HB

187

Alaska State Legislature

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Representative Kyle Johansen
District 1

Sponsor Statement

HB 187: An Act relating to holders of business license endorsements for sales of tobacco products

House Bill 187 was introduced to address the lack of Due Process under the Fifth Amendment of the Alaska and United States Constitutions that retailers face during business license enforcement proceedings under AS 43.70.075 "the sale of tobacco products to underage persons".

According to the statute as it is currently written, the State of Alaska does not need to prove negligence by the retailer. It only needs to show the conviction of the employee who made the illegal sale of a tobacco product to an underage person. The retailer is not allowed to show evidence of its policies prohibiting illegal sales or any of its other good faith efforts to train and educate its employees.

House Bill 187 addresses the Due Process issue by requiring a finding of negligence of the license holder before the retailer can be sanctioned. The retailer would be allowed to show its policies and procedures as well as any other good faith efforts it has made to ensure its employees are trained not to make illegal sales to underage persons.

House Bill 187 then allows an Administrative Law Judge (ALJ) the discretion to determine the appropriate penalty bases on the circumstance of each individual case. If the ALJ determines that the retailer made no real effort to adequately train its employees on the sale of age restricted products, they can impose the full 20 day license suspension. If the ALJ determines that the retailer did everything in its power to stop the employee from making an illegal sale and the employee made one anyway, the ALJ can impose a license suspension of anywhere between zero and twenty days.

The changes made in House Bill 187 are necessary to provide Alaska businesses with the Due Process granted to them under the State and Federal constitution, while still allowing Alaska to have the strictest penalty matrix in the country for the sale of tobacco products to underage persons.

JOHN A. TREPTOW
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February 28, 2007

VIA EMAIL (steve.rush@holidaycompanies.com)

Steve Rush
Director of Corporate Compliance
and Government Relations
Holiday Companies
4567 American Boulevard West
Minneapolis, Minnesota 55437

Re: DHSS Proposed Policy Change

Dear Mr. Rush:

You have asked that we review the policy change regarding tobacco enforcement authored by L. Diane Casto, Manager, DBH, Prevention and Early Intervention of DHSS. It is our understanding that DHSS is proposing that a request be made to the Commissioner of Public Safety for a special commission for DHSS tobacco investigators to cite tobacco endorsement holders under AS 11.16.130 at the same time that employees of the endorsement holders are cited under AS 11.76.100(a)(1) for the sale of tobacco products to underage individuals.

It is our opinion that the proposed policy change violates the same due process guarantees recognized by Superior Court Judge William Morse in his Order of October 27, 2006, in the case *Holiday Alaska, Inc. v. State of Alaska, Division of Corporations, Business and Professional Licensing*, Case No. 3AN-05-14036 CI, filed in the Superior Court for the State of Alaska, Third Judicial District at Anchorage, wherein the Court concluded that AS 43.70.075 was unconstitutional. In addition, it is our opinion that Judge Morse's holding raises serious questions about the legality of the mandatory suspension of endorsements found in AS 43.70.075(d). The reasons for our opinion are set forth below.

It is our understanding that in light of Judge Morse's October 27, 2006 decision, DHSS is proposing that, in order to meet the due process deficiencies currently found in AS 43.70.075(d), DHSS wants the authority to have its tobacco investigators cite tobacco endorsement holders under AS 11.16.130 at the same time it cites the endorsement holders' clerks under AS 11.76.100(a)(1). According to DHSS, "This policy change, to cite both the clerk of the business, will accomplish the court's concerns that due process is not given to the businesses whose clerks are cited for selling tobacco to youth under 18." We certainly disagree with that conclusion.

Citing the endorsement holder for violation of AS 11.76.130 does not begin to address the constitutional concerns expressed by Judge Morse. In fact, citing endorsement holders

under AS 11.16.130 for violations by the endorsement holders' clerks under AS 11.76.100(a)(1) raises the very same constitutional issues that concerned Judge Morse and ultimately led him to declare this provision unconstitutional. AS 11.16.130 provides that, "An organization is legally accountable for conduct constituting an offense if the conduct (1) is the conduct of its agent and (a) within the scope of the agent's employment and in behalf of the organization; or (b) is solicited, subsequently ratified, or subsequently adopted by the organization or (2) consists of an omission to discharge a specific duty of affirmative performance imposed on the organizations by law." This criminal statute is basically a strict liability statute for which liability is imposed upon the organization if the organization's employee acts within the scope of the employee's employment in behalf of the organization. The predicate for liability under AS 11.16.130 is the conduct of the employee. Once the employee's offense is established, the organization is liable if the employee was acting within the scope of his employment and on behalf of his employer. That statutory scenario for the imposition of liability is virtually identical to the method in which liability is imposed on an endorsement holder, under AS 43.70.075, for an employee's violation of AS 11.76.100. Under both statutes, if the criminal conduct of the employee is established, the only issue to be resolved, before imposition of "punishment," is the issue of whether the employee was acting within the course and scope of his employment.

Judge Morse found, "Holiday has a property interest in its ability to sell tobacco products. That interest must be protected in a proceeding wh[illegible]n Holiday may lose, even temporarily, the tobacco endorsement that is required to sell tobacco products." (Decision, p. 5) Judge Morse also noted, "Once the state presented the judgments of convictions of the three individuals, the only issue became whether each was acting within the scope of his employment at the time of the events that led to the conviction. The question on appeal is whether, by restricting Holiday to such a narrow issue, did the hearing fail to afford Holiday due process." (Decision, p. 9) Judge Morse found that, "In the hearing at which Holiday was facing the suspension of the tobacco endorsement, the central issue was whether its agents or employees had sold tobacco products to underage customers. The restriction of the hearing to the issue of the scope of the agent or employee's authority avoids the typical central issue entirely." (Decision, p. 12) In a footnote, Judge Morse stated, "The only time the scope of authority might be of any practical relevance would be on the rare occasion when the holder of the tobacco endorsement could defend on the grounds that the agent or employee had taken tobacco products off premises and sold them to customers, safe in the back of the employee's car or from the agent's home." (Decision, p. 12, fn. 32)

Charging the endorsement holder with a violation of AS 11.16.130 runs afoul of Judge Morse's most basic concern:

> The use of the convictions of three individuals as conclusive proof of elements of the case for the suspension of the tobacco endorsements against Holiday is the basic fact that Holiday had no opportunity to be heard concerning the questions concerning the alleged conduct of its agents or employees. The conduct of the three individuals constitute the issues of central importance in the case against Holiday but, by the use of the convictions of the violations of these three individuals, Holiday is deprived of any meaningful opportunity to be heard on

> those central issues. Having been deprived of that opportunity by the restriction of the issues that could be raised at the administrative hearing, Holiday was deprived of due process.... Holiday was not afforded due process in law in violation of state and federal constitutional rights.

(Decision, p. 17)

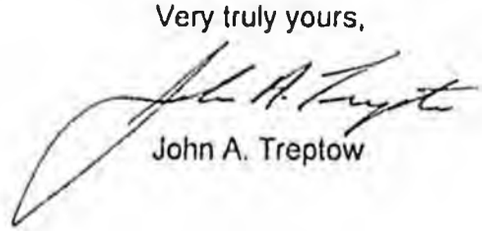
What DHSS continues to overlook is the fact that AS 11.76.100 requires the "negligent" sale of tobacco products to a person under the age of 19. The legislature clearly did not intend that the sale of tobacco to a person under the age of 19, without fault, would establish criminal liability. AS 11.76.100(a)(1) is not a strict liability statute. The problem with DHSS's proposal is that it fails to give the endorsement holders the opportunity to present evidence on the negligent sale question. Endorsement holders are not afforded the opportunity to produce any evidence relevant to (1) employee training on tobacco sales, (2) company policies regarding the sale of tobacco products to underage persons, or (3) any other evidence that would tend to show they were not negligent. As long as the underlying conduct of the employee is judged by a negligence standard in order to impose criminal liability, the failure to afford an endorsement holder an opportunity to present evidence that it acted negligently in connection with the sale to underage persons will continue to run afoul of due process guarantees under state and federal law.

The proposed policy change regarding tobacco enforcement does absolutely nothing to address—let alone correct—the due process deficiencies and the unconstitutionality of AS 43.70.075.

Holiday Alaska's appeal of the administrative law judge's decision to Judge Morse did not involve that portion of subsection (d) of AS 43.70.075 that mandates a suspension of the endorsement. Under the statute, the administrative law judge "shall suspend the endorsement for a period of...." The length of the suspension depends upon whether the endorsement holder has previously been convicted and, if so, the timing of the previous conviction(s). The mandatory nature of the penalties deprives the endorsement holder of presenting any evidence on mitigating factors that might best serve the interests of justice and the purposes of tne statute. Once again, the underlying conduct that is being punished is negligent conduct, not intentional conduct or reckless disregard of the rights of others. The constitutional deficiencies found in the "Liability" section of AS 43.70.075 are certainly found in the "Punishment" section of that section as well. Judge Morse's ruling certainly brings into question the continued validity of the imposition of punishment under subsection (d) of AS 43.70.075.

If we can provide any additional information, please do not hesitate to contact us.

Very truly yours,



John A. Treptow

HOLIDAY STATIONSTORES
4567 West 80th Street, Bloomington, MN 55437 (952) 830-8700

Representative Kyle Johansen
State Capitol, Room 13
Juneau, AK 99801-1182

Re: House Bill 187

Dear Representative Johansen:

I am writing representing the Holiday Stationstore group in Alaska. I supervise the operation of 26 convenience stores in Alaska. These stores employ over 300 Alaskan workers and provide additional moneys to the Alaskan economy through many corporate visitors aiding in the training and success of these stores.

The above Bill provides a way of correcting issues faced by retailers of tobacco products who happen to make a sale to an underage person. Under the current law AK 43.70.075, it does not allow us as retailers to due process. We cannot introduce any evidence in our defense. The law needs to be changed.

The penalties that exist under the AK law 43.70.075 are the most severe in the nation. A first time offense is met with a 20 day suspension. This is not only all tobacco products but the related gasoline, food, snack, beverage, candy or automotive sale which can go along with the tobacco purchase. Customers do not come directly back after a retail store has suffered and undue penalty and cannot sell their product for a 3 week period. The monetary punishment on the business could exceed a hundred thousand or more dollars.

The Alaskan employees of Holiday Stationstores appreciate your support of this legislation which is important to their everyday lively hood.

Regards,

Tom Iverson

Tom Iverson
Regional Director of Operations

SAFEWAY

Safeway Inc.
Loss Prevention Director
1121 124th Avenue NE
Bellevue, WA 98005

March 22, 2007

Representative Kyle Johansen
State Capital, Room 13
Juneau, AK 99801-1182

RE: HB 187

Dear Representative Johansen:

My purpose in writing is in support of HB 187 and to urge its passage by the Legislature. Safeway Inc. does business in the State of Alaska under the names of Safeway Inc., Carrs/Gottstein, Eagle Quality, Hansons Trading, Oaken Keg and the Great Alaska Tobacco Company. From time to time, stings conducted by law enforcement in the State of Alaska result in employees of these entities being cited for selling tobacco to under cover operatives directed by law enforcement. When this occurs, Safeway and its subsidiary organizations are subjected to suspensions and fines without recourse. HB 187 sets up a practice of due process and allows the introduction of evidence that might tend to mitigate the suspension and any civil penalty.

As the Loss Prevention Director for Safeway Inc., I interact with state regulatory agencies in four states, Montana, Idaho, Washington and Alaska. I am particularly knowledgeable about the practices in the State of Washington. As you are likely aware, Washington has one of the best Synar compliance rates of all the states. It is clearly the design of their program to assist retailers in educating both the retailer and their employees. This is a significant part of their overall strategy to achieve their excellent Synar compliance rates. They do not immediately suspend sales on a first sale to minor violation. They have learned that often the employee who failed a sting by an undercover operative is of great value to that company to ensure that no similar failures occur. After years of running successful sting operations they are now focusing more on the education piece. The are also focusing on education of the public with regards to the larger issue of social sources for minors to obtain tobacco. What they have discovered is that the real problem of minor access to tobacco is largely related to individuals who are of age, purchasing tobacco and providing it to minors.

HB 187 is taking a step in the correct direction by allowing employers to demonstrate the efforts they go to ensure compliance with the Alaska regulations regarding the sale of tobacco to minors. As you are aware Safeway Inc. has at considerable expense engaged a private company to conduct in house compliance tests at our stores to ensure compliance with the Alaska State rules. There are however times when employees of Safeway and its subsidiaries do not do the right thing. They will sometimes sell to a minor operative even though they have signed rules and regulations that preclude this at date of hire and twice yearly doing the course of the year and have undergone regular education, and experience in house tests. Safeway also has imposed date of birth locks on restricted item sales to attempt to remove the human error element.

HB 187 provides the ability for Safeway to properly present these efforts to ensure compliance as mitigation. This is an excellent piece of legislation that places the State of Alaska more in line with the practices of the other states where Safeway does business. We are very supportive of the passage of this legislation.

Sincerely,

Jason B. Moulton
Loss Prevention Director
Safeway Inc.
Seattle Division

JBM:ls

SAFEWAY

Safeway Inc.
Loss Prevention Director
1121 124th Avenue NE
Bellevue, WA 98005

April 27, 2007

Chairman Chenault
House Finance Committee
Alaska State House of Representatives'
Juneau, Alaska.

