" for purposes of AS 23.20.379); *see also Risch v. State,* 879 P.2d 358, 363 n. 4 (Alaska 1994).

10 Though the Hearing Officer's Appeal Tribunal Decision separates its "Findings of Fact" from its "Conclusion," the conclusion section includes the Hearing Officer's finding that Calvert quit without good cause. The Hearing Officer's conclusion appears to be entirely fact-based; the determinative factual question was "whether the claimant exhausted all reasonable alternatives prior to quitting her job."

11 *Storrs v. State Medical Bd.,* 664 P.2d 547, 554 (Alaska 1983) (citing *Keiner v. City of Anchorage,* 378 P.2d 406, 411 (Alaska 1963)).

12 *Id.* (citing *Interior Paint Co. v. Rodgers,* 522 P.2d 164, 170 (Alaska 1974)).

13 *Smith,* 816 P.2d at 904; *see also Childs v. Kalgin Island Lodge,* 779 P.2d 310, 313 (Alaska 1989) (holding that findings of the

Alaska Workers' Compensation Board will not be vacated when supported by substantial evidence, but "independent review of the law is proper" where "the Board's decision rests on an incorrect legal foundation").

14 The BPM fulfills 8 AAC 85.360's mandate that "the department ... maintain a policy manual interpreting the provisions of AS 23.20 and this chapter." We have looked to the BPM to interpret AS 23.20 in the past, and continue to do so here. *See, e.g., Wescott v. State, Dep't of Labor,* 996 P.2d 723 (Alaska 2000) (adopting the BPM's criteria for determining good cause and citing the BPM throughout). The *Wescott* opinion refers to the BPM as the "Precedent Manual." The BPM is divided into eight sections: Able & Available, Evidence, Labor Dispute, Miscellaneous, Misconduct, Suitable Work, Total & Partial Unemployment, and Voluntary Leaving. Content within each section is indicated by an combination of the abbreviated section title (e.g., "VL" for Voluntary Leaving, "EV" for Evidence) and a numbered subsection (e.g., VL 385–2). Individual subsections may have different dates based on their most recent updates.

15 BPM at VL 425–1 (Nov.2009).

16 *Id.* at VL 5–2 (Apr.2004); *see also Wescott,* 996 P.2d at 726.

17 BPM at SW 5–4 to 5–5 (Aug.2008).

18 *Id.* at VL 210–1 (Oct.1999). The language of the statute and the BPM, while defining suitability and good cause as separate inquiries, creates significant overlap in the criteria applicable to each. AS 23.20.385(b), for example, identifies a single set of factors to be used "[i]n determining whether work is suitable for a claimant and in determining the existence of good cause for leaving or refusing work." Similarly, the BPM includes statements such as "work that is unreasonably distant from a worker's residence is unsuitable, and the worker has good cause for leaving it," *id.* at VL 150–2 (Nov.2010), followed by a discussion addressing distance from work primarily in terms of good cause. As a result, it can be difficult to draw a clear line between the two concepts in practice.

19 AS 23.20.385(a)-(b); *see also* BPM at VL 425–1 to 425–3 (Nov.2009).

20 BPM at EV 190.3–1 (July 1999).

21 *Id.* at VL 425–1 (Nov.2009); *see also id.* at EV 190.3–1 to 190.3–2 (July 1999).

22 *See id.* at VL 385–2 (Nov.2009).

23 *Id.* at VL 5–2 (Apr.2004); *see also Wescott,* 996 P.2d at 726.

24 In support of this reading, the Department cites the fact that a suitability inquiry does not require a claimant to show that she exhausted reasonable alternatives before leaving a job, "presumably because an issue that makes work unsuitable is a fundamental attribute of the job itself" and cannot be easily changed. By contrast, a worker who quits for "good cause" unrelated to suitability is required to demonstrate that she explored alternatives, which implies that good cause is determined by factors that are at least potentially within the worker's power to control or adjust.

25 The Department's brief does not address the safety concerns raised by Calvert in her Voluntary Leaving Statement.

26 BPM at VL 425–2 (Nov.2009).

27 *Id.* (citing Appeal Tribunal Decision, Docket No. 99–1253, September 2, 1999).

28 *See* BPM at SW 5–4 to 5–5 (Aug.2008).

29 *Id.* at VL 425–1 (Nov.2009).

30 *Id.* at VL 425–3 (Nov.2009).

31 *Id.* at VL 210–1 (Oct.1999).

32 *Id.*

33 *Id.* at VL 5–3 (Apr.2004); *id.* at EV 5–1 (July 1999); *see also Wescott v. State, Dep't of Labor,* 996 P.2d 723, 727 (Alaska 2000) (citing *Reedy v. M.H. King Co.,* 128 Idaho 896, 920 P.2d 915, 918 (1996)).

34 BPM at VL 210–1 (Oct.1999).

35 *Id.* at VL 210–2 (Oct.1999).

36 *Id.* at VL 160–2 (Nov.2010).

37 *Id.* at VL 210–2 (Oct.1999). The BPM quotes the Commissioner of Labor: "The 'good cause' test only requires a worker to exhaust all reasonable alternatives. An alternative is reasonable only if it has some assurance of being successful.... [T]here must be a foundation laid that the alternative does have some chance of producing that which the employee desires." *Id.* at VL 160–1 (Nov.2010).

38 *Id.* at VL 385–2 (Nov.2009); *see also id.* at VL 385–3 (Nov.2009) ("[T]he precipitating event is the reason for the separation, although the combined effect of the reasons may be taken into account in determining good cause.").

39 *Id.* at VL 385–2 (Nov.2009).

40 For instance, as Calvert pointed out in her appeal brief to the Commissioner of Labor, "[t]he Hearing Officer did not ask the opposite question: Would you have quit if your job security and agreement with your employer had not been tampered with [as a result of personality conflicts]?"

41 BPM at VL 210–1 (Oct.1999).

42 *Id.*

43 AS 23.20.385(b).

44 *Id.* at VL 150–2 (Nov.2010). The BPM also explains "if the time and expense of commuting is customary in the worker's occupation and locality, the worker generally does not have good cause." *Id.*

45 *Id.* at VL 210–1 (Oct.1999).

46 Calvert worked in the "gear" department, where she was responsible for ensuring that other employees' lab coats and other specialized clothing were cleaned daily and ready to be handed out at the start of the work day. This required her to get to Snug Harbor an hour before most employees started work to "start coffee and ... make sure that there was enough gear to hand out and ... everything was ready to go."

47 In her appeal to the Commissioner of the Department of Labor, Calvert argued that her phone bill did not reflect that she had received any calls from King during the relevant period. And in her appeal to the superior court, she contended that "[t]he claim by employer of attempting to phone claimant four times is unsupported HEARSAY and there is a preponderance of credible evidence (my phone bill and written statements) in opposition to that claim."

48 BPM at VL 160–3 (Nov.2010).

49 *Id.*

50 At least one prior decision of the Commissioner of Labor has held that where an employer's actions established a "pattern of abuse and hostility" toward his employee, it would have been futile for the employee to confront the employer about his offensive behavior. *See* Decision of the Comm'r, Docket No. 98–0321, April 30, 1998. But the situation in Docket No. 98–0321 is distinguishable from the present case. There, the employer was the sole owner of the business, was verbally abusive, and had proven hostile to previous attempts by the employee to resolve other problems. Here, Calvert does not allege a relationship with her employers of such open hostility. She also had multiple levels of authority within Snug Harbor management from whom to seek assistance, and she does not appear to have been refused accommodation (upon direct request) on prior occasions.

51 *See, e.g., Wagner v. Stuckagain Heights,* 926 P.2d 456, 459 (Alaska 1996).

52 *Smith v. Sampson,* 816 P.2d 902, 907 (Alaska 1991).

53 *Button v. Haines Borough,* 208 P.3d 194, 201 (Alaska 2009) (internal quotation marks and citations omitted).

54 BPM at VL 515.4–1 (Nov.2009). The worker must also "present [ ] the grievance to the employer and allow[ ] the employer an opportunity to adjust the situation." *Id.* This requirement is addressed below.

55 *See, e.g.,* Decision of the Comm'r, Docket No. 95–1484, August 1, 1995 (implying that verbal threats by a fellow employee gave worker "adequate reason" for leaving work, though still finding an absence of good cause based on the worker's failure to attempt to remedy the situation); Appeal Tribunal Decision, Docket No. 98–0392, March 20, 1998 (finding that a worker had good cause

to quit after a fellow employee threatened to get in a gun fight with him, and the worker reported the incident to his employer).

56 BPM at VL 450.05–5 (Nov.2009).

57 *Id.* at VL 450.4–1 (Nov.2009) (noting that a worker whose hours are reduced to part-time "is able to seek other work without leaving the existing employment").

58 *Smith v. Sampson,* 816 P.2d 902, 904 (Alaska 1991); *see also Childs v. Kalgin Island Lodge,* 779 P.2d 310 (Alaska 1989).

59 *See, e.g., Wagner v. Stuckagain Heights,* 926 P.2d 456, 459 (Alaska 1996).

60 *AT & T Alascom v. Orchitt,* 161 P.3d 1232, 1246 (Alaska 2007) (citing *Bruner v. Petersen,* 944 P.2d 43, 49 (Alaska 1997)); *see also Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

61 *AT & T Alascom,* 161 P.3d at 1246 (citing *Tachick Freight Lines, Inc. v. State, Dep't of Labor, Emp't Sec. Div.,* 773 P.2d 451, 452 (Alaska 1989)).

62 *Withrow,* 421 U.S. at 47, 95 S.Ct. 1456.

63 *Id.* at 58, 95 S.Ct. 1456.

64 *AT & T Alascom,* 161 P.3d at 1246.

65 *Bollerud v. State, Dep't of Pub. Safety,* 929 P.2d 1283, 1286 (Alaska 1997).

66 Similarly, in her brief on appeal to the superior court, Calvert contended that she "was never properly warned or informed by the employer or DOL that her OWN judgments regarding good cause for leaving work ... was not the standard for which she could voluntarily quit her job and still be eligible for [unemployment insurance] benefits."

67 *Hutton v. Realty Executives, Inc.,* 14 P.3d 977, 980 (Alaska 2000) (citing *Ferrell v. Baxter,* 484 P.2d 250, 265 (Alaska 1971)).

68 *City of W. Covina v. Perkins,* 525 U.S. 234, 241–42, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999) (distinguishing *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), from *West Covina,* because the state law remedies at issue in *West Covina* were "established by published, generally available state statutes and case law").

69 *See* http://labor.state.ak.us/esd_unemployment_insurance/home. htm.

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254 P.3d 341
Supreme Court of Alaska.

Kenneth MONZULLA, Appellant,
v.
VOORHEES CONCRETE CUTTING and Alaska National Insurance Company, Appellees.

No. S–13640. | June 24, 2011.

Synopsis

Background: Employer filed a motion for extraordinary review of Workers' Compensation Board's interlocutory order denying employer's petition to change venue. The Workers' Compensation Appeals Commission, Kristin S. Knudsen, Commission Chair, reversed the Board's venue decision. Claimant appealed.

Holdings: The Supreme Court, Carpeneti, C.J., held that:
1 claimant's challenge to Commission's subject matter jurisdiction to review Board's interlocutory order denying employer's petition to change venue was not untimely;
2 Commission has implied jurisdiction to review interlocutory Board orders; and
3 Commission had jurisdiction to stay Board's decision denying employer's petition to change venue while Commission reviewed the decision.

Affirmed.

West Headnotes (17)

1 **Workers' Compensation**
Scope and Extent of Review in General

In an appeal from the Workers' Compensation Appeals Commission, The Supreme Court reviews the Commission's decision rather than the Workers' Compensation Board's decision.

2 **Workers' Compensation**
In general; questions of law or fact

In an appeal from the Workers' Compensation Appeals Commission, the Supreme Court applies its independent judgment to questions of law that do not involve agency expertise.

3 **Statutes**
Particular State Statutes

In an appeal from the Workers' Compensation Appeals Commission, Supreme Court applies its independent judgment to questions of statutory interpretation.

4 **Workers' Compensation**
Taking and Perfecting Proceedings for Review

Workers' compensation claimant's challenge to Workers' Compensation Appeals Commission's subject matter jurisdiction to review Workers' Compensation Board's interlocutory order denying employer's petition to change venue was not untimely, even though claimant did not raise it until he moved for reconsideration of Commission's decision on the merits.

5 **Courts**
Time of making objection

The question of subject matter jurisdiction can be raised at any time.

6 **Courts**
Determination of questions of jurisdiction in general

A court can raise the issue of its subject matter jurisdiction sua sponte.

7 **Statutes**
⇐General Rules of Construction
Statutes
⇐Intention of Legislature
Statutes
⇐Policy and purpose of act
Statutes
⇐Meaning of Language

Courts interpret a statute according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.

8 **Statutes**
⇐Intention of Legislature
Statutes
⇐Meaning of Language

A court's goal in interpreting a statute is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.

9 **Statutes**
⇐Policy and purpose of act

Courts construe a statute in light of its purpose.

10 **Statutes**
⇐Meaning of Language
Statutes
⇐Legislative history of act

In construing a statute, courts look at the meaning of the words used and the legislative history.

11 **Statutes**
⇐Words used

Courts will presume that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.

12 **Statutes**
⇐Statute as a Whole, and Intrinsic Aids to Construction

All sections of a statute should be construed together so that all have meaning and no section conflicts with another.

13 **Workers' Compensation**
⇐Decisions reviewable

Workers' Compensation Appeals Commission has implied jurisdiction to review interlocutory Workers' Compensation Board orders.

14 **Workers' Compensation**
⇐Purpose of legislation

The goal of the statutory amendment that established the Workers' Compensation Appeals Commission was to increase the efficiency and flexibility of the workers' compensation system and reduce some of its costs. AS 23.30.007(a).

15 **Workers' Compensation**
⇐Purpose of legislation

Creation of the Workers' Compensation Appeals Commission was intended to provide consistent, legally precedential decisions in an expeditious manner.

16 **Workers' Compensation**

Nature and form of remedy

Workers' Compensation Appeals Commission had jurisdiction to stay Workers' Compensation Board's decision denying employer's petition to change venue while Commission reviewed the decision. AS 23.30.125(c).

17 **Workers' Compensation**
Powers and duties in general

Workers' Compensation Appeals Commission's power to issue stays is not confined to compensation orders. AS 23.30.125(c).

Attorneys and Law Firms

***342** James M. Hackett, Law Office of James M. Hackett, Fairbanks, for Appellant.
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Before: CARPENETI, Chief Justice, FABE, WINFREE, CHRISTEN, and STOWERS, Justices.

Opinion

OPINION

CARPENETI, Chief Justice.

I. INTRODUCTION

Does the Alaska Workers' Compensation Appeals Commission have subject matter jurisdiction to review interlocutory orders of the Alaska Workers' Compensation Board before a final Board decision? In 2006 the Commission decided that it had implied jurisdiction to hear motions for extraordinary review, which are similar to petitions for review in the appellate courts. In 2008 an employer asked the Commission to review and to stay the Board's non-final order denying a change of venue from Fairbanks. The Commission first issued a partial stay, permitting the case to go forward in any venue other than Fairbanks. It later reviewed the merits of the Board's decision to deny the change of venue and reversed it. The employee contends that the Commission did not have subject matter jurisdiction over motions for extraordinary review because the legislature only granted the Commission jurisdiction to hear appeals of final Board orders. Because we find that jurisdiction to hear interlocutory appeals is necessarily incident to the Commission's express power to hear appeals from final Board decisions, we affirm the Commission's decision.

II. FACTS AND PROCEEDINGS

Kenneth Monzulla hurt his back in 1999 when he was working for Voorhees Concrete Cutting in Fairbanks. As the Board noted in one of its decisions in the case, "[t]he medical and legal records in this case are voluminous." In September 2001, the parties entered a partial compromise and release agreement to settle all issues except future medical care for his lumbar and thoracic spine; their more recent substantive disputes have involved the extent of this medical care.