RE: Alaska State HB 187 Written comments submitted in lieu of oral testimony.

Dear Sir:

My purpose in writing is to communicate Safeway's support of HB 187 and to urge its passage by the Alaska State Legislature. Safeway Inc. does business in the State of Alaska under the names of Safeway Inc., Carrs/Gottstein, Eagle Quality, Hanson's Trading, Oaken Keg and the Great Alaska Tobacco Company. We currenlty operate 28 stores, 7 fuel stations and 8 tobacco shops. From time to time, compliance checks conducted by law enforcement in the State of Alaska result in employees of these entities being cited for selling tobacco to under cover operatives. This happened (4) times is 2005, (2) times in 2006 and none yet in 2007. When this occurs, Safeway and its subsidiary organizations are subjected to suspension and fines without recourse. HB 187 sets up a practice of due process and allows the introduction of evidence that might tend to mitigate the suspension and any civil penalty.

I know from participation in the hearings on this bill that the State of Alaska takes great pride in having the toughest laws in the nation to combat sales of tobacco to minors. Safeway and its subsidiaries share your concern about youth access to tobacco and believe that a viable compliance check program, a strong retail education program for employees, and a enhanced education program specifically targeting youth and their parents are keys to reducing youth access to tobacco.

As the Loss Prevention Director for Safeway Inc., I interact with state regulatory agencies in four states, Montana, Idaho, Washington and Alaska. I am particularly knowledgeable about the practices in the State of Washington where I sit on the Youth Access Task Force and also act as Co Chair for the Governors Council on Substance Abuse. As you may be aware, Washington has one of the best Synar compliance rates of all the states as well as a declining number of youth who are smoking. Our latest statistics show that 19.7% of 12th grade youth have smoked tobacco during the past 30 days. This is compared to a national statistic of 25% for the same age group. This trend line continues to shift downward from 27% in 2000.

During the hearings I have heard a lot of statistics about the how well Alaska has done in improving the percentage of the compliance checks where the retailer denies the sale. What I have not heard are the statistics about the percentage of youth who are smoking and if that number is decreasing. Clearly Alaska is doing very well in passing the compliance checks but the real test is are we having less youth smoking.

During the Washington State healthy youth survey 12.9% of those who were smoking indicated that they purchased their cigarettes from a store. The bulk of those surveyed indicated that they were given the tobacco by someone 18 or older (12.9%) Borrowed or bummed the tobacco (21.5%) or gave someone else money to buy them (27.6%), (6.1% purchased them from a vending machine, (4.3%) stole from a store or family, and (14.7%) cited other. Compliance checks focus primarily on the source of approximately 13% of the youth access to tobacco source problem.

Washington State continues to emphasize compliance checks as a significant part of their overall strategy to achieve their excellent Synar compliance rates. They do not however immediately suspend sales on a first sale to minor violation. They have learned that often the retailer and the employee who failed a compliance check by an undercover operative redouble their efforts to ensure that no similar failures occur. After years of running successful compliance check operations they are now focusing more on education of the retail organization and the retail employee. The are also focusing on the education of the public with regards to the larger issue of the health implications of tobacco use and social sources for minors to obtain tobacco. What they have discovered is that the larger problem of minor access to tobacco is not underage sales but is largely related to individuals who are of age, purchasing tobacco and providing it to minors. They have also focused recent grant monies to law enforcement to focus on minors in possession. The answer to youth access to tobacco is a combination of a good compliance program including reasonable sanctions with due process included for the retailer, education of employees and the retailers, education of the public, and enforcement of the minor possession laws.

HB 187 is taking a step in the correct direction by allowing employers to demonstrate the efforts they go to ensure compliance with the Alaska regulations regarding the sale of tobacco to minors and to afford due process to the retailer whose employees may fail these checks. As you are aware Safeway Inc. at considerable expense has engaged a private company to conduct in house compliance tests at our stores to ensure compliance with the Alaska State rules. There are however still times when employees of Safeway and its subsidiaries fail compliance checks. They will sometimes sell to a minor operative even though they have signed policy and procedures that preclude this at the time they are hired. Safeway employees are reminded monthly of this policy through an employee newsletter. They are also required to resign this policy every six months and under-go regular education and reeducation on this subject which is provided by management. Safeway also uses a date of birth lock at the point of sale on restricted item sales to attempt to remove the human error element involved in calculating the age of the customer.

I would like to raise one other issue. That issue is the actual impact to business when a suspension is imposed. In order to make this meaningful I am using two very specific examples. The first is the Greater Alaska Tobacco Company Store number 1869 located at 5600 Debarr Road in Anchorage. Below is a example of the financial impact at that store and on tax revenue that would not be paid to the City of Anchorage and the State of Alaska associated with either a 20 day or 10 day suspension. The assumption here is that the customers would return within 30 after the suspension occurs. If that does not happen the impact is even greater. Keep in mind that a GATC is principally a tobacco store.

GATC 1869
(20) Day Suspension
Loss Sales: 65,714
50% Loss Sales First 30 Days After Re-Opening: 49,285
Total Loss Sales: 114,999
Est. Loss Tax Revenue To The City And State: 31,000 First 20 Days / 50% Loss Taxes Next 30 Days 23,250 = 54,250
(10) Day Suspension
Loss Sales: 32,857
50% Loss Sales First 30 Days After Re-Opening: 49,285
Total Loss Sales: 82,142
Est. Loss Tax Revenue To The City And State: 15,500 First 10 Days / 50% Loss Taxes Next 30 Days 23,250 = 38,750 Total

The second example is that of a traditional food store operation that also sells tobacco. These numbers are from Safeway Store 2628 located at 1725 Abbott Road in Anchorage Alaska.

Carrs 2628
(20) Day Suspension
Loss Sales: 33,714
50% Loss Sales First 30 Days After Re-Opening: 25,285
Total Loss Sales: 58,999
Est. Loss Tax Revenue To The City And State: 16,000 First 20 Days / 50% Loss Taxes Next 30 Days 12,000 = 28,000 Total
(10) Day Suspension
Loss Sales: 16,857
50% Loss Sales First 30 Days After Re-Opening: 25,285
Total Loss Sales: 42,142
Est. Loss Tax Revenue To The City And State: 8,000 First 10 Days / 50% Loss Taxes Next 30 Days 12,000 = 20,000 Total

Essentially, what you see above is that in a best case scenario, the current practice of suspension without due process is essentially penalizing sales in the amount of $115,000 for the GATC or $59,000 for the grocery store. This is a very significant impact to the operation of these stores and is viewed as onerous especially when there is no due process provided in the law as currently written.

HB 187 provides the opportunity for retailers to present their efforts to ensure compliance as mitigation before an Administrative Law Judge. We would encourage you consider giving further latitude to the ALJ with regard to the suspension penalty particularly in light of the financial impact that it represents. This legislation addresses the due process issue. We are very supportive of the passage of this legislation.

Sincerely,

Jason B. Moulton
Loss Prevention Director
Safeway Inc.
Seattle Division

JBM:jbm

Testimony
CSHB 187 (JUD) K
4/29/07

L. Diane Casto
Manager, DBH
Prevention & Early Intervention Services
907/465-1188

The DHSS Division of Behavioral Health is responsible for enforcement of illegal sale of tobacco to youth under the age of 19. In addition, as required by the federal Synar legislation, the state must maintain an illegal sell rate to minors of 20% or less or face federal monetary penalties to the Substance Abuse Prevention & Treatment Block Grant.

The DHSS, DBH opposed CSHB 187 (version K) as written, but we do support the need for and intent of HB 187 to address the lack of due process for retailers whose employees sell tobacco to minors under the age of 19.

Primary areas of concern:

1) Section 2 - currently the state has to prove that the employee negligently sold tobacco to a minor. HB 187 will now require the state to prove also the employer's negligence in that sale. Our interest is in holding the employer accountable for the acts of his/her employee.

2) Section 3 - this section allows retailers to develop, on paper, a loosely identified and monitored "training" program to inform employees of the State's laws related to the sale of tobacco to minors, thereby reducing (or eliminating) their responsibility for the actions of their employees and reducing their period of suspension to sell tobacco for the illegal sale.

3) Section 3, paragraph (w) - while this amendment does add a 10-day floor for suspension, guaranteeing that all citations will include some level of tobacco endorsement suspension, this floor appears to be the same for all violations. This would provide for a retailer with a history of non-compliance to continue to have their suspensions reduced to 10 days instead of 45, 90 or 100 days. While we support a suspension floor, it should be graduated in relation to the indicated number of days or not available at all to those who repeatedly violate the law.

The current system of fines and suspensions is working. State law was amended in 2002 to ensure that retailer violations resulted in consistent, temporary suspensions of tobacco sales, in addition to fines to the clerk of sale.

In 2002 the state's illegal sell rate was 30%--following the change in law, the 2003 rate was 10%. In addition to reducing youth access, youth usage of

tobacco also has decreased. We support a fair fix to the due process issue for Alaska retailers; we do not support dismantling the current system of fines and suspensions for those businesses that sell tobacco to youth under the age of 19.

Points in response to questions from House Finance on 4/28:

- Alaska does have the most stringent laws related to enforcement of illegal sale of tobacco to minors. We are not the only state to impose suspensions; we are the only state to have a mandatory number of suspension days per violation. One problem noted by the US General Accounting Office is the inconsistent application of fines and suspension in many states–reducing the quality of the tobacco enforcement programming. Alaska's laws are equitable and consistently applied to all retailers violating Alaska's tobacco laws.

- As noted, there are other states with sell rates as low as or lower than Alaska's rate, without mandatory suspension. While this is true, there are varied reasons. One reason is that many states are using youth ages 14-15 to conduct the purchases. Alaska's program uses youth who are primarily 15-17. The use of younger youth naturally produces fewer sales. The federal government is reviewing the age of youth buyers and considering changes to the Synar methodology. Other methodology inconsistencies affect the ability to compare outcomes state-by-state and are under review by the General Accounting Office.

- It is also important to remember that the number of compliance checks we conduct each year is very small–we have only three (3) Tobacco Investigators that cover the state. In a report by the Schneider Institute for Health Policy it estimates that "even aggressive compliance inspections programs will observe far fewer than 1/100th of 1% of all [tobacco sale] transactions." The majority of tobacco sales occur when Tobacco Investigators are not observing; our compliance and enforcement work is not a constant intrusion on retailers.

Alaska State Legislature

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Representative Kyle Johansen
District 1

SECTIONAL ANALYSIS

HB 187

"An Act relating to holders of business license endorsements for sales of tobacco products"

SECTION 1:

Provides that the department shall suspend the endorsement for the sale of tobacco only after a hearing.

SECTION 2:

Expands the evidence that the hearing officer shall use to:

1. Did the license holder negligently violate AS 11.76.100, 11.76.102, 11.76.107? Hearing officer may consider provisions of Section 3.
2. Any other evidence that might tend to mitigate or aggravate the length of suspension.

SECTION 3:

Allows the department to reduce license suspension period if the license holder establishes that a written policy against the selling of tobacco products to minors was adopted and enforced prior to the date of violation. Also allows the department and license holder to agree to an informal disposition of a suspension.

Alaskans for Tobacco-Free Kids

American Cancer Society · AMERICAN LUNG ASSOCIATION. of Alaska · American Heart Association. Learn and Live. · AARP Alaska

April 23, 2007

Representative Kevin Meyer
Co-Chair House Finance Committee
Capitol Room 515
Juneau, AK 99801-1182

Dear Representative Meyer:

We are writing to express our strong support for the state's Work Draft for HB 187, "An Act relating to the suspension of business license endorsements and the imposition of civil penalties for certain sales of tobacco products to persons under 19 years of age", dated 4/2/2007 (773-07-0086 bil.doc/ Drinkwater). We are confident this draft addresses the issue of due process while not substantially weakening the effective enforcement program that prevents the illegal sales of tobacco products to children. **The draft also allows for reduced suspensions in recognition of exemplary efforts to prevent sales to kids. Indeed, the draft represents a win, win for all parties concerned.**

ATFK expressly acknowledges the need to make statutory changes to provide due process and has been actively working with the Palin Administration to that end. It is imperative, however, that such changes not compromise effective enforcement of illegal tobacco sales. Preventing illegal sales is a critical part of the overall comprehensive tobacco prevention effort needed to reduce youth smoking.

Smoking is described as a "pediatric epidemic" because nearly all smoking starts in childhood. In Alaska, more than three-quarters of youth who smoke started before age 15 and nearly half started before age 13. Virtually no one starts smoking after age 18. Tobacco is a deadly addictive drug and cigarettes kill approximately half of all long-term users. Accordingly, retail businesses that sell tobacco products have a grave responsibility to prevent the illegal sale of tobacco to children.

In the recent past, Alaska has made excellent progress in reducing illegal tobacco sales to children. We should all, be proud of that achievement. After many years of wide-spread illegal sales, Alaska law was amended to ensure that violations resulted in a predictable and consistent temporary suspension of tobacco sales. The compliance program currently in place immediately succeeded in dramatically reducing illegal sales. After predictable and significant penalties were put in place, illegal sales to kids plummeted. **The original draft of HB 187 and the most recent 3/27/07 (19C) draft presented by Holiday would go backwards by severely weakening the clear, predictable and consistent enforcement program against illegal tobacco sales.**

ATFK agrees that retailers should be able to contest whether an illegal sale did take place. We also agree that exemplary efforts to prevent sales to children should be recognized and based on those efforts a reduction in the length of suspension may be warranted. The state's work draft referenced above, provides for reduced suspension where specific criteria have been met (beginning at Page 4, Line 10 through page 5, line 5). This criterion assures exemplary effort, rather than simply arguing that an education program is in place. Again, we believe this draft addresses the issue of due process, maintains a strong, effective enforcement program against illegal tobacco sales and recognizes retailers' efforts to prevent illegal sales with an opportunity for reduced license suspensions.