The parties have also disagreed about venue for the proceedings. Because Monzulla injured his back in Fairbanks, venue for Board proceedings related to his injury was initially in Fairbanks.[1] Monzulla moved to the Kenai Peninsula in 2002, and his treating ***343** physician at the time of the Board proceeding was in Soldotna. Voorhees twice asked the Board to change venue from Fairbanks to Anchorage, arguing that it would be less costly and time consuming to have hearings in Anchorage. Monzulla, appearing pro se, opposed Voorhees's requests to change venue because the Fairbanks office was already familiar with his case.

Voorhees's first petition for a change of venue was filed in November 2006. After a hearing, the Board denied the petition, finding that "Fairbanks [would] better serve the balanced interests of the parties, witnesses, and the [Board], and would provide a speedier remedy." The Board held a hearing on March 1, 2007, on various claims raised by Monzulla; in its decision, it granted some claims and denied others. Voorhees appealed the Board's final decision to the Commission and at the same time appealed the interlocutory order denying its petition for change of venue. On February 4, 2008, the Commission affirmed in part and reversed in part the Board's orders. On the venue issue, the Commission affirmed the Board's denial of a change of venue with a cautionary instruction to the Board not to consider its own interest when evaluating a change of venue request.

On July 16, 2008, Voorhees again petitioned the Board to change venue; the Board again denied the petition.

Voorhees filed a motion for extraordinary review and request for stay with the Commission on October 24, 2008. The Commission granted extraordinary review of the venue question, stayed the Board proceedings "in the northern venue, but not proceedings in other venues," and invited the participation of the director of the Division of Workers' Compensation because of the question's potential impact on Board procedure.2 Monzulla filed a letter with the Commission, which it construed as a motion for reconsideration of its grant of extraordinary review. The Commission denied reconsideration.

In its decision on the merits, the Commission decided that the Board had abused its discretion in failing to change venue to Anchorage "because it relied on an impermissible consideration, its own interest, under 8 [Alaska Administrative Code] 45.072(2) and because it lacked sufficient evidence to find that Fairbanks was a more convenient forum than Anchorage for the parties and witnesses."

After the Commission reversed the Board's venue decision, an attorney entered an appearance on behalf of Monzulla and moved for reconsideration of the Commission's decision. He argued that the Commission did not have subject matter jurisdiction to consider the motion for extraordinary review and had misconstrued the case law in its discussion of the law of the case doctrine. The Commission declined to consider Monzulla's challenge to its subject matter jurisdiction because he had not raised it previously in the appeal and had not distinguished Commission precedent on the subject. But it ordered briefing on whether it had misconstrued our case law. Monzulla filed an appeal in this court related to the Commission's subject matter jurisdiction on October 2, 2009. On October 8, 2009, the parties filed a stipulation with the Commission dismissing Monzulla's motion for reconsideration; the Commission issued an order dismissing the motion for reconsideration and indicating that its decision dated August 6, 2009, was the final decision of the appeals commission. Monzulla appeals the Commission's exercise of jurisdiction over the motion for extraordinary review and its partial stay of the Board's venue order.

III. STANDARD OF REVIEW

1 2 3 In an appeal from the Alaska Workers' Compensation Appeals Commission, we review the Commission's decision rather than the Board's decision.3 We apply our independent judgment to questions of law that do not involve agency expertise.4 ***344** We likewise apply our independent judgment to questions of statutory interpretation.5

IV. DISCUSSION

A. Monzulla's Challenge To Subject Matter Jurisdiction Was Timely.

4 Monzulla contends that the Commission erred because it did not consider whether it had jurisdiction to hear interlocutory appeals. He asserts that his "failure to object to the Commission's lack of subject matter jurisdiction [before reconsideration] is immaterial."

The Commission refused to consider Monzulla's challenge to its subject matter jurisdiction because he did not raise it until he moved for reconsideration of its decision on the merits and had not established "that there [were] grounds to distinguish or overturn" *Eagle Hardware & Garden v. Ammi.*6 The Commission stated that "AS 23.30.180(f) [did] not permit [Monzulla] to raise a legal issue for the first time on reconsideration, especially one that [was] not closely related to any points raised or decided in the appeal."

5 6 The question of subject matter jurisdiction can be raised at any time,7 and a court can raise the issue of its subject matter jurisdiction sua sponte.8 Therefore, we conclude that Monzulla's challenge was not untimely.9 But any error was harmless, as set out below in Part IV.C.

B. The Legislature Did Not Explicitly Grant Interlocutory Review Jurisdiction To The Commission.

Monzulla's appeal raises the question whether the Commission has jurisdiction to review interlocutory Board orders before the Board issues a final decision. He argues, based on the statutory language, that the legislature did not grant the Commission this power. Monzulla contends that the legislature "was aware of how to fashion broad extraordinary discretionary review power when it enacted the Commission's statutory powers and authority" but chose to limit the Commission's jurisdiction to review of final decisions. Because the legislature in AS 23.30.007(a) limited the Commission's jurisdiction to administrative appeals,10 Monzulla insists that the legislature did not intend to give the Commission power to review non-final Board decisions.

Voorhees responds that the legislature directly granted jurisdiction over interlocutory appeals to the Commission. Voorhees asks us to interpret the statute, particularly AS 23.30.125(b)11 and AS 23.30.128(b),12 as giving the Commission authority to hear motions ***345** for extraordinary review. According to Voorhees, these statutory sections are meaningless unless construed as

granting the Commission interlocutory appellate jurisdiction.

7 8 9 We interpret a statute "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[13] Our goal in interpreting a statute is "to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[14] We construe a statute "in light of its purpose."[15]

10 11 12 In construing a statute, we look at the meaning of the words used and the legislative history.[16] "[W]e will presume 'that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.' "[17] All sections of a statute should "be construed together so that all have meaning and no section conflicts with another."[18]

As noted, Voorhees argues that in AS 23.30.125(b) and AS 23.30.128(b) the legislature specifically granted the Commission jurisdiction to review interlocutory orders. According to Voorhees, these statutory subsections are meaningless unless they grant the Commission discretionary review jurisdiction. Voorhees contends that if they are not interpreted this way, they would be in conflict with AS 23.30.007(a) and AS 23.30.008(a).

The parties agree that "all sections of an act are to be construed together so that all have meaning and no section conflicts with another."[19] Voorhees contends that the statutory subsections at issue here—AS 23.30.007(a), AS 23.30.008(a), AS 23.30.125(b), and AS 23.30.128(b)—cannot be construed together unless they are read as a direct grant of interlocutory review jurisdiction to the Commission. We disagree.

The statutory subsections at issue here can be harmonized. Alaska Statute 23.30.007(a) is the express grant of jurisdiction to the Commission; its jurisdiction is "limited to administrative appeals." Alaska Statute 23.30.008(a) provides that the Commission's decisions are final and conclusive and have the force of precedent for the Commission and the Board; it expressly limits the Commission's jurisdiction to workers' compensation cases. Alaska Statute 23.30.125(b) clarifies that review of Board decisions is done by the Commission, not the superior court. Alaska Statute 23.30.128(b) sets out the Board actions the Commission can review and the standards of review for the Commission to apply.[20] Thus, nothing in the statutory language explicitly gives the Commission jurisdiction over discretionary review of non-final Board decisions.