As always if there are questions or concerns, please feel free to contact us.

Sincerely,

Michelle Toohey
American Lung Association of Alaska

Suzanne Meunier
American Heart Association

Pat Luby
AARP

Emily Nenon
American Cancer Society

Policy change regarding Tobacco Enforcement within the Department of Health and Social Services

Prepared by L. Diane Casto, Manager, DBH, Prevention & Early Intervention

On October 27, 2006 the Anchorage Superior Court issued a decision in the Holiday Alaska v. SOA, DCCED, Division of Corporations, Business and Professional Licensing court case. The decision, that the current process for citing retailers who sell tobacco products to persons under 19 years of age does not provide for due process to the retailer, will impact our mandated tobacco enforcement activities.

Currently, clerks are cited under AS 11.76.100(a) (1) if they sell to an underage person. If they plead no contest or guilty, or are convicted following a trial, the conviction is forwarded from the court system to Department of Commerce, Community and Economic Development (DCCED). DCCED then sends a notice to the clerk's employer indicating that, as a result of the conviction, their tobacco endorsement will be suspended and a civil penalty imposed unless the employer request a hearing. Holiday successfully argued on appeal to superior court that it was denied due process because it faced suspension of its tobacco endorsement based on the results of court proceedings about which they had no notice and no opportunity to participate.

To rectify this situation and provide retailers with appropriate due process, DHSS will change its policy for issuing citations by citing both the employee and the corporate employer simultaneously. The business entity can be held responsible for the acts of its employees (i.e. the negligent sale of tobacco) via AS 11.16.130, which says that an organization is legally accountable for an offense if the conduct, among other things, is the conduct of its agency and within the scope of the agent's employment and in behalf of the organization.

DHSS will request, from the Commissioner of Public Safety, a special commission for the DHSS Tobacco Investigators to cite under AS 11.16.130. It should be noted that because of an Alaska case, ABC Towing v. State, which says that a sole proprietorship is not an "organization" under AS 11.16.130; sole proprietors cannot be cited under this theory of legal accountability. They could be cited if DHSS had a basis for arguing that the owner was independently guilty. Approximately 10% of tobacco enforcement cases involve a sole proprietor as the employer.

This policy change, to cite both the clerk of sale and the business, will accomplish the courts concern that due process is not given to the businesses whose clerks are cited for selling tobacco to youth under 19. Without this change to our policy, our tobacco enforcement work will be greatly compromised. This proposed change to our policy is the most valid and has been discussed with staff of the Attorney General's office. We anticipate this change will be completed within 30-days of initiation.

The Alaska Tobacco Control Alliance is supportive of the change in policy. We all believe the current system of citations and suspensions of tobacco endorsements is effective in keeping tobacco products out of the hands of youth and we have continually met our federal Synar sell rate of 20% or below since 2003.

TESORO

Tesoro Alaska Company
P.O. Box 196272
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The Honorable Jay Ramras
Alaska House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Chairman Ramras:

Thank you for hearing HB 187 (An act relating to holders of business license endorsements for sales of tobacco). I write today in support of the legislation.

Tesoro Alaska operates 31 retail sites that have tobacco sales endorsements. My company has developed a strong culture to prevent underage tobacco sales, and has invested heavily in a training and self-enforcement programs to help employees live within the law. We have also developed a positive working relationship with state enforcement officials to prevent underage sales.

Tesoro Corporation operates convenience stores in 16 western states. Among those states, Alaska has the toughest laws against underage tobacco sales, and passage of HB187 would in no way weaken that position. We support the bill to preserve our due process rights.

We support the policy goal of the Legislature and Administration to prevent underage tobacco sales. Key to achieving that goal is a legal framework that encourages all endorsement holders to invest in training and policies that Tesoro has. Passage of HB 187 is a positive change to state law.

Sincerely,

Kip Knudson
External Affairs Manager

CC: Representative Kyle Johansen

Anchorage Daily News Editorial

(Published: April 11, 2007)

Keep the heat on

Tobacco vendors should be accountable for underage sales

Do Alaska lawmakers really want to make it easier for stores to get away with selling tobacco to minors?

They're being asked to do just that, under the guise of ensuring due process to "responsible" vendors. Yes, those vendors have some reason to complain, but legislators don't have to open the new loophole proposed by Ketchikan Republican Rep. Kyle Johansen.

Under current law, the state automatically suspends a tobacco seller's license if any underage customer is busted for buying smokes or other products from that location. First offense is a 20-day suspension, and the penalty goes up from there.

Rep. Johansen wants to create a good-faith exemption from the mandatory license suspension. Under his House Bill 187, if a vendor can prove it has a reasonable program to prevent underage sales, it could get off without a suspension.

That change would take Alaska back to the bad old days, when undercover stings busted 36 percent of all vendors tested for sales to minors. After the state started suspending violators' licenses, the underage sales rate dropped to about 11 percent.

Tobacco vendors deserve a chance to contest the evidence in an underage sales case. After all, a finding of guilt will cost them a license suspension. That is a matter of fairness and due process. And the business license suspension time ought to fit the crime. It should be less for a business that rides herd on its clerks to follow the law, compared to a business that doesn't care if it's selling tobacco to elementary school kids. A minimum three-day suspension might be appropriate in the first case, while the latter would be lucky if it ever gets to sell cigarettes again.

But letting the tobacco vendor off the hook altogether for underage sales, as long as it has a good excuse? That's a bad idea.

Holding vendors strictly accountable for underage sales is a proven way to keep harmful tobacco products away from kids. The task for the Legislature is to enforce that accountability, while making sure the vendor gets due process and faces a license suspension that's proportionate to the offense.

BOTTOM LINE: The Legislature shouldn't let tobacco vendors off the hook when clerks sell to minors.

GREATER ★ FAIRBANKS
CHAMBER
OF COMMERCE

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April 9, 2007

Representative Kyle Johansen
State Capitol, Room 13
Juneau, Alaska 99801-1182

Dear Representative Johansen:

The Greater Fairbanks Chamber of Commerce (Chamber) supports House Bill 187, and we urge its passage by the Legislature and signature by Governor Palin.

HB 187 addresses the issue of business license enforcement proceedings that retailers face under current Alaska statute for the sale of tobacco to underage persons. This statute was recently ruled to be defective by Alaska Superior Court Judge William Morse. The Court found that current law did not allow employers their constitutional guarantee of due process – their day in court.

The Chamber recognizes the issue of tobacco use among our youth is a serious social concern and supports retailers' efforts to refuse sale of these products to underage persons. These efforts often include frequent training, clearly displayed written policies and the employee's signed acknowledgment that they understand state law with regard to tobacco sales.

Yet, current law gives no consideration to any of these procedures put in place by an employer making every effort to maintain compliance. If an employee is found to be in violation of AS 11.76.100-107 (despite all efforts made by the employer to avoid this very outcome), then current law says the employer is automatically in violation. This is where Judge Morse correctly identifies the due process deficiency. The employee should have their day in court, but so too should the employer.

Your bill, HB 187, fixes this defect by amending current law so as to implement a hearing process overseen by an administrative law judge (ALJ). The ALJ will have the responsibility of weighing evidence presented by both the state and the employer and also considering any mitigating and/or aggravating circumstances prior to deciding the case and meting out the penalties prescribed in the law should the defendant be in violation of the statute.

It is clear the issue here is not one of relaxing punishment for illegal tobacco purchases – in fact, the Chamber would not support such language. The issue is squarely one of fairness as provided for in both the Alaska and U.S. Constitutions. We look forward to seeing your bill passed by the Legislature and ultimately signed into law.

Sincerely,

Charlie Boddy
Board Chair

Cc: Interior Delegation

ANCHORAGE CHAMBER of COMMERCE

Anchorage Chamber of Commerce
Board of Directors
Resolution 2006/07-11
In Support of House Bill 187

WHEREAS, the Fifth Amendment to the U.S. and Alaska Constitutions guarantee Due Process of law; and

WHEREAS, under the current statute, (AS 43.70.075 "the sales of tobacco products to underage persons") the retailer is not allowed a single opportunity to show evidence of its policies prohibiting illegal sales or any of its other good faith efforts to train and educate its employees, nor does the statute require the State of Alaska to prove negligence by the retailer; and

WHEREAS, on October 27, 2006, Anchorage Superior Court Judge Morse found the current statute unconstitutional as a deprivation of the retailer's Fifth Amendment right to Due Process; and

WHEREAS, members of the Anchorage Chamber of Commerce that sell tobacco products will also suffer economic damages in the event of a license suspension without Due Process; and

WHEREAS, House Bill 187 addresses the Due Process issue by requiring a finding of negligence of the license holder before the retailer can be sanctioned; and

WHEREAS, HB 187 also requires that license holder adopt and enforce a written policy against the illegal sales of tobacco, establish and enforce disciplinary sanctions for noncompliance, inform employees of the applicable laws and their requirements, require employees to sign a form that they have been informed of and understand the company's written policy and also require the employees to verify the age of tobacco product customers; and

WHEREAS, Alaska will continue to have the strictest penalty matrix in the country for the illegal sale of tobacco products; and

WHEREAS, the changes to the current statute provided in HB 187 are necessary to provide Alaska businesses with the Due Process granted to them under the U.S. and Alaska Constitutions.

NOW THEREFORE BE IT RESOLVED, the Anchorage Chamber of Commerce supports HB 187 ""An Act relating to holders of business license endorsements for sales of tobacco products."; and

BE IT FURTHER RESOLVED, that copies of this resolution be sent to the Twenty-Fifth Alaska Legislature, Anchorage Chamber members and statewide media.

Approved the 20 day of April 2007

William J. Evans, chair

Stacy Schubert, IOM, president

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLIDAY ALASKA, INC., d/b/a HOLIDAY ALASKA, INC., Appellant, v. STATE OF ALASKA, DIVISION OF CORPORATIONS, BUSINESS AND PROFESSIONAL LICENSING, Appellee.	Case No. 3AN-05-14036 CI

ORDER

Administrative Appeal

In this administrative appeal Holiday Alaska, Inc. (Holiday) challenges the constitutionality of one aspect of AS 43.70.075(d). That statute allows for the imposition of a civil penalty on a business if one of its employees sells tobacco to a person under the age of 19. Holiday does not challenge the ability of the State of Alaska, Department of Commerce, Community and Economic Development (State) to penalize a business for such a sale. Holiday does contend that the method, permitted by the statute and here used by the State, to prove that the prohibited sale occurred, violated Holiday's due process rights. The Court agrees.

Administrative Proceedings and Decision.

In order to sell tobacco products a business licensee must obtain a separate tobacco endorsement for each location or outlet from which the business intends to offer the products.[1] To limit the consumption of tobacco products by young people, AS 11.76.100 prohibits any "person"[2] from "negligently sell[ing]" any item containing tobacco to a person under 19 years of age.[3] A business may lose its endorsement to sell tobacco products from a particular location if it or its agent or employee sells tobacco products to an underage customer from that location. Alaska Statute S 43.70.075(d)(1) provides, in part:

> If a person who holds an endorsement issued under this section, or an agent or an employee of a person who holds an endorsement issued under this section acting within the scope of the agency or employment, has been convicted of violating AS 11.76.100..., the department shall suspend the endorsement for a period of ... 20 days and impose a civil penalty of $300 if the person has not been previously convicted of violating AS 11.76.100....

The parties do not dispute the operative facts. The State charged three Holiday employees at three different locations of selling tobacco products to

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1 AS 43.70.075(a).

2 A "person" is defined to be "a natural person and, when appropriate, an organization[.]" AS 11.81.900(b)(45). An "organization" includes "a corporation, company, ...joint stock company, ... or any other group of persons organized for any purpose." AS 11.81.900(b)(43).

3 AS 11.76.100(a)(1). A person who violates this section is guilty of a violation, subject to a fine of not less than $300. AS 11.76.100(f). A violation is a noncriminal offense that carries no possibility of a jail term. AS 11.81.900(62). The accused is not entitled to a jury trial or the appointment of counsel at public expense. *Id.*

an underage person. Each employee separately pled "guilty" or "no contest" to violating AS 11.76.100. The State then initiated three separate administrative proceedings to suspend Holiday's tobacco endorsements at the three applicable locations. Holiday requested a hearing in each case. Those proceedings were consolidated into one hearing.

Holiday moved to dismiss the allegations against it, raising constitutional arguments.[4] The Administrative Law Judge denied the motion, ruling that "this administrative hearing is not the proper forum for Holiday's challenge to the validity of AS 43.70.075.... Holiday has the option to challenge the validity of the tobacco enforcement law in the superior court."[5]

The administrative hearing is limited to three possible questions, only one of which is relevant to this case:

> (1) was the person holding the business license endorsement, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, or 11.76.107.[6]

Understanding that the State intended to proceed under clause (1) by submitting the judgments of conviction of its three employees, Holiday correctly perceived that the only issue that remained was whether each of the three employees engaged in the conduct that led to the convictions "while acting within

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4 R. 155-65.

5 R. 360.

6 AS 43.70.075(m)(1).

the scope of [his] employment."[7] Holiday conceded that each employee was acting within the scope of the employment.[8] Nonetheless, Holiday protested that it would be a violation of Holiday's due process rights to be punished because of a fact or finding (each employee's conviction) determined in an entirely different proceeding, of which Holiday had no notice, and in which it could not and did not participate.

The Administrative Law Judge found that the State had proved the allegations by a preponderance of the evidence and that Holiday had violated AS 43.70.075(d)(1).[9] It recommended that the tobacco endorsement of each of the three outlets be suspended for 20 consecutive days and that there be three fines in the amount of $300 each.[10] The commissioner of the department adopted the recommended decision and penalties.[11] Holiday filed a timely notice of appeal.[12]

Discussion.

A defendant in an administrative hearing enjoys federal and state constitutional due process rights. The scope of those rights will depend upon what

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7 AS 43.70.075(m)(1); Tr. Vol. 2, at 11.

8 Tr. Vol. 2, at 11.

9 R. 479-82.

10 R. 483.

11 R. 484.

12 R. 492-93.

is at stake for the defendant and the State. An entity's "interest in a lawful business is a species of property entitled to the protection of due process."[13] Holiday has a property interest in its ability to sell tobacco products. That interest must be protected in a proceeding wherein Holiday may lose, even temporarily, the tobacco endorsement that is required to sell tobacco products.[14]

The scope of Holiday's due process rights depends upon the exact facts that the State must prove in order to deprive Holiday of the endorsement. The two statutes, AS 43.70.075 and 11.76.100, taken together, define the conduct and circumstances that must be proven. The State must show that 1) Holiday (or one of its employees or agents) 2) negligently sold tobacco products 3) to an underage customer 4) from a particular location.

The curious aspect of this case is that the State need not (indeed cannot) prove those facts in a single hearing, but must do so in two separate hearings. First, there is the hearing in district court that may result in a person (whether a natural person or an organization) being convicted of violating AS 11.76.100. Second, there is the administrative hearing at which State must prove either that the holder of the endorsement was convicted of the violation, or that the

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13 *Frontier Saloon, Inc. v. Alcoholic Beverage Control Board*, 524 P.2d 657, 659 (Alaska 1974).

14 *Id.*, 524 P.2d at 660 ("A license to engage in a business enterprise is of considerable value to one who holds it. There can be no question in this case that a suspension of appellant's liquor license would represent a potential economic loss to its business.").

holder's employee or agent, while acting in the scope of the employment or agency, was so convicted.

Oddly, neither statute expressly requires proof of the specific location or outlet at which the violation occurred, even though the particular endorsement subject to suspension can only be the endorsement assigned to the location or outlet where the alleged sale occurred. While neither statue expressly makes the location of the sale an element of the conviction or suspension, it remains a fact that must be proven before the State can suspend a particular endorsement because each endorsement is tied to a specific location. The State could not revoke the endorsement for a Fairbanks store if the underage sale occurred at an Anchorage outlet. Nor could it suspend a particular endorsement, assigned to one of a holder's multiple Anchorage locations or outlets, without proving the precise location or outlet at which the prohibited sale occurred.

At the first hearing there could be two potential defendants, either Holiday itself, or one of its employees or agents. At that hearing the State must prove that the defendant "negligently [sold a tobacco product] to a person under 19 years of age."[15] The mens rea of the violation is "negligence," which the Court

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15 AS 11.76.100(a)(1). Each of the officers who cited an individual Holiday employee, identified on the citation an address where the offense allegedly occurred (and therefore presumably that of each Holiday outlet). R. 351, 354, 357. But when each employee entered the plea that led to the conviction, there would have been no need for the judge to discuss facts asserted in the citation that were not elements identified in AS 11.76.100(a)(1). The actual judgments of convictions make no reference to a street location or otherwise identify the outlet or location where the offense occurred. R. 352, 353, 356.

presumes to be civil negligence, a less culpable mental state than "criminal negligence."[16]

Had the State charged Holiday with the alleged violation, then Holiday would have had the opportunity to defend itself by various factual assertions. Holiday could have asserted that no prohibited sale occurred because the purchaser was actually 19 years of age or older or bought a candy bar, not a tobacco product. It could have asserted that the purchaser looked 35 years old and thus Holiday was not negligent to have sold the tobacco product to a person for whom there was so little apparent risk that she was under 19.[17] Perhaps Holiday could have asserted that it acted reasonably in its hiring and supervision of those of its employees and agents who might sell tobacco products, so that it had not been negligent, and thus not violated AS 11.76.100(a)(1), even if the natural

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16 "The difference between criminal and civil negligence although not major is distinct. Under both standards, a person acts 'negligently' when he fails to perceive a substantial and unjustifiable risk that a particular result will occur. The two tests part ways in their descriptions of the relevant unobserved risk. Under ordinary negligence, the risk must be of such a nature and degree that the failure to perceive it constitutes a deviation from the standard of care that a reasonable person would observe in the situation." *State v. Hazelwood*, 946 P.2d 875, 877 (Alaska 1997)(quotation and citation omitted). Criminal negligence, as defined in AS 11.81.900(a)(4), requires a greater risk.

17 Because a conviction for conduct prohibited by AS 11.76.100 is a non-criminal violation, it is not entirely clear whether the standard of proof to be used at the trial of the alleged violation is that applicable to a crime, proof beyond a reasonable doubt, or a lesser standard, whether the normal civil standard, preponderance of the evidence, or the more stringent civil standard, clear and convincing evidence. The Court will assume that it is the highest standard, the criminal standard.

person had made an illegal sale.[18] Had the State charged Holiday (rather than its agent or employee) with the violation of AS 11.76.100(a)(1), the fact finder would have had to consider Holiday's defenses when evaluating the sufficiency of the State's case against Holiday.

If Holiday had been convicted, and the State sought further fines and a suspension of the endorsement, then presumably the State would have offered the convictions as evidence at the subsequent administrative hearing. Assuming that the doctrine of collateral estoppel would prevent Holiday from relitigating whether it had violated AS 11.76.100(a)(1), Holiday would have little to say at the hearing (though a dispute over the location of the violation might remain open if that was not addressed at the earlier hearing). Nonetheless, it would have had the opportunity to challenge most of the State's case at the earlier hearing.

This is not the sequence of events that unfolded in the three administrative prosecutions that are the subject of this appeal. Instead of citing Holiday, the officers cited the individuals accused of selling the tobacco products. Holiday received no notice of the citations or the hearings at which the employees entered pleas of guilty or no contest. At the administrative hearing, the only question that could be addressed by Holiday was: Did "an agent or employee of [Holiday] while acting within the scope of the agency or employment of the

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[18] At the later administrative hearing Holiday submitted copies of its policies and other documents describing the steps it takes to train employees not to sell tobacco products to underage youth. R. 50-138.

person, . . . violat[e] AS 11.76.100[?]"[19] Once the State presented the judgments of conviction of the three individuals, the only issue became whether each was acting within the scope of his employment at the time of the events that led to the conviction. The question on appeal is whether, by restricting Holiday to such a narrow issue, did the hearing fail to afford Holiday due process. The Alaska Supreme Court has provided guidance on the scope of the issues that a subject of a business license suspension action must be afforded.

In *Frontier Saloon* a corporation was convicted in district court of allowing a minor on the premises.[20] The district court, as required by statute, sent notice of the conviction to the Alcoholic Beverage Control Board.[21] The Board held a session without notice to the corporation and voted to impose a ten-day closure.[22] It had discretion to impose a closure of between 10 and 45 days.[23]

The corporation appealed, arguing that it was a violation of both its state and federal constitutional rights to due process to have been denied a hearing before the Board prior to the imposition of the closure. In response,

> The state argue[d] that a hearing before the Board was unnecessary because due process requirements were met through the

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19 AS 43.70.075(m)(1).

20 524 P.2d at 658.

21 *Id.*

22 *Id.*

23 *Id.*

> judicial determination of guilt in the criminal proceeding brought against appellant. It is argued, in effect, that appellant had its day in court when it pleaded guilty to the offense. Thus, no further adjudicative determination is necessary. This argument overlooks, however, the different character of the criminal proceeding and the administrative proceeding.
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> The penalty imposed by the Board is not automatic. The use of the word 'may' rather that the directive 'shall' in AS 04.15.100(b), indicates a discretionary power, *Alaska Alcoholic Beverage Control Board v. Malcolm, Inc.*, 391 P.2d 441 (Alaska 1964). In addition, the reference to 'upon the direction of the majority of its members' clearly contemplates a vote, which would be a hollow gesture if the suspension authority were not discretionary. The choice of the duration of the penalty by the Board creates a further area of discretion.[24]

Thus the Supreme Court agreed that the corporation had suffered a violation of its state and federal due process rights.[25]

In order to satisfy due process requirements, the litigant must be given more than just a hearing. That hearing must be "meaningful."[26] In determining "whether a hearing is a meaningful one, [the court is] guided by

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[24] *Id.*, 524 P.2d at 660. The Supreme Court noted that the fact that the Board had discretion to impose a range of penalties was not determinative. 524 P.2d at 661 n. 5. It observed that other courts had "found that even when suspension is statutorily mandated a right to notice and hearing still obtains." *Id.* The Supreme Court expressly chose not to address the process due if the suspension was mandatory. *Id.*

[25] *Id.*, 524 P.2d at 661.

[26] *Javed v. Dep't of Public Safety*, 921 P.2d 620, 622 (Alaska 1996) (quoting *Graham v. State*, 633 P.2d 211, 216 (Alaska 1981).

'considerations of fundamental fairness.'"[27] Thus at an administrative hearing concerning the suspension of a driver's license "the accused must be granted the opportunity to *fully contest issues of 'central importance'* to the revocation decision."[28]

Where there are allegations that a driver drove with an excessive amount of alcohol in his system a meaningful hearing "would require the presence of the arresting officer, the production of the report of the arresting officer and any tape recordings, videotapes, or transcripts concerning events surrounding the arrest, and the presence of witnesses having evidence to offer on contested points."[29] The alleged driver must be afforded an opportunity to challenge the reliability of the breath test[30] and the state must preserve the breath sample or give the driver an opportunity to obtain an independent test.[31]

In the hearing at which Holiday was facing the suspension of the tobacco endorsement, the central issue was whether its agents or employees had

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27 *Javed*, 921 P.2d at 622 (quoting *Thorne v. State, Dep't of Public Safety*, 774 P.2d 1326, 1329 (Alaska 1989) quoting *Whisenhut v. State, Dep't of Public Safety*, 746 P.2d 1298, 1300 (Alaska 1987)).

28 *Thorne*, 774 P.2d at 1331 (quoting *Champion v. State, Dep't of Public Safety*, 721 P.2d 131, 133 (Alaska 1986)) (italics supplied).

29 *Graham*, 633 P.2d at 216 n. 12.

30 *Champion*, 721 P.2d at 133.

31 *Id.* and *Briggs v. State, Dep't of Public Safety*, 732 P.2d 1078, 1080 (Alaska 1987).

sold tobacco products to underage customers. The restriction of the hearing to the issue of the scope of the agent or employee's authority avoids the typical central issue entirely.[32]

The holding in *Juved* is again compelling. Alaska Statute 28.15.165 required the suspension of a driver's license if a driver failed or refused to take a breath test.[33] The accused was allowed an administrative hearing but the issues at the hearing were limited.[34] The accused could only argue that the arresting officer did not have reasonable grounds to believe that the accused was driving or that other specified circumstances existed.[35] But the accused could not demonstrate that he was not driving. The Supreme Court concluded, "a hearing which is statutorily limited to the reasonableness of the arresting officer's beliefs at the time of arrest is not necessarily meaningful or fundamentally fair. Revocation is not fair if the accused can demonstrate that he was not driving, regardless of the reasonable beliefs of the arresting officer."[36] This analysis applies to the restriction

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32 The only time the scope of authority might be of any practical relevance would be in the rare occasion when the holder of the endorsement could defend on the grounds that the agent or employee had taken tobacco products off premises and sold them to customers, say from the back of the employee's car or from the agent's home.

33 921 P.2d at 623.

34 *Id.*

35 *Id.*

36 *Id.*

of the issues at the tobacco endorsement suspension hearing to preclude Holiday from arguing that its agent or employee did not sell tobacco products at all, or did not sell to an underage patron, or did not unreasonably sell tobacco products.

Holiday has not been afforded a meaningful administrative hearing when the State is permitted to utilize the judgment of conviction of another person (even if that person was an agent or employee of Holiday) as proof of what Holiday did. In *Scott v. Robertson*[37] the Alaska Supreme Court addressed the circumstances when a criminal conviction of a party can be used against the same party in a subsequent civil trial. It reviewed the traditional restrictions against the use of the conviction and concluded to abandon some of the restrictions in favor of a more tolerant rule. It described the more liberal rule it was adopting as follows:

> The trend in recent years, however, has been to admit criminal convictions as evidence in subsequent civil trials where: (1) the prior conviction is for a serious criminal offense; (2) the defendant in fact had a full and fair hearing; and (3) it is shown that the issue on which the judgment is offered was necessarily decided in the previous trial. We adopt this position for use in Alaska.
>
> The three conditions which we have set forth as prerequisites to the use of a criminal conviction in a subsequent civil case arising from the same set of facts are designed to protect the defendant against the introduction of unduly prejudicial criminal convictions. We first require that the prior conviction be for a serious offense in order that the accused have the motivation to defend himself fully. A driver who pleads guilty to a minor traffic violation may have decided merely that the costs of defending outweigh the burden of having such a conviction on his record. Such a conviction is not credible evidence of guilty conduct. Generally, any offense

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37 583 P.2d 188 (Alaska 1978).

punishable by imprisonment should be considered to be a serious offense.