C. The Commission Has Implied Jurisdiction To Hear Interlocutory Appeals.

We next consider whether the Commission has implied jurisdiction to hear interlocutory ***346** appeals. We have previously held that the Board has implied powers. In *Wausau Insurance Cos. v. Van Biene* we decided that the Board had implied jurisdiction to apply equitable principles, such as estoppel, in workers' compensation proceedings.[21] And we decided that the Board had implied jurisdiction to set aside a compromise and release agreement because of fraud in *Blanas v. Brower*.[22] In both instances we determined that the implied power was necessarily incident to the Board's express powers.[23]

In deciding whether an administrative agency has properly exercised an implied power, other courts have considered whether the implied power is consistent with the legislature's objectives in granting powers to the administrative agency,[24] the nature of the administrative proceeding,[25] and "whether the circumstances, in relation to the type of proceeding, require the agency to exercise its implied and incidental powers."[26]

13 Applying these principles here, we hold that the Commission has implied jurisdiction to review interlocutory Board orders. The Commission "performs a quasi-judicial function that is akin to appellate review."[27] In some circumstances, delay of review until a final decision on the merits can make review pointless. This case is one example: Review of an improper refusal to change venue is pointless after a final decision on the merits when there may be no further proceedings. Similarly, if the Board improperly required an employee to undergo a psychiatric examination, a delay in review could subject the employee to an intrusive and unnecessary examination.[28] Discretionary appellate review of non-final orders may at times be necessary to ensure fundamental fairness to the parties.

14 15 The goal of the statutory amendment that established the Commission was "to increase the efficiency and flexibility of the current system ... and reduce some of its costs."[29] The legislation eliminated superior court review of workers' compensation cases and substituted review by the Commission.[30] Creation of the Commission was intended "to provide 'consistent, legally precedential decisions in an expeditious manner.' "[31]

Discretionary review jurisdiction in the Commission can further all of these goals: increasing efficiency, providing precedential decisions from a body with expertise in workers' compensation, and reducing costs in workers' compensation appeals. Discretionary review can speed the ultimate resolution of a case when review concerns a controlling legal issue.[32] In this case, the ultimate decision on the merits may have been delayed,[33] but we agree with Voorhees that the venue question was one which would evade meaningful ***347** review without interlocutory appellate jurisdiction.

We have already noted that, in creating the Commission, the legislature intended to replace review by the superior

court with review by the Commission. We agree with Voorhees that the legislature wanted those seeking review of Board decisions to have the same procedural rights of review that they had in the superior court. We recognize, as Monzulla argues, that the discretionary review previously available in the superior court has a different origin[34] than the Commission's authority to hear interlocutory appeals, but nothing in the legislative history indicates that the legislature wanted employers or employees to have fewer rights of review before the Commission than before the superior court. We conclude that the Commission had implied jurisdiction to grant discretionary review of the venue decision.[35]

D. The Commission Had Authority To Stay The Board's Decision.

16 Monzulla argues separately that the Commission was without jurisdiction to stay the Board's decision because the workers' compensation statute and the Commission's regulations only permit stays of "compensation orders," which are a limited class of Board orders. Voorhees does not address this argument separately.

The only provision of the Alaska Workers' Compensation Act related to stays by the Commission is AS 23.30.125(c), which states:

> If a compensation order is not in accordance with law or fact, the order may be suspended or set aside, in whole or in part, through proceedings in the commission brought by a party in interest against all other parties to the proceedings before the board. The payment of the amounts required by an award may not be stayed pending a final decision in the proceeding unless, upon application for a stay, the commission, on hearing, after not less than three days' notice to the parties in interest, allows the stay of payment in whole or in part, where the party filing the application would otherwise suffer irreparable damage. Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments. The order of the commission allowing a stay must contain a specific finding, based upon evidence submitted to the commission and identified by reference to the evidence, that irreparable damage would result to the party applying for a stay and specifying the nature of the damage.

Monzulla does not dispute that the legislature gave the Commission some power to stay Board decisions; he argues that because a compensation order refers only to a Board order denying a claim or making an award of compensation,[36] the statute permits the Commission to stay only compensation orders, not other Board decisions. **17** Given the purposes of the legislation, we do not think that the legislature intended the Commission's power to issue stays to be confined to compensation orders. The statutory language does not expressly limit stays to compensation orders nor does it prohibit stays of other Board orders. The statute sets out the standards the Commission must apply when a party seeks to stay a monetary award from the Board.[37] Although "[t]here is a presumption that the same words used twice in the same act have the same meaning,"[38] the legislature appears not to have distinguished compensation orders from other decisions in the legislation establishing the Commission. Alaska Statute 23.30.127, which sets out deadlines for appeals and ***348** cross-appeals to the Commission, uses the term "compensation order" when referring to the time for filing an appeal[39] and "decision" when referring to the time for filing a cross-appeal.[40]

In addition, without authority to stay Board decisions while review is pending, the Commission's discretionary review jurisdiction would be meaningless. If the Commission could not stay a Board order while it reviewed the order, issues could become moot while review was pending.

V. CONCLUSION

Because discretionary review of non-final Board orders is necessarily incident to the Commission's express power to hear appeals from final Board decisions, we AFFIRM the Commission's decision that it had jurisdiction to stay and review the Board's venue decision in this case.

Footnotes

1 8 Alaska Administrative Code (AAC) 45.072 (2011) (setting venue in "the city nearest the place where the injury occurred" unless circumstances justify change of venue).

2 The director filed a *Notice of Limited Intervention for Purposes of Supplementing the Record* with an attached affidavit on January 12, 2009, but did not participate further.

3 *Barrington v. Alaska Comm'ns Sys. Grp., Inc.*, 198 P.3d 1122, 1125 (Alaska 2008).

4 *Id.*

5 *Grimm v. Wagoner,* 77 P.3d 423, 427 (Alaska 2003).

6 AWCAC Dec. No. 003 (Feb. 21, 2006), *available at* http://labor. state. ak.us/WCcomm/orders.htm. In *Ammi,* the Commission decided that it had implied jurisdiction to review interlocutory Board orders before a final decision of the Board. *Id.* at 8–9.

7 *Nw. Med. Imaging, Inc. v. State, Dep't of Revenue,* 151 P.3d 434, 438 n. 5 (Alaska 2006) (citing *Hydaburg Coop. Ass'n v. Hydaburg Fisheries,* 925 P.2d 246, 248 (Alaska 1996)) (noting that challenge to agency jurisdiction was raised during second appeal to superior court).

8 *See Hydaburg Coop. Ass'n,* 925 P.2d at 248 (quoting *Burrell v. Burrell,* 696 P.2d 157, 162 (Alaska 1984)) (noting that subject matter jurisdiction must be raised by the court if noticed and not raised by one of the parties).

9 To the extent the Commission implied that Monzulla had to raise a subject matter jurisdiction challenge at a specific time, it erred.

10 AS 23.30.007(a) provides, in relevant part:

> The commission has jurisdiction to hear appeals from final decisions and orders of the board under this chapter. Jurisdiction of the commission is limited to administrative appeals arising under this chapter.

11 AS 23.30.125(b) states:

> Notwithstanding other provisions of law, a decision or order of the board is subject to review by the commission as provided in this chapter.

12 AS 23.30.128(b) states:

> The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

13 *Grimm v. Wagoner,* 77 P.3d 423, 427 (quoting *Native Vill. of Elim v. State,* 990 P.2d 1, 5 (Alaska 1999)).

14 *Muller v. BP Exploration (Alaska) Inc.,* 923 P.2d 783, 787 (Alaska 1996) (quoting *Tesoro Alaska Petroleum, Co. v. Kenai Pipe Line Co.,* 746 P.2d 896, 905 (Alaska 1987)).

15 *Beck v. State, Dep't of Transp. & Pub. Facilities,* 837 P.2d 105, 117 (Alaska 1992) (citing *Vail v. Coffman Eng'rs, Inc.,* 778 P.2d 211 (Alaska 1989)).

16 *Alaskans for a Common Language v. Kritz,* 170 P.3d 183, 192 (Alaska 2007) (citing *State v. Alex,* 646 P.2d 203, 208 n. 4 (Alaska 1982)).

17 *Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety,* 91 P.3d 240, 248 (Alaska 2004) (quoting *Kodiak Island Borough v. Exxon Corp.,* 991 P.2d 757, 761 (Alaska 1999)).

18 *In re Hutchinson's Estate,* 577 P.2d 1074, 1075 (Alaska 1978).