> The requirement of a full and fair hearing is designed to prevent the introduction of the prior conviction where there is substantial question as to its validity. Normally, a criminal conviction, incorporating the high burden of proof on the state and the stringent safeguards against violations of due process, should be admissible absent strong showing of irregularity. Generally, no conviction entered without representation of counsel ought to be considered as evidence in a subsequent trial.
>
> The third prerequisite would preclude the use of a conviction where the fact sought to be introduced had not necessarily been determined at the prior trial.[38]

Consider a scenario that is more favorable to the State than the present situation. If the State had prosecuted Holiday for the alleged violations of AS 11.76.100 (a)(1), rather than three of its employees, and then offered those judgments of conviction in the administrative hearing concerning the suspension of the tobacco endorsements, the proposed use of the convictions would not have met the requirements of *Scott*. The first *Scott* prong requires that the prior conviction be for a serious criminal offense, defined as one for which incarceration is possible. The sale of tobacco products to an underage consumer is defined as a violation, a category of offense that is less serious than a misdemeanor, and for which there is no possibility of incarceration. A conviction for a violation is not a conviction for a serious criminal offense. In fact a violation

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38 *Id.*, 583 P.2d at 191-92 (footnotes omitted).

is defined to be not a criminal offense.[39] Because the consequences of a conviction for a violation are so minor, a person accused of that conduct does not have sufficient incentive to fight the charges so as to permit the use of the conviction in a subsequent civil proceeding.

The proceedings in the district court provided even less incentive to the accused to fight the charges. None of the three individuals was exposed to the collateral potential of having the tobacco endorsement suspended in a later administrative proceeding. From Holiday's perspective the use of the convictions of other defendants at the administrative hearing was even more perverse. It had a greater incentive, because of the potential suspensions of the tobacco endorsements, to challenge the accusations of underage sales, but had no ability to exert that challenge. It could not participate in the district court proceedings and was not allowed to raise defenses (except a hopelessly insignificant one) in the administrative hearing.

The use of the conviction for a violation does not meet *Scott*'s second prong. The safeguards that are normally found in a criminal proceeding are usually deemed adequate to ensure that there will not be substantial questions about the validity of the conviction sought to be used in the civil proceeding. One of the protections in the criminal proceeding is the availability of counsel to all accused persons. But a person accuse of a violation is not entitled to public

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39 AS 11.76.100(f). A violation is a noncriminal offense that carries no possibility of a jail term. AS 11.81.900(62).

representation. The three individuals who were convicted of the violation had no right to a public defender or a trial by jury.[40] Nor is it likely that any of the three accused individuals would incur the expense of private counsel even if he or she could afford it because there was so little at stake. The definition of a violation states that "conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."[41] Because Holiday had no notice of the hearings at which the three individuals entered pleas, it had no ability to provide counsel for those persons in an effort, by defending the individuals directly, to defend itself indirectly from the consequences of their convictions if used against Holiday in a subsequent administrative hearing.

Finally, it is doubtful that the third *Scott* prong would be satisfied. That test does not permit the prior conviction to be used in the subsequent hearing unless the fact relevant to the second proceeding had necessarily been proven in the first trial. In order for a specific tobacco endorsement to be suspended the State must link the underage sale with the location applicable to the endorsement. The elements of the noncriminal offense of underage sale do not include, and thus do not necessitate, the proof of the location of the sale with such specificity. While it is true that the conviction may cover some elements relevant to the administrative

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40 AS 11.81.900(b)(62) ("a person charged with a violation is not entitled (A) to a trial by jury; or (B) to have a public defender or other counsel appointed at public expense to represent the person").

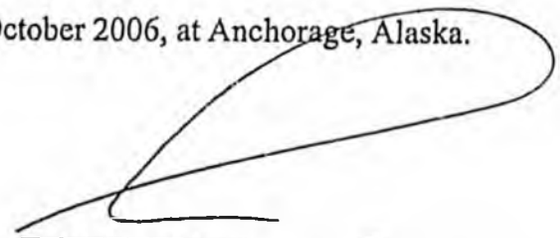
41 AS 11.81.900(b)(62).

hearing, it does not cover all of them. The prior conviction might meet the third prong and thus be admissible, but it alone would not suffice for the suspension of the endorsement as it might be silent as to the location of the sale or identification of the specific endorsement to be suspended.

But the most significant problem with the use of the convictions of the three individuals as conclusive proof of elements of the case for the suspension of the tobacco endorsements against Holiday is the basic fact that Holiday had no opportunity to be heard concerning the questions surrounding the alleged conduct of its agents or employees. The conduct of the three individuals constitute the issues of central importance in the case against Holiday but, by the use of the convictions for the violations of the three individuals, Holiday is deprived of any meaningful opportunity to be heard on those central issues. Having been deprived of that opportunity by the restriction of the issues that could be raised at the administrative hearing, Holiday was deprived of due process just as was the driver in *Javed* who could only challenge the reasonableness of the arresting officer's belief and not present evidence that he was not the driver.

Holiday was not afforded due process of law in violation of its state and federal constitutional rights. *The decisions of the Administrative Law Judge and commissioner are REVERSED.*

DONE this 27th day of October 2006, at Anchorage, Alaska.



William F. Morse
Superior Court Judge

I certify that on 27 October 2006
a copy of the above was mailed to
each of the following at their
addresses of record:

Treptow
Drinkwater

Mary Ventress
Judicial Assistant

Best Practices for Enforcing State Laws Prohibiting the Sale of Tobacco to Minors

Joseph R. DiFranza

Objective: To determine best practices for enforcing public health laws prohibiting the sale of tobacco to minors. **Methods:** The author compared annual merchant compliance surveys to identify the 10 highest and the 10 lowest performing states. State and federal documents describing state efforts to improve compliance with their laws from 1995 to 2004 were systematically reviewed for evidence concerning the effectiveness of 26 enforcement strategies. These were rated as essential, recommended as a best practice, not recommended, or unable to rate. **Results:** The following strategies appear essential to high performance: a law enforcement strategy with a state agency coordinating enforcement, state funding of test purchases for enforcement, prosecution of offenders with penalties for violating the law, and effective merchant education. The following features are not recommended: warnings in lieu of penalties for offenders, reliance upon nonfunded local enforcement, and limitations placed on enforcement authority or the conduct of test purchases. **Conclusions:** Some states have achieved high compliance with the law by pursuing a variety of strategies employing common elements. Others have hampered their efforts by pursuing counterproductive strategies.

KEY WORDS: law enforcement, tobacco, youth

In July 1992, Congress enacted the Synar Amendment, making substance abuse block grants from the Department of Health and Human Services (DHHS) contingent upon states enacting and enforcing a prohibition on the sale of tobacco to minors.[1] Beginning in 1996, states were required to conduct annual scientific surveys, employing underage decoys to conduct test purchases to determine the rate at which merchants violate the law. Each state was assigned an individualized schedule of annual targets for lowering its violation rate to 20%.[2] States failing to make appropriate progress were sometimes penalized and had to commit state funds to improve compliance.

Although Congress required states to enforce their laws "in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18,"[1] DHHS did not require states to enforce their laws by penalizing lawbreakers.[3] As a result, states pursued different strategies to improve compliance, with some proving more effective than others. By 1998, the violation rate for the large rural state of Maine was 4 percent, whereas the violation rate for the tiny urban District of Columbia was 47 percent.[4] By 2000, 23 states had missed at least one annual target.

Many of the strategies used to enforce these laws cannot be subjected to experimental manipulation. It would be a violation of the right to equal protection provided by the 14th Amendment to randomly assign fines of $100, $500, or $1000 to consecutive defendants to evaluate the impact of penalty severity on subsequent compliance. Nor could states be randomly assigned different constitutions to evaluate the impact of Home Rule clauses. Although experimental evidence would be ideal, real-world limitations dictate that many decisions regarding public health policy and the allocation of resources must be made in the absence of experimental evidence. In such situations, we strive to make informed decisions on the basis of experience. The author's purpose was to identify the best public health practices in enforcing tobacco access laws by drawing

J Public Health Management Practice, 2005, 11(6), 559–565

The Robert Wood Johnson Foundation, Substance Abuse Policy Research Program, funded this project.

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upon the experiences of states with the best and the worst performance records.

Methods

Data regarding state efforts to enforce youth access laws were obtained from multiple sources. Each state files an annual block grant application with the Substance Abuse and Mental Health Services Administration (SAMHSA).[5] These applications describe efforts to improve compliance. Copies of state block grant applications and correspondence between the states and SAMHSA describing activities from 1995 to September 30, 2001, were obtained through a series of Freedom of Information Act requests made by the author to the DHHS. Additional information was obtained from SAMHSA publications; by contacting voluntary agencies and state, county, and local officials by phone or e-mail; by attending SAMHSA-sponsored Synar conferences; and from official state Web sites.[6] These materials were supplemented by requesting state block grant applications for 2002–2004 from the states, and additional information by phone and e-mail. The author reviewed over 10,000 pages of materials. The outline presented in Table 1 guided data extraction, which produced a 127-page, single-spaced summary document, which was itself extracted onto 42 spreadsheets, each of which organized the data from 20 selected states on a single topic. Complete data extraction was performed only for the 20 selected states. Each spreadsheet was examined for striking patterns that distinguished the best and worst performing states from one another.

Each state is required to annually conduct a random survey to measure statewide compliance with the law.[1] Results are reported on the SAMHSA Web site in terms of the percentage of merchants who made an illegal sale when approached by an underage decoy.[4] Several options were considered for using these data to rank states according to their performance: the number of years it took each state to lower its violation rate to 20 percent; the highest and lowest violation rates for the most recent year; or the highest and lowest average violation rates. State violation rates often fluctuated: Vermont had the second best in 1998, but fell to 37th place by 2001. Wyoming had the worst violation rate in 1999, but rose to sixth place the following year. If Wyoming were placed in the top tier for its most recent performance, would the policies that put it in last place be considered best practices? To avoid these problems, a ranking system was chosen to emphasize consistently good or poor performance.

The following method was used to identify 10 high-performing (HI) and 10 low-performing (LO) states.

TABLE 1 ○ The guide used to extract data from the audit materials

- The law
  - Is there a designated enforcement agency?
  - Is a license required to sell tobacco?
  - Is licensing at the local or state level?
  - Does the state law facilitate or hinder enforcement?
  - Does the state law prohibit local enforcement efforts?
  - What are the penalties for illegal sales?
  - Can a license be suspended or revoked?
  - Can storeowners be cited?
  - Are there restrictions on vending machines?
- Legislative support
  - Is the legislature supportive?
  - Does the state fund enforcement?
  - Does the state expect local government to fund enforcement?
- Administration
  - Is it clear which state agency is responsible for Synar compliance?
  - Has the legislature assigned enforcement responsibility?
  - What type of agency is responsible for enforcement?
  - Do state agencies collaborate?
  - Are there regular meetings of state officials to deal with enforcement?
  - Is there a clear plan based on a workable model?
  - Is the state's goal just to pass, or to get its violation rates as low as possible?
- Mechanism of enforcement
  - Does a state agency coordinate enforcement?
  - Is the state divided into regions of responsibility where specific agents are assigned and compliance rates are monitored on an ongoing basis?
  - Have enforcement positions been established?
  - Is there a statewide database of retailers?
  - Is there a statewide system for tracking inspections?
  - How often does the state measure compliance rates?
  - Is enforcement targeted to problem areas?
  - What proportion of merchants is inspected each year?
  - Are other aspects of the law enforced, such as signage?
  - Are citations issued to the clerk, the storeowner, or both?
  - Are all violators prosecuted?
  - Is prosecution handled criminally, civilly, or administratively?
  - Are prosecutions generally successful?
  - What penalties are administered?
  - Are offending retailers reinspected?
- Merchant/community education
  - What is done to educate merchants?
  - Are the names of violators publicized?
  - Are violators targeted for reeducation?
  - Is there a hotline for citizens to report stores that sell to minors? Are complaints pursued?
  - Do community coalitions play a role?

The states and the District of Columbia were ranked 1 to 51 from the lowest to the highest violation rate reported for each of the 6 years from 1997 to 2002. (Data

TABLE 2 ○ Top- and bottom-ranked states*

	Violation rates						Rankings					
	1997	1998	1999	2000	2001	2002	1997	1998	1999	2000	2001	2002
High performing												
1. Maine	13	4	6	9	7	7	6	1	1	7	3	7
2. Florida	7	8	8	8	8	7	2	4	4	5	5	6
3. South Dakota	13	18	9	8	5	8	7	15	5	4	1	8
4. New Hampshire	12	8	8	10	11	10	4	3	3	8	11	13
5. Hawaii	23	15	11	7	8	6	20	12	7	3	6	4
6. Colorado	19	28	16	6	7	5	9	36	12	1	4	1
7. Washington	6	15	12	14	11	14	1	11	9	16	12	29
8. Massachusetts	17	19	14	18	10	9	8	18	10	24	9	11
9. Louisiana	39	20	7	7	9	6	47	21	2	2	7	3
10. New Mexico	23	14	19	12	12	10	21	9	20	10	14	15
Low performing												
42. North Carolina	45	26	25	20	20	18	48	31	34	32	38	41
43. Indiana	24	26	28	22	25	19	25	32	40	36	47	45
44. Iowa	27	36	33	29	18	11	29	49	46	50	31	21
45. District of Columbia	34	47	25	25	16	16	43	51	35	45	23	35
46. Maryland	36	35	33	25	25	10	44	48	45	46	48	18
47. Tennessee	37	24	31	26	20	22	46	26	43	47	40	49
48. Pennsylvania	30	32	41	27	28	15	36	39	50	48	50	31
49. Montana	37	35	25	22	23	23	45	45	33	37	46	50
50. Alaska	29	24	34	36	27	30	34	24	49	51	49	51
51. Kansas	47	35	29	23	21	21	49	47	41	39	41	47

*Cell values indicate the state's reported rate of illegal tobacco sales for the federal fiscal years indicated. States were ranked from 1 to 51 from the lowest to the highest violation rate reported for each year. The mean of these six rankings was used to identify the 10 highest-performing and 10 lowest-performing states as indicated by the number preceding the state's name.

from 1996 were not used because very few states had initiated enforcement and seven did not have data.) The mean of the six annual rankings for each state was used to identify the 10 HI and 10 LO states (Table 2). The violation rates for HI and LO states overlapped on 3 of the 6 years (Table 2). Differences of a few percentage points in violation rates between states may not be meaningful, as states used different protocols for measuring violation rates[7] and the surveys generally had a 95 percent confidence interval of 3 percentage points.[2] This ranking method factors in the speed with which violation rates were lowered, the level of reduction achieved in comparison to that achieved by other states during the same year, and maintenance of performance. Twenty states were included to ensure that the sample reflected state diversity.

The small sample size and the nature of the data did not allow for meaningful quantitative or statistical analysis. For example, reported merchant education efforts included various combinations of letters, mailed training materials, signs, stickers, buttons, posters, billboards, community coalition activities, public service announcements on radio or television, training seminars, videos, Web-based courses, educational test purchases with warnings or prizes, and personal visits from citizen volunteers, health officials, or law enforcement officers. Even if the cost or volume of these efforts could be determined, a quantitative analysis would be comparing not apples and oranges but a cornucopia of assorted fruits and vegetables. Without valid quantitative data for most of the variables, multivariate analyses too were not an option.

State experiences were compared and contrasted to evaluate the impact of different strategies to improve compliance. The author rated strategies according to these criteria: (1) *essential* to success, (2) not essential, but *recommended as a best practice*, (3) hindering efficient operation and therefore *not recommended*, and (4) *unable to rate* because of insufficient evidence. All HI states sustained violation rates below 15 percent. A strategy was considered *essential* if no state had attained a violation rate below 20 percent without it. Strategies *recommended as best practices* improve program productivity, making efficient use of state revenues and allowing states to accomplish more with less. Several states have adopted legislation drafted by the tobacco industry that hampers efficient enforcement, for example, by stripping enforcement powers from

local authorities, or by placing gratuitous limitations on how compliance checks are conducted.[8] Strategies that squander resources by impeding enforcement are *not recommended*.

Most LO states abandoned their initial approaches after failing to make adequate progress. For some, new strategies brought success. This transition came in different years for different states; the analysis is based on the *early years* of poor performance.

● Results

Table 2 presents the final state rankings. To determine how the selection of states might have differed if other ranking strategies had been employed, states were ranked according to their average violation rate from 1997 through 2002. This was averaged with the six annual rankings: the same 20 states sorted into the HI and LO groups. When the average violation rate from 1997 through 2002 was used as the sole ranking criterion, 9 of the 10 HI states were reselected, as were 8 of the 10 LO states. Thus, identification of HI and LO states was not strongly influenced by the choice of ranking method.

Features of the law

Five LO states, but no HI states, had laws that protected offenders from punishment or otherwise made enforcement more difficult. Maryland exempted vending machines from penalties. North Carolina allowed only a warning for first offenses. Tennessee required state officials to obtain permission from local judges to employ minors for test purchases. Montana allowed only the health department to enforce the law, exempted storeowners from penalties, and reduced a schedule of escalating fines ($100, $200, $300, and $500) to a flat $25. Indiana's law, with no requirement for proof of age, provided that it must be proved that a clerk "knowingly" sold tobacco to a minor, allowing for a defense that the clerk "reasonably believed" the customer was 18.[9] When the legislature protects offenders from prosecution or penalties, the effectiveness of enforcement efforts is undermined. Such provisions are *not recommended* (Table 3).

The state law determines whether a violation is prosecuted through the court as a criminal or civil offense, or administratively within the enforcement agency. All three approaches were used by both HI and LO states. Although criminal prosecution sounds tougher, it is the least efficient: inspectors must appear in court, judges dismiss many cases, and penalties can be trivialized. Although all three approaches are compatible with excellent performance, administrative disposition is the *recommended* approach as it makes the most efficient use of state resources.

TABLE 3 ○ Summary of recommendations

Essential
A concrete plan concerning how the state will enforce its law
A state agency overseeing enforcement
Ongoing enforcement inspections employing test purchases
State funding of enforcement inspections
Prosecution of offenders
Penalties for violating the law
Effective merchant education
Recommended
Administrative disposition of citations
Licensing of tobacco sellers
Maintenance of a state database of tobacco sellers
Not recommended
Reliance upon unfunded local enforcement
Warnings instead of penalties for offenders
Protecting offenders from prosecution and penalties
Limitations on the conduct of test-purchases
Limiting which officials can enforce the law
Unable to rate
The type of agency that is conducting enforcement
The proportion of merchants to inspect each year
The severity of the penalty
Whether the owner, the clerk, or both are charged
Citizen complaint lines
Test purchases conducted solely for educational purposes
Tobacco industry–sponsored merchant education programs

In some states, enforcement did not happen because nobody was assigned responsibility. However, provisions in the state law assigning enforcement responsibility did not correlate with state performance. In both HI (New Mexico, South Dakota) and LO states (District of Columbia), the assigned agency either ignored its responsibility or employed ineffective methods (Tennessee). Whether or not the law assigns enforcement responsibility, the governor can. A state agency quickly assumed responsibility for coordinating enforcement in every HI state. In the LO states, this was true only in Tennessee and Kansas. In Tennessee, Department of Agriculture agents attempted to observe illegal sales during food inspections but did not perform test purchases. As no LO state was able to lower violation rates to 20 percent without a state agency leading the effort, this appears to be *essential* to success.

A license to sell tobacco is required in six HI states and seven LO states. Although a licensing requirement had no apparent impact on state performance, states without licensing expended more resources to establish and maintain a database of tobacco retailers. A database is used to plan enforcement, track violations,

conduct the annual Synar compliance survey, and mail educational and training materials to merchants. With increased productivity, states might save money even if licenses were issued free of charge: licensing is *recommended*.

Every state restricted vending machines to reduce youth access. Such restrictions are *recommended* as violation rates for unrestricted vending machines are consistently higher than for over-the-counter sales.[10]

A preemptive state law strips local government of authority. Bans on self-service displays, bans on tobacco-vending machines, and enforcement of tobacco access laws all began with local government.[11] The tobacco industry has worked hard for preemption.[8] Five HI and five LO states had preemptive laws, and one in each group prohibited local enforcement. Thus, preemption did not preclude the successful implementation of enforcement at the state level. However, preemption forecloses a community's ability to eliminate other sources of tobacco for youth, such as free samples or products stolen from self-service displays.

Enforcement

In nine HI states, the legislature supported enforcement with funding or facilitative laws. Every HI state used state funds to pay people to enforce the law. This involved state personnel or contracts with local officials or civilians. Among the LO states, in the early years only Alaska and Kansas spent more than a pittance on enforcement; several legislatures were hostile to enforcement. Not 1 of the 50 states achieved the 20 percent goal without funding enforcement; state funding for enforcement appears to be *essential*.

In six LO states, local authorities were encouraged to enforce the law but were not paid. Among the HI states, only New Hampshire tried this briefly. This approach was never successful: it is *not recommended*; all who attempted it either instituted state-level enforcement or later channeled state funds to support local enforcement.

All HI states settled quickly upon an enforcement plan and instituted the legislative or administrative modifications necessary to make it work. Although the letter of the law required states to only reduce violation rates to 20 percent, all HI states embraced the spirit of the law by attempting to extinguish illegal sales. Although some LO states now have their sights on goals below the mandatory 20 percent, in the early years, their common ambition was to protect their block grant funds by hitting their assigned annual targets. The most efficient states set up all responsibilities (merchant education, licensing, enforcement, and administrative disposition) within a single agency. When this was not the case, HI states coordinated activities across state agencies through interdepartmental meetings and memoranda of understanding. During the first several years under Synar, coordinated action was uncommon in LO states and only Alaska and Kansas had a plan of action. Advocates of enforcement in LO states were often frustrated by a lack of cooperation from the legislature, executive branch, other state agencies, or local authorities. Planning appears to be *essential*.

HI states rely on a variety of state agencies to conduct, or contract for, test purchases. In Maine, it is the Attorney General's office; in Hawaii, South Dakota, Massachusetts, and New Mexico, the health department; and in Florida, New Hampshire, Colorado, Washington, and Louisiana, the alcoholic beverage enforcement agency. LO states also relied primarily on alcoholic beverage agencies. Health departments were involved because their block grant was at risk. Efforts in Alaska and the District of Columbia failed because health departments were unable to obtain police cooperation. While success can be achieved with different types of state agencies overseeing enforcement, failure may result when that agency does not have enforcement powers.

Test purchases are performed by youths supervised by either civilian contractors (South Dakota) or law enforcement officers. States had no trouble prosecuting violations occurring under civilian supervision; this offers a more cost-effective approach than do the utilization of sworn law enforcement officers. A particularly wasteful system is to have a nonenforcement state agency contract with an enforcement agency at overtime rates (District of Columbia).

The number of enforcement inspections can vary with funding levels. Six HI states had at least one year during which they averaged one or more inspection per merchant. The lowest inspection rate among HI states was 20 percent. By contrast, 20 percent represented the highest inspection rate (only Kansas) among LO states in the early years. All LO states, but Kansas, later increased their inspection rates. Higher inspection rates are generally associated with better performance, but other factors too are important. Both Kansas and Florida maintained inspection rates of 20 percent over the period 1997–2002. The violation rate for Kansas never dropped below 20 percent, while Florida's was consistently under 10 percent. In 2000, Massachusetts had a violation rate of 18 percent compared to 8 percent for Florida, despite the fact that the inspection rate for Massachusetts was 200 percent, 10 times that for Florida. Florida's inspections were conducted by state law enforcement and resulted in $500 fines for all offenders. Massachusetts' inspections were conducted by local health boards and resulted in warnings for about half of offenders and fines of $50 to $100 for the rest.

Six states in each group found it helpful to divide the state into regions of enforcement responsibility. All 20 states maintain databases of tobacco retailers; HI states more commonly used these to facilitate enforcement. All HI states and seven LO states now use their databases to track inspection results for individual merchants. All states must measure their violation rate annually for Synar. Nine states (five HI, four LO) track enforcement inspections to monitor violation rates in real time, making it possible to respond to adverse trends. Six HI states and three LO states identify and target areas of poor compliance for additional enforcement and/or education. Seven HI states and eight LO states have at least occasionally reinspected offenders.

Penalties

No state achieved the 20 percent goal without prosecuting offenders. Eight LO states prosecuted offenders only very rarely, whereas nearly 100 percent of offenders were prosecuted in eight HI states. Initially, offenders in Massachusetts and South Dakota were as likely to receive a warning as a fine, and these states had to compensate by implementing the nation's highest inspection rates.

In New Mexico, fines for a first offense ranged from $20 to $200, whereas in other HI states fines ranged from $50 (Massachusetts, South Dakota, Louisiana) to $500 (Florida). Among LO states, Tennessee and North Carolina have no penalty for a first offense, and fines in the remaining states range from $25 to $300 plus court costs. State performance did not correlate with the severity of the fine: the average fine was $271 in the top-ranked state (Maine) and $272 in the bottom-ranked state (Kansas). In Alaska, stiff penalties may have backfired by increasing appeals, and therefore the cost of prosecution, draining resources from inspections. Very high compliance rates can be achieved with modest fines, but having no penalty for a first offense may not be compatible with high performance. Six HI states and five LO states provide for license suspension, but this penalty was rarely used. Although the most common practice in both HI and LO states was to cite both the clerk and the storeowner, some states cite only one or the other. All approaches were compatible with HI performance.

Five HI states target offenders for merchant education, sometimes court ordered. Two LO states make merchant education available to offenders. Six HI and five LO states have citizen tip lines to report stores selling tobacco to minors. Nine HI and nine LO states had community groups involved in generating support for the law, conducting merchant education, or helping to recruit youth for test purchases.