19 *Id.*

20 Because we agree with Monzulla that the statutory sections can be harmonized, we do not need to consider whether one section is more specific. *Nat'l Bank of Alaska v. State, Dep't of Revenue,* 642 P.2d 811, 817–18 (Alaska 1982) (quoting *State, Dep't of Highways v. Green,* 586 P.2d 595, 602 (Alaska 1978)).

21 847 P.2d 584, 588 (Alaska 1993).

22 938 P.2d 1056, 1061–62 (Alaska 1997).

23 *Id.; Van Biene,* 847 P.2d at 588.

24 *Unite Here! Local 5 v. City & Cnty. of Honolulu,* 123 Hawai'i 150, 231 P.3d 423, 449 (2010).

25 *Hawes v. Colo. Div. of Ins.,* 65 P.3d 1008, 1017–18 (Colo.2003) (en banc) (holding that the legislature had established a type of cy pres proceeding so that Division of Insurance had implied authority to award common fund attorney's fees).

26 *Id.*

27 *Alaska Pub. Interest Research Grp. v. State,* 167 P.3d 27, 36 (Alaska 2007).

28 *Cf. BP Exploration Alaska, Inc. v. Stefano,* AWCAC Dec. No. 76 (Alaska 2008) (denying extraordinary review of protective order preventing employer from compelling employee to attend psychiatric medical evaluation).

29 2005 Senate Journal 465.

30 *Alaska Pub. Interest Research Grp.*, 167 P.3d at 37, 40.

31 *Id.* at 39 (quoting 2005 Senate Journal 465).

32 *Cf. Thurston v. Guys With Tools, Ltd.*, 217 P.3d 824, 825 (Alaska 2009) (granting review to ensure that proper legal standard was applied on remand).

33 The Board hearing in Fairbanks on the merits of the claim was scheduled for November 14, 2008. The Commission issued its decision reversing the Board on August 6, 2009. The Board issued its final decision and order on reconsideration in the case on December 7, 2010. *Monzulla v. Voorhees Concrete Cutting,* AWCB Dec. No. 10–0200 (Dec. 7, 2010).

34 *See* AS 22.10.020(d); AS 23.30.129; Alaska R.App. P. 610.

35 Monzulla did not appeal the merits of the Commission's venue decision or its application of the law of the case doctrine to his case, so we express no opinion on these issues.

36 AS 23.30.110(e).

37 AS 23.30.125(c).

38 *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1123 (Alaska 1995) (quoting *Kulawik v. ERA Jet Alaska,* 820 P.2d 627, 634 (Alaska 1991)).

39 AS 23.30.127(a).

40 AS 23.30.127(c).

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Don Bullock

254 P.3d 1078
Supreme Court of Alaska.

MARATHON OIL COMPANY, Appellant,
v.
STATE of Alaska, DEPARTMENT OF NATURAL RESOURCES, Appellee.

No. S–13771. | June 10, 2011.

Synopsis

Background: Company that leased land from State for the purpose of producing natural gas appealed Department of Natural Resources' (DNR's) denial of its request for retroactive application of contract pricing. The Superior Court, Third Judicial District, Anchorage, John Suddock, J., affirmed. Company appealed.

Holdings: The Supreme Court, Fabe, J., held that:
1 reasonable basis standard of review applied to DNR's interpretation of statute governing contract pricing;
2 DNR's interpretation of statute as permitting DNR to approve contract pricing only for future production was longstanding and reasonable, and thus Supreme Court would defer to it;
3 DNR's interpretation of statute was a rule of internal agency procedure, and thus DNR was not required to promulgate its interpretation in a regulation; and
4 company's due process rights were not violated.

Affirmed.

West Headnotes (14)

1 **Statutes**
- General Rules of Construction

Statutes
- Intention of Legislature

Statutes
- Policy and purpose of act

Statutes
- Meaning of Language

Courts interpret statutes according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.

2 **Statutes**
- Legislative history in general

Courts decide questions of statutory interpretation on a sliding scale: the plainer the language of the statute, the more convincing contrary legislative history must be.

3 **Statutes**
- Executive Construction

Courts reviewing agency interpretations of statutes apply the "reasonable basis standard," under which they give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions.

4 **Statutes**
- Executive Construction

Courts reviewing agency interpretations of statutes apply the "independent judgment standard," under which the court makes its own interpretation of the statute at issue, where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute.

5 **Statutes**
- Long continuance of construction, and approval or acquiescence

Courts give more deference to agency interpretations of statutes that are longstanding and continuous.

6 **Statutes**
- Particular State Statutes

Whether statute governing gas leasing permitted retroactive application of contract pricing to compute State's royalty on a natural gas lease implicated Department of Natural Resources' (DNR's) expertise, and thus reasonable basis standard of review applied

to DNR's interpretation of statute. AS 38.05.180(aa).

7 **Statutes**

Policy and purpose of act

Statutes

Meaning of Language

To establish the meaning of a statute, courts examine both its text and its purpose.

8 **Mines and Minerals**

State Leases

Statute listing reasons Department of Natural Resources can reject a lessee's request to use contract pricing to calculate State's royalty on an oil and gas lease is exclusively concerned with objections to the price a lessee submits as its contract price; other non-price related reasons for rejecting a request may still exist. AS 38.05.180(aa)(2).

9 **Mines and Minerals**

State Leases

The overall purpose of the Alaska Land Act is to maximize revenue for the state. AS 38.05.005 et seq.

10 **Mines and Minerals**

State Leases

Department of Natural Resources' (DNR's) interpretation of statute governing contract pricing as permitting DNR to approve contract pricing to calculate State's royalty on a natural gas lease only for future production was longstanding and reasonable, and thus Supreme Court would defer to it. AS 38.05.180(aa).

11 **Mines and Minerals**

State Leases

Department of Natural Resources's (DNR's) interpretation of statute governing contract pricing as permitting DNR to approve contract pricing to calculate State's royalty on a natural gas lease only for future production was a rule of internal agency procedure, and thus DNR was not required to promulgate its interpretation in a regulation. AS 38.05.180(aa).

12 **Administrative Law and Procedure**

Legislative questions; rule-making

Supreme Court uses its independent judgment in deciding whether an agency action is a regulation for purposes of the Administrative Procedure Act. AS 44.62.010 et seq.

13 **Constitutional Law**

Sale or lease in general

Mines and Minerals

State Leases

Lessee had adequate notice, for due process purposes, that Department of Natural Resources (DNR) could interpret statute governing contract pricing, which was silent on the issue of retroactivity, as permitting DNR to approve contract pricing to calculate State's royalty on a natural gas lease only for future production; fact that statute did not expressly prohibit retroactive requests did not mean that lessee could assume that the statute allowed retroactivity. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 7; AS 38.05.180(aa).

14 **Constitutional Law**

Sale or lease in general

Mines and Minerals

State Leases

Lessee had both adequate notice of Department of Natural Resources' (DNR's) decision on its request to use contract pricing to calculate State's royalty on natural gas lease and a fair opportunity to present its claims that statute permitted retroactive approval of contract pricing, and thus lessee's due process rights were not violated by DNR's denial of lessee's retroactive request for contract pricing. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 7; AS 38.05.180(aa).

Attorneys and Law Firms

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Martin T. Schultz, Assistant Attorney General, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for Appellee.

Before: CARPENETI, Chief Justice, FABE, WINFREE, and STOWERS, Justices.

Opinion

OPINION

FABE, Justice.

I. INTRODUCTION

Gas producers that lease land from the State of Alaska must pay royalties calculated on the value of the gas produced from the leased area. This royalty payment can be calculated under one of two methods: (1) "higher of" pricing or (2) contract pricing. "Higher of" pricing is the default. Computing the royalty owed under "higher of" pricing involves sophisticated calculations using market data and the prices of other producers. The Department of Natural Resources (DNR) usually does not calculate the royalty payment under "higher of" pricing until years after the time of production, once an audit can be completed. In order to pay royalties under contract pricing, the lessee must first request that form of payment calculation from DNR. Under contract pricing, the lessee's price at which it sells gas is used to determine the lessee's royalty payment.