Merchant education

Merchant education and enforcement are two sides to a coin. A state must educate to ensure that sellers know how to refuse illegal sales, and enforce to ensure that they are motivated to do so. If there is no penalty for breaking the law, didactic efforts are not enough; no state achieved a 20 percent violation rate through education alone. All HI states combined strong education with strong enforcement. Although it is impossible to quantify, HI states did much more to educate merchants. Although some LO states had strong education and some had adequate enforcement, none had both. In the early years, Kansas had high prosecution rates, substantial penalties, and an inspection rate equal to Florida's, but it had very weak education and its violation rate far surpassed Florida's. North Carolina had an excellent education program and a high inspection rate, but with only a warning for first offenses they provided little motivation to obey the law.

Good education can enhance the impact of enforcement; many states notify sellers that they have been inspected and publicize the names of offenders. These practices were more common among HI states. The yellowed newspaper clipping taped to the cash register listing fines paid by local clerks may have more educational impact than do any glossy pamphlet.

Nonenforcement test purchases can be educational by informing sellers that they are being watched, and by providing feedback regarding the adequacy of employee training. Educational tests could be counterproductive if offenders are not punished and word spreads that violations are not taken seriously.

The use of tobacco industry–sponsored educational programs, such as We Card, was strongly associated with poor performance (used in six LO states and one HI state, briefly). It seems unlikely that the industry programs were responsible for the poor performance. Rather, those states that relied on the industry programs were those that were reluctant to invest state resources in education and enforcement, and were willing to trust the industry to foot the bill and police itself.

● Discussion

For a state to achieve excellent compliance with tobacco sales laws, the following features appear to be essential: (1) a concrete plan concerning how the state will enforce its law, (2) effective merchant education, (3) ongoing enforcement inspections employing test purchases, (4) a state agency overseeing enforcement, (5) state funding of enforcement inspections, (6) prosecution of offenders, and (7) penalties for violating the law. Although the highly successful states employed a variety of different approaches, these seven features

were common to all. The study results are summarized in Table 3.

Although a regression analysis would be the ideal method for examining the impact of these multiple factors, it was simply impossible to quantify much of the data. For example, within a single state, one county could prosecute only clerks, another only storeowners, and in a third, it could be both. Likewise, penalties can vary from case to case within a state. A valid statistical analysis requires valid state data.

On the basis of the Massachusetts experience, the author had previously recommended that every merchant be inspected three to four times each year.[12] With higher rates of prosecution and stiffer penalties, states have achieved excellent results while inspecting as few as 20 percent of their merchants each year. The cost-effectiveness of enforcement has been estimated at $44 to $8,200 per year of life saved, based on the assumption that each merchant is inspected four times per year (a rate that is 20 times higher than that used successfully by Florida).[13] To the degree that illegal sales can be curtailed with far fewer inspections, the potential cost-effectiveness of these programs has been seriously underestimated.

Hawaii did very well by providing state funding to county police. However, when Alaska tried the same approach, the local police refused to cooperate. An approach that works in one state may not work in another. Nevertheless, there are many effective approaches to choose from. Success may require experimenting with different approaches. Success was not limited to states of one size, population density, demographic makeup, or governmental organization. This suggests that all states could achieve very high rates of compliance if they were to use this analysis to strengthen their programs.

A limitation of this study is that a second reviewer did not verify the accuracy of the data extraction. However, there was ample opportunity for self-correction as the same data was extracted from annual reports from 1995 to 2004. Further, the study design minimized the role of judgment; almost all the data extraction questions could be answered yes or no; no rating scales were used. Finally, strategies were identified as essential only when no state had reached the 20 percent violation rate goal without it; no judgment was needed for this call.

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April 25, 2007

The Department of Health and Social Services has reviewed the proposed House (JUD) Committee Substitute for HB 187 (Version M) and regards several of the provisions as extremely problematic. The department therefore recommends adoption of the proposed CS drafted by the Department of Law (Drinkwater 4/2/2007).

Employer Negligence

The state should not have to show that the endorsement holder negligently violated AS 11.76.100, as required in Version M (the state does have to show that the employee negligently sold to a minor, but that's at the district court level). The State's interest is in holding the employer accountable (i.e. vicariously liable) for the acts of his or her employee. There is nothing about the Holiday decision that requires the state, in order to take licensing action, to show that the employer was independently negligent in selling tobacco to a minor.

The Department of Law draft in paragraph (4) appropriately allows the hearing officer to consider the employer's efforts to institute an effective and meaningful program.

Compliance Program

In version "M", the requirements of (t) would allow endorsement holders to easily set up a shell of a compliance program; in other words, they could set up a program on paper and make little or no effort to take precautions in terms of hiring employees, training them, or monitoring them.

The Department of Law draft addresses these additional terms in (t)(2),(4) and (7).

Aggravators and Mitigators

While version "M" gives lip service to the notion that "aggravating factors" could result in an increased suspension or penalty, there is no mechanism for the increase to occur. Only a reduction is possible. Also, be aware that the terms "aggravators" and "mitigators" are associated with criminal cases and aren't appropriate for the administrative setting.

The Department of Law draft makes clear in (d) that there can be increases OR decreases of 10 and 20 days respectively under (d)(1) and (d)(2), but after that the suspensions are mandatory. Or, if the endorsement holder can show that the employee did not negligently sell to a minor (by overcoming the presumption in (w)) there is no suspension or penalty. (This is important to keep in mind because it goes to the heart of the Holiday decision, and the judge's ruling that Holiday should have the opportunity to contest the central issue in the case; that is, whether the employees negligently sold tobacco products).

Ten Day Floor

While version "M" includes a floor, the devil is in the details. If the 10-day floor applies only to situations under current paragraph (m)(4), it will mean that we'll have lots of hearings and only the very least sophisticated businesses will get 20 days. If it applies to both (m)(4) and (5), there is a potential due process argument: e.g. if an employer can show that it was a candy bar and not

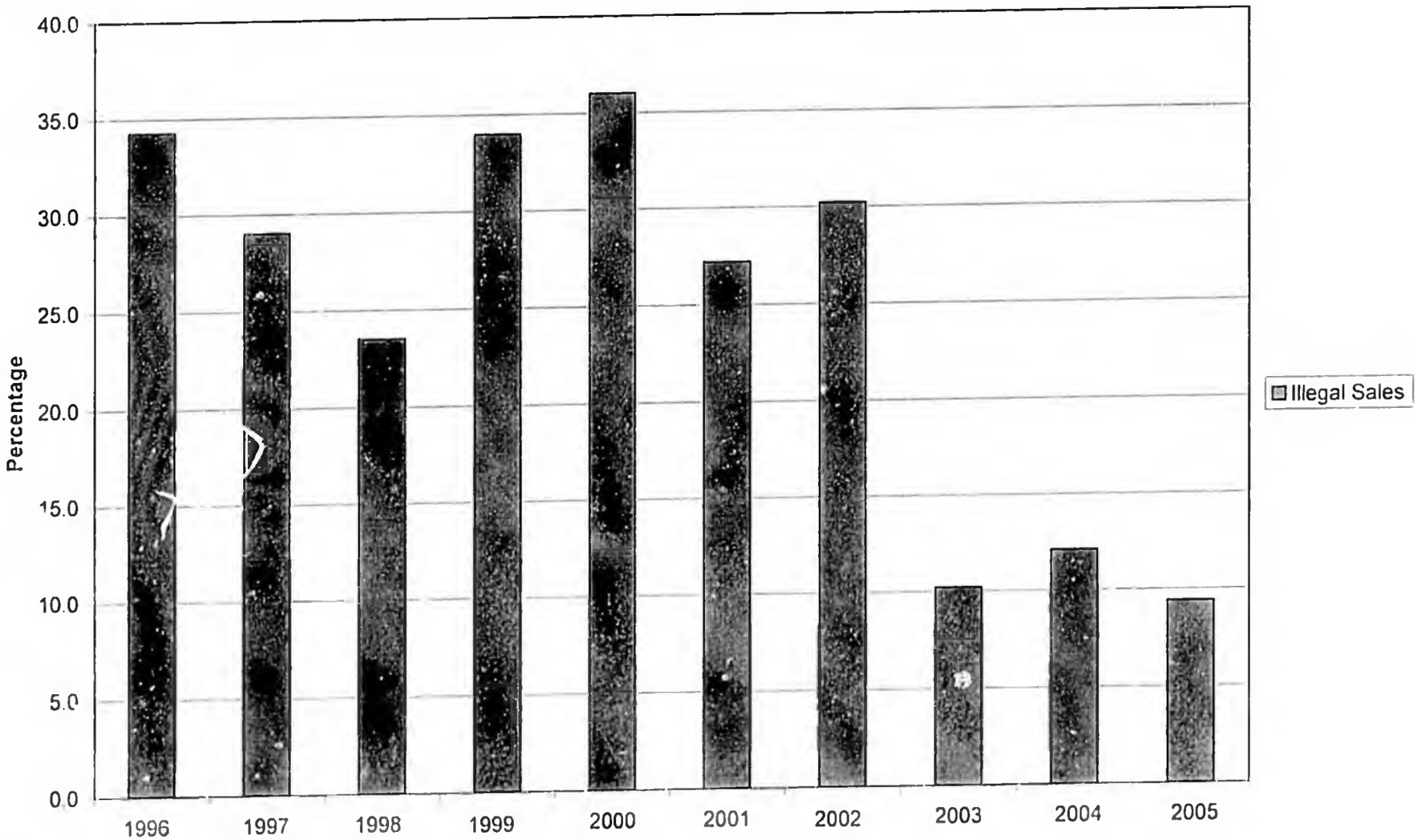
cigarettes that were sold, it wouldn't make sense to require a 10 day suspension. Also, is it 10-day floor on ALL the suspension periods or just the first one?

See the Department of Law draft at paragraphs (d), (m)(5) and (m)(6).

When a Business Gets a Reduction

Under version "M", a single location can get a reduction of the suspension period twice in one year. The Department of Law draft changed it to once. Paragraph (u) in both. Note that under version "M" the department can agree to a reduction if the person has not previously received a sanction under (d). The original bill did not contain this limitation.

Illegal Vendor Sales of Tobacco to Youth in Alaska 1996-2005



Source: US Department of Health and Human Services, Center for Substance Abuse Prevention

LAW OFFICES
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April 18, 2007

Representative Jay Ramras
State Capitol, Room 104
Juneau, AK 99801-1182
Phone: (907) 465-3004
Fax: (907) 465-2070

Re: Support for Due Process Protections of House Bill 187

Dear Representative Ramras,

The purpose of this letter is to urge you to support Rep. Kyle Johansen's proposed bill (HB 187) which seeks to correct the lack of Due Process afforded to tobacco vendors under the current AS 43.70.075. House Bill 187 corrects the unfairness of the present law's strict liability punishment of tobacco sales violations. By allowing an Administrative Law Judge the authority to take into account an employer's good faith efforts to prevent illegal tobacco sales to minors, HB 187 will continue to promote an employers' efforts to prevent illegal sales without unfairly punishing those employers for the unsanctioned and unpreventable intentional misconduct of its employees. The current legislation (AS 43.70.075) does not take into account an employer's inability to protect itself against an employee's willful violation of the law. Moreover, the law severely punishes a business for the deliberate misconduct of employees done in violation of the business's stated policies and procedures.

Gas Line II, LLC, who I currently represent in ongoing litigation involving a sale to minors offense, is a gas station/convenience store located in Fairbanks and who encountered exactly this problem early last year. Gas Line II takes a very hard line with its employees regarding tobacco sales to minors and has implemented multiple procedures aimed at preventing such sales. Gas Line II employees are required to enter a customer's date of birth into the company's Ruby Verifone cash register software system in order to complete any tobacco sale. The software is programmed to reject the tobacco sale if the date entered indicates that the customer is under the age of 19. In addition to this significant, seemingly fail-safe procedure, Gas Line II's criteria for checking customer IDs is posted next to the cash register with the bold print sign that states "Do Not Sell Tobacco To Anyone Whose Birth Date Comes After [Date]". The sign displays the date of birth after which customers must be denied tobacco purchases and is intended to serve as a constant reminder to its employees not to sell tobacco to minors. In addition, Gas Line II employees undergo significant employee orientation and training when hired regarding ID requirements for tobacco sales, procedures for properly checking customer IDs, and the use of the Ruby Verifone register system. Employees are specifically advised not to sell tobacco products to minors and are warned that violation of that policy will result in the immediate termination of their employment.

In spite of the extensive measures taken by Gas Line II to prevent tobacco sales to minors, two Gas Line II employees recently jeopardized the company's tobacco license[1] by intentionally circumventing Gas Line II's policies and procedures prohibiting tobacco sales to minors. Gas Line II's video surveillance footage captured two instances where Gas Line II employees requested an undercover agent's ID, physically checked the birth date as it appeared on the ID, but thereafter entered a different date into the Ruby Verifone register in order to intentionally override the system and complete the tobacco sale. In one instance, the video footage actually shows that the employee first entered the undercover agent's correct date of birth as appeared on the individual's ID. When the Ruby Verifone register rejected the sale, the employee intentionally overrode the register by entering a different birth date in order to complete the sale.

What more could Gas Line II as an employer do to prevent the illegal sales under the circumstances? Gas Line II immediately fired the two employees involved. Unfortunately, Gas Line II's expensive and far-reaching good faith efforts to prevent the illegal tobacco sales went unrecognized under the statute when Gas Line II sought to defend itself against the violations and retain its tobacco vending license.