Marathon Oil Corporation (Marathon) began production in the Ninilchik gas field in 2003. In 2008, before completion of the audit to determine the "higher of" royalty payment for 2003–2008, Marathon requested contract pricing from DNR. Marathon requested contract pricing for the period of 2008 onward and sought retroactive application of contract pricing to the 2003–2008 period. DNR approved Marathon's request for contract pricing from 2008 onward but denied the request to apply contract pricing to production prior to 2008. Marathon appealed to the superior court, which affirmed DNR's ruling. Marathon appeals.

Marathon has three arguments. First, Marathon argues that the statute that governs contract pricing—AS 38.05.180(aa)—permits retroactive application of contract pricing and that DNR was wrong to deny Marathon's request. We conclude that the statute is ambiguous, and because DNR's interpretation is longstanding and has a reasonable basis in the statute, we defer to its interpretation. Second, Marathon argues in the alternative that even if DNR's interpretation of the statute is valid, DNR was obliged to promulgate its interpretation as a ***1081** regulation before applying it to any party. We conclude that DNR's interpretation is a rule of internal agency procedure and therefore did not have to be issued as a regulation. Third, Marathon argues that DNR's treatment of Marathon violated due process. We conclude that Marathon's due process rights were not violated. We therefore affirm the superior court's decision upholding DNR's order.

II. FACTS AND PROCEEDINGS

Marathon leases land from the State of Alaska for the purpose of producing natural gas. Marathon has many natural gas leases on the Kenai Peninsula, including one at Ninilchik.

Gas lessees must pay a royalty to the State in the amount of 12.5% of the value of the gas produced in the leased area. Determining the value of the gas produced for the purpose of calculating this royalty is usually done through "higher of" pricing. The value of the gas produced is deemed to be the highest of four possible prices. [1]

Lessees must deliver royalty payments on or before "the last day of the calendar month following the month in which the oil, gas, or associated substances are produced." But the four values needed to calculate the royalty under "higher of" pricing are usually not determined until several years after the time of production, after DNR performs an audit. After the audit, a lessee's royalty liability is often "re-adjusted upward."

In 1986 the legislature amended the royalty statute. [2] The amendments, codified in AS 38.05.180(aa) and AS 38.05.180(bb), allowed lessees to request contract pricing rather than the default "higher of" pricing. Contract pricing permits lessees to use the price at which they sell gas to Alaska utilities as the price on which royalties will be calculated. The stated purpose of the 1986 amendments was to benefit utility consumers. [3] The contracts between gas producers like Marathon and gas-purchasing utilities had historically allocated the risk of higher royalty payments to the utilities. That is, producers sold gas to utilities under a long-term

contract with a fixed price for gas. If the market price of gas rose above the contract price, producers had to pay higher royalties. Under the terms of their contracts with utilities, they could pass on this added expense to utilities. Utilities would then pass the expense along to their consumers. The 1986 amendments allowed lessee-producers to use their contract price as the royalty price, thus avoiding this possible increase in consumers' utility bills.

In 1995 DNR leased lands in the Ninilchik Unit on the Kenai Peninsula to Marathon for the purposes of gas production. Marathon began production on this land in 2003. In 2008 Marathon requested contract pricing from DNR, both for future production and for past production between 2003 and 2008. DNR approved Marathon's request for contract pricing from 2008 forward but rejected the request for the 2003–2008 period. The ***1082** commissioner stated that he "decline[d] to grant retroactive approval under the terms of the statute." Marathon requested reconsideration, arguing that AS 38.05.180(aa) permitted retroactive approval. DNR affirmed its earlier decision, reasoning that "AS [3]8.05.180(aa) does not authorize the Department of Natural Resources to grant retroactive approval." Marathon appealed, and the superior court affirmed DNR's order. Marathon appeals.

III. STANDARD OF REVIEW

1 2 3 4 5 We interpret statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[4] We decide questions of statutory interpretation on a sliding scale: "[T]he plainer the language of the statute, the more convincing contrary legislative history must be."[5] We use one of two standards to review agency interpretations of statutes.[6] We apply the reasonable basis standard, under which we give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions.[7] We apply the independent judgment standard, under which "the court makes its own interpretation of the statute at issue, ... where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute."[8] We give more deference to agency interpretations that are "longstanding and continuous."[9]

6 It is DNR's job to manage the state's resources and to collect royalties from gas lessees.[10] We have explained that the reasonable basis standard is appropriate when an agency's adjudication of a regulated party's claim "requires resolution of policy questions which lie within the agency's area of expertise and are inseparable from the facts underlying the agency's decision."[11] The question whether to allow retroactivity lies within DNR's expertise. Allowing retroactivity could have important consequences for how royalties are assessed and paid. The state royalty and audit system is complicated, and DNR has expertise in deciding when retroactive application makes sense within that system.[12] In *Alaska International Construction v. Earth Movers of Fairbanks*, we explained that " 'the comparative qualification of court and agency to decide the particular issue' [is] the most important factor for whether a court should substitute its judgment for that of an agency's."[13] Here, where the question implicates "special agency expertise" and is not "merely ... a question of statutory interpretation," we use the reasonable basis standard.[14]

IV. DISCUSSION

A. DNR's Interpretation Of AS 38.05.180(aa) Is Reasonable.

In 1959, shortly after statehood, the legislature passed the Alaska Land Act and gave DNR the responsibility for managing state- ***1083** owned land.[15] The Alaska Land Act provided that state lands were open to oil and gas development and gave DNR the power to lease state lands for that purpose.[16] The Alaska Land Act required that DNR, when it leased state land, collect a royalty of at least 12.5% of the value of all oil and gas produced.[17] To determine a lessee's royalty obligation, DNR must calculate the value of the oil and gas produced by the lessee. To determine the value of the oil and gas produced by a lessee, DNR historically has not used the price at which the lessee actually sold its oil or gas. Rather, DNR has used an approximation of market price. In its lease agreements, DNR has obligated lessees to pay 12.5% of the "higher of" four different values.[18] These four values are designed to estimate the market price of oil and gas. The goal of "higher of" pricing is to ensure the state's royalty is not based on a below-market sales price.

The 1986 amendments to the Alaska Land Act allowed lessees to calculate their royalty obligations using a different, potentially more favorable method. The amendments permitted lessees to use the price at which they contracted to sell gas to Alaska utilities as the basis for calculating the

state's royalty. [19] To use this "contract" price, the lessee must apply and receive permission from DNR. [20]

The question presented is whether a lessee must apply for contract pricing before production actually occurs. For at least ten years, DNR has interpreted the 1986 amendments as permitting DNR to approve contract pricing only for future production. Thus, a lessee can apply to have contract pricing used to calculate its royalties for future production, but not for gas production that has already occurred. Marathon disputes this interpretation, arguing that the statute permits DNR to use contract pricing for past production. Marathon offers alternative statutory interpretations, proposing several cutoff points after which a lessee would no longer be permitted to apply for contract pricing. Marathon even suggests that a lessee could apply for contract pricing after the completion of the audit to determine its "higher of" royalty liability so long as the lessee applied "before the statute of limitations ran."

7 To establish the meaning of a statute, we examine both its text and its purpose. [21] We will give the appropriate deference to DNR, deferring to its interpretation "so long as it has a reasonable basis in the law." [22]

1. The text of the statute

a. The meaning of "prospective"

Alaska Statute 38.05.180(aa)(2)(B) provides that DNR should not approve a request for contract pricing if "the *prospective* reduction in royalty receipts would not be balanced by increased benefits to in-state gas and electric consumers." (Emphasis added.) DNR notes that Black's Law Dictionary defines "prospective" as meaning "[i]n the future." [23] According to DNR, "prospective" refers to the "future period after the application is approved" and therefore AS 38.05.180(aa) only allows contract pricing for future production. DNR maintains that AS 38.05.180(aa) does not permit application of contract pricing to past production.

Marathon argues that the word "prospective" has a different meaning within the context of the statute. In Marathon's view, the legislature's reference to "prospective reduction in royalty receipts" is "not the same as requiring that a request be made in advance of or commensurate in time with first gas production." Marathon instead argues that ***1084** the word refers to the future effects of DNR's decision to approve or deny a request for contract pricing. According to Marathon, DNR can decide to approve contract pricing for any period, past or future, but DNR must consider the "prospective" effects of that decision. Marathon contends that "DNR may still consider the 'prospective reduction in royalty receipts' resulting from use of the contract price even if the royalty would [correlate] with gas deliveries and production occurring in the past."

The term "prospective" could plausibly have either meaning. The use of the word could signify that the legislature only intended contract pricing to be available for future gas production; or the use of the word could be incidental "and the timing of the [application] ... immaterial." We agree with the superior court that "the phrase 'prospective reduction in royalty receipts' is ambiguous."

b. The scope of AS 38.05.180(aa)(2)

8 Marathon argues that AS 38.05.180(aa)(2) provides an exhaustive list of the reasons that DNR may reject a request for contract pricing. Alaska Statute 38.05.180(aa)(2) provides that DNR should reject a lessee's request for contract pricing if the commissioner makes a finding that

> (A) the contract price or transfer price is unreasonably low;
>
> (B) the prospective reduction in royalty receipts would not be balanced by increased benefits to in-state gas and electric consumers;
>
> (C) the lessee and the utility are related in management, ownership, or other aspect and, in the case of a transfer price, that relationship is not regulated under AS 42.05; and
>
> (D) the contract price or transfer price is not in the best interest of the state.

Marathon contends that because retroactivity is not among the listed reasons for rejection, DNR had no right to refuse Marathon's request for retroactive application. Marathon claims that AS 38.05.180(aa) creates a presumption in favor of approval and that DNR did not respect this presumption. But AS 38.05.180(aa)(2)'s core scope is more limited than Marathon contends. Alaska Statute 38.05.180(aa)(2) provides an exhaustive list of the *price-related* reasons DNR can reject requests for contract pricing, but the statute does not address other grounds for rejection. The legislative history of the 1986 amendments indicates that AS 38.05.180(aa)(2) is exclusively concerned with objections to the price a lessee submits as its contract price. [24] Other non-price related reasons for rejecting a request may still exist. If DNR is

correct that the statute does not authorize retroactive contract pricing, then DNR is justified in rejecting such a request even though the statute does not specifically list that reason for rejection. Therefore, AS 38.05.180(aa) would not preclude DNR from rejecting Marathon's request. As we will discuss below, agencies are generally given discretion to manage such procedural matters.

2. The purpose of the statute

a. The pro-consumer purpose of the 1986 amendments

Both parties agree that the purpose of the 1986 amendments was to benefit consumers: The statute lowers the amount of royalties paid by gas producers, and the savings are passed on to consumers. Marathon points to this pro-consumer purpose of the 1986 amendments and argues that allowing retroactivity would further this legislative purpose. Marathon argues that (1) the purpose of the statute is to benefit consumers by using contract pricing; (2) retroactivity results in more contract pricing; and (3) therefore, retroactivity is consistent with the purpose of the statute. Marathon cites extensive legislative history to support its argument, but while this legislative history generally recognizes the benefits of contract pricing, it does not answer the question whether the statute permits retroactivity.

9 Although it is true that the stated purpose of the 1986 amendments was to benefit consumers, the 1986 amendments exist ***1085** within the larger goals of the Alaska Land Act. Alaska Statute 38.05.180(a) recites the goals of the Alaska Land Act:

> (a) The legislature finds that
>
> (1) the people of Alaska have an interest in the development of the state's oil and gas resources to
>
> (A) maximize the economic and physical recovery of the resources;
>
> (B) maximize competition among parties seeking to explore and develop the resources; [and]
>
> (C) maximize use of Alaska's human resources in the development of the resources.

As we have recognized, the overall purpose of the Alaska Land Act is to maximize revenue for the state: In *Chevron v. LeResche* we pointed out that the purpose of the Alaska Land Act was "to provide for orderly oil and gas leasing that maximizes state return on its oil and gas resources," and that this fact should influence the statute's construction.[25] And as Marathon acknowledges, AS 38.05.180(aa) is "an exception to the goal of maximum royalty recovery."

Though the 1986 amendments' purpose of benefiting a smaller subset of Alaska's utility consumers would arguably support Marathon's interpretation, the Alaska Land Act's overall purpose of maximizing revenue for all Alaskan citizens would support DNR's interpretation. The 1986 amendments and their legislative history do not provide guidance as to which purpose should predominate in this case.

b. The legislative tolerance for retroactivity

Marathon points to the retroactivity that exists elsewhere in the statute and the fact that audits and royalty calculations occur well after the time of production. Royalty calculations involve amounts, such as "tax reimbursement amounts," that cannot be known until some time after production.[26] Marathon argues that the 1986 amendments reflect a tolerance for retroactivity and that, therefore, the statute allows retroactive requests for contract pricing. But Marathon ignores a crucial distinction between the type of retroactivity it seeks and the retroactivity built into the statute's structure. The statute recognizes that royalties will be *calculated* retroactively, but that is different than allowing the method used to calculate royalties to be *applied* retroactively. Royalties are necessarily calculated after the fact because the amount of gas production and other inputs will not be known until after production has occurred. Selecting which royalty calculation method to apply, however, can be accomplished before production has occurred.[27]

3. We defer to DNR's longstanding interpretation.

10 The key to our decision is the standard of review. We conclude that the statute is ambiguous and provides no direct answer whether retroactive contract pricing is permitted. We have recognized that "an agency's interpretation of a law within its area of jurisdiction can help resolve lingering ambiguity."[28] We therefore defer to DNR's interpretation that both the 1986 amendments' use of the word "prospective" and the Alaska Land Act's purpose of maximizing revenue prohibit it from approving retroactive contract pricing and we therefore conclude that it has a reasonable basis in the statute.

We are especially inclined to defer when an agency's statutory interpretation is longstanding. DNR has been applying its

interpretation for at least a decade. In multiple *1086 cases, we have recognized the special deference that is due to longstanding agency statutory interpretations. In *Bullock v. State*, we afforded a Department of Revenue interpretation "great weight" because it was "long-standing" and "continuous."[29] In *Bartley v. State*, we also emphasized how deference was due "when the agency's interpretation is longstanding."[30] In *Premera v. State*, we explained that we "apply a more deferential standard of review where an agency action is longstanding and continuous."[31] Since DNR's interpretation has been "longstanding and continuous," we apply this deferential standard of review and conclude that DNR's interpretation is reasonable.

B. DNR Was Not Required To Promulgate Its Interpretation In A Regulation.

11 12 Marathon argues that DNR's interpretation of the statute, even if valid, must be promulgated through a regulation before being applied to Marathon or any other party.[32] We use our independent judgment in deciding whether an agency action is a regulation.[33] Alaska Statute 38.05.020 provides that DNR may "establish reasonable procedures and adopt reasonable regulations necessary to carry out this chapter." Alaska Statute 38.05.020 requires that regulations so adopted must comply with Alaska's Administrative Procedure Act (APA).[34]

We have been hesitant to force agencies to promulgate all statutory interpretations as regulations.[35] Other courts have been similarly reluctant to require agencies to convert statutory interpretations into regulations, especially in matters that the agency would have had difficulty foreseeing. The United States Supreme Court in *SEC v. Chenery* explained this limitation: "[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule."[36] We stated in *Alyeska Pipeline Service Co. v. State* that a "requirement that each [agency] interpretation be preceded by rulemaking would result in complete ossification of the regulatory state."[37] It would be counterproductive to require DNR to devote its resources to promulgating regulations on every possible eventuality. We have previously explained that "absent statutory restrictions and due process limitations, administrative agencies have the discretion to set policy by adjudication *1087 instead of rulemaking."[38] Here, DNR made its statutory interpretation in the context of adjudicating applications for contract pricing. Because we permit agencies to make new statutory interpretations in adjudications and because DNR's interpretation does not impose "any new substantive requirements,"[39] we hold that DNR was not required to promulgate its interpretation in a regulation.

C. Due Process

Marathon claims that "[d]ue process considerations are triggered by DNR's refusal to consider Marathon's request under the legislative criteria." But, as the State notes, it is somewhat difficult to discern what due process violation Marathon is alleging. The Alaska Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."[40] The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." We have held that the "crux of due process is the opportunity to be heard and the right to adequately represent one's interests."[41]

Marathon did have sufficient notice and the opportunity to represent its interests. Marathon argues that DNR did not adequately "apprise" Marathon of the grounds on which DNR would make its decision. Marathon argues that because it did not have adequate notice of DNR's earlier interpretation of the statute, Marathon was therefore denied the "opportunity to defend its request and have its merits judged."

13 But DNR has relied on its interpretation of AS 38.05.180(aa) for over a decade. As we explained in *Alyeska Pipeline Service Co. v. State*, a statute itself can provide constructive notice of an agency's interpretation.[42] The statute in *Alyeska Pipeline*, like AS 38.05.180(aa), was silent on the issue in question. Nevertheless, we explained that, since the agency's interpretation was reasonable, a "careful reading" of that statute "should have alerted Alyeska to the possibility" that the agency could interpret the statute the way it did.[43] The fact that AS 38.05.180(aa) does not expressly prohibit retroactive requests does not mean that Marathon can assume that the statute allows retroactivity. Accordingly, we conclude that Marathon did have adequate notice that DNR could interpret AS 38.05.180(aa) as not allowing retroactive contract pricing.

14 Moreover, DNR did provide Marathon with notice of its decision on Marathon's request, and Marathon had the opportunity to present its arguments to DNR. After Marathon submitted its request, DNR rejected the request because

it was retroactive. Marathon requested reconsideration and argued that AS 38.05.180(aa) does permit retroactivity. DNR affirmed its earlier decision and explained its interpretation that "AS [3]8.05.180(aa) does not authorize the Department of Natural Resources to grant retroactive approval." Because Marathon had both adequate notice and a fair opportunity to present its claims, we conclude that its due process rights were not violated.

V. CONCLUSION

For the foregoing reasons, we AFFIRM the superior court's decision.

CHRISTEN, Justice, not participating.

Footnotes

1 The four prices are: (1) "the field price received by the lessee for the oil, gas, or associated substances"; (2) "the volume-weighted average of the three highest field prices received by other producers in the same field or area for oil of like grade and gravity, gas of like kind and quality, or associated substances of like kind and quality at the time the oil, gas, or associated substances are sold or removed from the leased or unit area or the gas is delivered to an extraction plant if that plant is located on the leased or unit area; if there are less than three prices reported by other producers, the volume-weighted average will be calculated using the lesser number of prices received by other producers in the field or area"; (3) "the lessee's posted price in the field or area for the oil, gas, or associated substances"; or (4) "the volume-weighted average of the three highest posted prices in the same field or area of the other producers in the same field or area for oil of like grade and gravity, gas of like kind and quality, or associated substances of like kind and quality at the time the oil, gas, or associated substances are sold or removed from the leased or unit area or the gas is delivered to an extraction plant if that plant is located on the leased land or unit area; if there are less than three prices posted by other producers, the volume-weighted average will be calculated using the lesser number of prices posted by other producers in the field or area." STATE OF ALASKA, DEP'T OF NATURAL RES., COMPETITIVE OIL AND GAS LEASE (ADL No. 384372), ¶ 38 (1995).

2 Ch. 55, SLA 1986.

3 Letter from Esther C. Wunnicke, Comm'r, Dep't of Natural Res., to Rep. Richard Schultz (Apr. 22, 1986).

4 *Native Village of Elim v. State,* 990 P.2d 1, 5 (Alaska 1999).

5 *Alaskans For Efficient Gov't, Inc. v. Knowles,* 91 P.3d 273, 275 (Alaska 2004) (quoting *Ganz v. Alaska Airlines, Inc.,* 963 P.2d 1015, 1019 (Alaska 1998)).

6 *Matanuska-Susitna Borough v. Hammond,* 726 P.2d 166, 175 (Alaska 1986).

7 *Id.*

8 *Id.*

9 *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.,* 171 P.3d 1110, 1119 (Alaska 2007).

10 AS 38.05.020, .180.

11 *Earth Res. Co. v. State, Dep't of Revenue,* 665 P.2d 960, 964 (Alaska 1983).

12 *See Kelly v. Zamarello,* 486 P.2d 906, 917 (Alaska 1971) (holding that reasonable basis deference is appropriate in areas with "complex subject matter").

13 697 P.2d 626, 633 (Alaska 1985) (quoting 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 30.14, at 269 (1958)).

14 *Union Oil Co. of California v. State,* 804 P.2d 62, 64 (Alaska 1990).

15 Ch. 169, SLA 1959.

16 Ch. 169, Art. VIII, § 3, SLA 1959; Ch. 169, Art. II, § 4, SLA 1959.

17 Ch. 169, Art. VIII, § 3, SLA 1959.

18 *See supra* note 1.

19 AS 38.05.180(aa), (bb).

20 AS 38.05.180(aa).

21 *Borg-Warner Corp. v. Avco Corp.,* 850 P.2d 628, 633 n. 12 (Alaska 1993) ("Statutory construction begins with an analysis of the language of the statute construed in view of its purpose.").

22 *Wilber v. State, Commercial Fisheries Entry Comm'n,* 187 P.3d 460, 465 (Alaska 2008).

23 BLACK'S LAW DICTIONARY 1222 (6th ed. 1990).

24 Letter from Esther C. Wunnicke, Comm'r, Dep't of Natural Res., to Rep. Drue Pearce (Apr. 28, 1986).

25 663 P.2d 923, 931 (Alaska 1983).

26 AS 38.05.180(bb).

27 Moreover, the 1986 amendments provide that contract pricing can only be applied to gas sales made after the legislation's passage. The 1986 session law adopting AS 38.05.180(aa) includes a note stating that the statute is only to be applied prospectively: "The legislature finds that this authorization should apply prospectively and does not intend the authorization to apply to the valuation for royalty purposes of gas sold by a lessee under a gas sales contract entered into before the effective date of this Act." Ch. 55, § 1, SLA 1986.

28 *Wilson v. State, Dep't of Corr.*, 127 P.3d 826, 829 (Alaska 2006) (quoting *Bartley v. State, Dep't of Admin., Teacher's Ret. Bd.*, 110 P.3d 1254, 1261 (Alaska 2005)).

29 19 P.3d 1209, 1210, 1215 (Alaska 2001).

30 110 P.3d at 1261.

31 171 P.3d 1110, 1119 (Alaska 2007).

32 The Administrative Procedure Act defines a "regulation." AS 44.62.640(a)(3) (" 'regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; 'regulation' does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; 'regulation' includes 'manuals,' 'policies,' 'instructions,' 'guides to enforcement,' 'interpretative bulletins,' 'interpretations,' and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public").

33 *Alaska Ctr. for the Env't v. State*, 80 P.3d 231, 243 (Alaska 2003) ("Whether the agency action is a regulation is a question of law that does not involve agency expertise, so we apply our independent judgment.").

34 AS 38.05.020(b)(1).

35 *See Burke v. Houston NANA*, 222 P.3d 851, 867 (Alaska 2010); *see also* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 6.9, at 504 (5th ed. 2010) ("Courts cannot require agencies to make 'rules' only through rulemaking because sometimes an agency is justified in eschewing rulemaking in favor of gradual development of 'rules' through adjudication of cases....").

36 332 U.S. 194, 202–03, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

37 145 P.3d 561, 573 (Alaska 2006).

38 *Amerada Hess Pipeline Corp. v. Alaska Pub. Utils. Comm'n*, 711 P.2d 1170, 1178 (Alaska 1986).

39 *Smart v. State, Dep't of Health & Soc. Servs.*, 237 P.3d 1010, 1017 (Alaska 2010).

40 Alaska Const. art. I, § 7.

41 *Groom v. State, Dep't of Transp.*, 169 P.3d 626, 635 (Alaska 2007).

42 145 P.3d at 571.

43 *Id.*

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