Gas Line II and other tobacco merchants are allowed no defense against the unsanctioned and intentional actions of unscrupulous or disgruntled employees who, under the current law, are able to literally destroy an employer's livelihood by, as in the Gas Line II situation, intentionally violating company policy and procedures and thereby deprive the company of a significant portion of its business. Suspension of a company's tobacco license has a major impact on overall sales. In 2005, Gas Line II's tobacco sales accounted for a significant percentage of its gross sales, and tobacco products were sold at least 30 percent of all sales transactions. Customers want one-stop shopping; if they know they cannot purchase their tobacco products at a particular location, they are less likely to shop there for other products. Furthermore, the suspension of a company's tobacco license, in this case for 135 days due to the two infractions, will significantly impair Gas Line II's business for a much longer period than the 135 day suspension. Once a company loses customers and those customers develop business ties elsewhere, it is difficult to regain that business.

Contrary to what opponents assert, House Bill 187 is not about reducing the punishment for illegal tobacco sales. It is about ensuring Due Process of law and recognizing a business's extensive good faith measures to comply with the law. HB 187 does not reduce employer incentives to implement procedures to prevent tobacco sales to minors – if anything it *increases* the incentives to put such preventative policies in place by allowing employers to assert those efforts as a good faith defense. HB 187 will continue to punish offenders but allow the judiciary to make sure that the punishment is appropriate to the offense. We urge your support of House Bill 187.

---

[1] Gas Line II's tobacco license was initially suspended under the statute's strict liability punishment of employers. Gas Line II entered into a stipulated agreement with the State allowing Gas Line II to keep its tobacco license pending the outcome of *Richard Godrey d/b/a Mendenhall Valley Tesoro v. State*, S-11894, in which the constitutionality of the statute under the Alaska Constitution has been challenged. If the statute's constitutionality is upheld, Gas Line II has already stipulated that it will pay the $1500 fine and that its tobacco license will be suspended for 135 days.

State Representatives
RE: HB 187

Sincerely,
BORGESON & BURNS, PC

John J. Burns
JJB:sfr
cc: House Judiciary Committee Members
Gus Johnson, Gas Line II, LLC
F:\304791\6\00007016.DOC

email

Testimony
CSHB 187 (JUD) K
4/29/07

L. Diane Casto
Manager, DBH
Prevention & Early Intervention Services
907/465-1188

The DHSS Division of Behavioral Health is responsible for enforcement of illegal sale of tobacco to youth under the age of 19. In addition, as required by the federal Synar legislation, the state must maintain an illegal sell rate to minors of 20% or less or face federal monetary penalties to the Substance Abuse Prevention & Treatment Block Grant.

The DHSS, DBH opposed CSHB 187 (version K) as written, but we do support the need for and intent of HB 187 to address the lack of due process for retailers whose employees sell tobacco to minors under the age of 19.

Primary areas of concern:

1) Section 2 - currently the state has to prove that the employee negligently sold tobacco to a minor. HB 187 will now require the state to prove also the employer's negligence in that sale. Our interest is in holding the employer accountable for the acts of his/her employee.

2) Section 3 - this section allows retailers to develop, on paper, a loosely identified and monitored "training" program to inform employees of the State's laws related to the sale of tobacco to minors, thereby reducing (or eliminating) their responsibility for the actions of their employees and reducing their period of suspension to sell tobacco for the illegal sale.

3) Section 3, paragraph (w) - while this amendment does add a 10-day floor for suspension, guaranteeing that all citations will include some level of tobacco endorsement suspension, this floor appears to be the same for all violations. This would provide for a retailer with a history of non-compliance to continue to have their suspensions reduced to 10 days instead of 45, 90 or 100 days. While we support a suspension floor, it should be graduated in relation to the indicated number of days or not available at all to those who repeatedly violate the law.

The current system of fines and suspensions is working. State law was amended in 2002 to ensure that retailer violations resulted in consistent, temporary suspensions of tobacco sales, in addition to fines to the clerk of sale.

In 2002 the state's illegal sell rate was 30%--following the change in law, the 2003 rate was 10%. In addition to reducing youth access, youth usage of

tobacco also has decreased. We support a fair fix to the due process issue for Alaska retailers; we do not support dismantling the current system of fines and suspensions for those businesses that sell tobacco to youth under the age of 19.

Points in response to questions from House Finance on 4/28:

- Alaska does have the most stringent laws related to enforcement of illegal sale of tobacco to minors. We are not the only state to impose suspensions; we are the only state to have a mandatory number of suspension days per violation. One problem noted by the US General Accounting Office is the inconsistent application of fines and suspension in many states–reducing the quality of the tobacco enforcement programming. Alaska's laws are equitable and consistently applied to all retailers violating Alaska's tobacco laws.

- As noted, there are other states with sell rates as low as or lower than Alaska's rate, without mandatory suspension. While this is true, there are varied reasons. One reason is that many states are using youth ages 14-15 to conduct the purchases. Alaska's program uses youth who are primarily 15-17. The use of younger youth naturally produces fewer sales. The federal government is reviewing the age of youth buyers and considering changes to the Synar methodology. Other methodology inconsistencies affect the ability to compare outcomes state-by-state and are under review by the General Accounting Office.

- It is also important to remember that the number of compliance checks we conduct each year is very small–we have only three (3) Tobacco Investigators that cover the state. In a report by the Schneider Institute for Health Policy it estimates that "even aggressive compliance inspections programs will observe far fewer than 1/100th of 1% of all [tobacco sale] transactions." The majority of tobacco sales occur when Tobacco Investigators are not observing; our compliance and enforcement work is not a constant intrusion on retailers.

Michelle Toohey
4-28-07
HB 187

Good ~~afternoon~~ morning, Mr. Chairman, members of the committee, my name is Michelle Toohey -- I am the Director of Public Relations and Advocacy for American Lung Association of Alaska. I appreciate the opportunity to discuss House Bill 187 with you today.

As you've heard,
HB 187 was introduced and is necessary to address a recent Superior Court decision in Holiday Alaska, versus the State of Alaska which ruled that the hearing process involving illegal tobacco sales enforcement deprived Holiday of its right to due process under the Alaska Constitution and the US Constitution.

American Lung Association of Alaska expressly acknowledges the need to make statutory changes to provide due process – and has been actively working with the Administration to that end – However, it is imperative that such changes not compromise effective enforcement of laws prohibiting tobacco sales to kids.

While we are pleased with the changes made to the bill in the House Judiciary Committee, we remain concerned that

the current draft goes far beyond addressing the matter of providing due process and could significantly undermine the effective enforcement of state law regarding illegal tobacco sales to children.

Mr. Chairman, I would like to briefly step back and provide some context.

Smoking has been described as a "pediatric epidemic" because nearly all smoking starts in childhood. In Alaska, more than three-quarters of youth who smoke started before age 15 and nearly half started before age 13. Virtually no one starts smoking after age 18.

Tobacco is a deadly addictive drug and cigarettes kill approximately half of all long-term users. Accordingly, retail businesses that choose to sell tobacco products have a grave responsibility to prevent the illegal sale of tobacco to children.

In the recent past Alaska has made excellent progress in reducing illegal tobacco sales to children, something we can and should all be proud of – the tobacco enforcement program has dramatically reduced widespread illegal sales of tobacco to youth.

As you can see from the bar chart (I believe you all have in your packets) -- not long ago, illegal vendor tobacco sales were as high as 36% -- that's roughly one in three sales! -- and have since been reduced to about 11%.

After many years of wide-spread illegal vendor sales to kids, Alaska state law was amended to ensure that violations resulted in a predictable and consistent temporary suspension of tobacco sales. As the bar chart so clearly shows, the reformed compliance program immediately succeeded in dramatically reducing illegal sales.

Again American Lung Association of Alaska recognizes and shares the concern regarding the constitutional right to due process and agrees that the issue must be addressed. That is not in dispute.

We also agree that retailers should be able to contest whether, in fact, an illegal sale did take place. Further, in recognition of exemplary efforts to prevent sales to children some reduction in the length of suspension may be warranted, but, that reduction must be based on vigilant training and monitoring efforts.

Mr. Chairman, I've stated that the current version of HB 187 goes beyond solving the issue of due process and unnecessarily weakens our enforcement program against illegal tobacco sales.

I want to conclude by stating the specific areas in the Judiciary version that are still of concern. Specifically, the requirement for the state to prove negligence on the part of the employer, the nominal set of criteria the businesses are required to have in place to receive a reduction in suspension and the ability for repeat offenders to continue receiving reduced suspensions ... are still of concern.

In summary, HB 187 goes far beyond solving the problem of due process and weakens the enforcement program and could have the contrary effect of reducing a retailer's incentive to aggressively prevent sales in an on-going manner.

Mr. Chairman we would ask that the committee consider the changes recommended by the Department of Health and Social Services which will achieve due process, while maintaining an effective enforcement program currently in place. Thank you.

HB

192

HOUSE COMMITTEE REPO

(11)
Date Referred to Committee: April 25, 2007 **FURTHER REFERRALS:**

Date of Committee Action: 5/2/07

The FINANCE Committee considered: **HB 192**

HOUSE BILL NO. 192 **LAYOFF/NONRETENTION OF TEACHERS**

"An Act relating to notification to teachers of layoff or nonretention."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* HB 192 (HES)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

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

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

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

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
EED	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gara	✓			
	FOSTER	X			
Harry Crawford Jr	CRAWFORD	X			
Mary Nelson	NELSON	✓			
	STOLTZE			X	
	Joule	X			
	KELLY			X	
	Hawker			*	
Chair:	Meyer	X			
Chair:	Chenault			X	

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 192(HES)
(H) Publish Date: 4/25/07

Revision Date/Time (Note if correction):
Dept. Affected: Education & Early Development
Title: An act relating to notification to teachers of layoff or nonretention.
RDU: Education Support Services
Component: Executive Administration
Sponsor: Representative Doogan, Crawford
Requester: Health, Education and Social Services, Finance
Component No.: 2736

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2007) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

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

This legislation requires school districts to give all teachers that are tenured or non-tenured notification of non-retention by the last day of the school term by registered mail.

AS 14.20.140(a) Which states a teacher who is to be laid off, will be notified via regular mail by March 16th, is repealed.

Prepared by: Eddy Jeans, Director
Phone 465-8679
Division: School Finance
Date/Time 4/20/07 1:30 PM
Approved by: Barbara Thompson, Deputy Commissioner
Date 4/20/2007
Agency: Education & Early Development

Alaska State Legislature

Mike Doogan
Representative
District 25, Anchorage

SPONSOR STATEMENT

HB 192
An Act relating to notification to teachers of layoff or nonretention.

Alaska Statute currently requires school districts to inform tenured teachers they will be laid off or not retained for the following school year by March 16, while teachers who have not acquired tenure must be notified by the final day of the school term.

HB 192 changes the notification date for lay off or nonretention of tenured teachers from March 16 to the final day of the school term, the same notification deadline mandated for non-tenured teachers. The reason for this change is school districts do not know what their budget for the following school year will be by the middle of March.

While school districts can project or make reasonable guesses, they do not know with certainty what the state's contribution to education is going to be until the end of the legislative session. In the face of inadequate information, it is unreasonable to require school districts to send pink slips to tenured teachers in the middle of March simply because they are uncertain if they will have adequate funds to retain the teachers by the time the legislature has passed an education funding budget.

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Rep.Mike.Doogan@legis.state.ak.us

Alaska State Legislature

Mike Doogan
Representative
District 25, Anchorage

SECTIONAL ANALYSIS

CS for HB 192(HES)
An Act relating to notification to teachers of layoff or nonretention.

Section 1: Amends AS 14.20.140(a) to stipulate if no bill containing public school funding passes the legislature by March 1, all teachers (non-tenured and tenured) are to be notified by an employer of layoff or nonretention on or before the last day of the school term or by registered mail postmarked on or before the last day of the school term.

Section 2: Amends AS 14.20.140(b) to stipulate if a bill containing public school funding passes the legislature by March 1, then

(1) tenured teachers must be notified by an employer of layoff or nonretention on or before March 16, or by registered mail postmarked before March 16, and

(2) non-tenured teachers must be notified by an employer of layoff or nonretention on or before the last day of the school term or by registered mail postmarked on or before the last day of the school term.

Section 3: Amends AS 14.20.180(b), to conform with the provisions of AS 14.20.140 (a) and (b), whichever is applicable.

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Alaska State Legislature

Mike Doogan
Representative
District 25, Anchorage

MEMORANDUM

To: Representative Kevin Meyer, Co-Chairman
House Finance Committee

From: Representative Mike Doogan

Date: April 30, 2007

Re: Changes between HB 192 and CS for HB 192(HES)

The following changes have occurred between the original version of HB 192 and HB 192(HES).

- HB 192 originally set the notification date for nonretention or layoff of tenured and non-tenured teachers as the last day of the school term. CS for HB 192(HES) would make an early (March 16) notification date for tenured teachers contingent on passage of a public education funding bill by March 1. If no public education funding bill passes the legislature by March 1, then tenured teachers are notified of nonretention or layoff by the final day of the school term.
- The notification date for non-tenured teachers (the final day of the school term) remains unchanged.

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Rep.Mike.Doogan@legis.state.ak.us

Sec. ,,14.20.140,,. Notification of lay off or nonretention.

(a) If a teacher who has acquired tenure rights is to be laid off under AS 14.20.177 or is not to be retained for the following school year, the employer shall notify the teacher of the layoff or nonretention by writing, delivered before March 16, or by registered mail postmarked before March 16.

(b) If a teacher who has no. acquired tenure rights is to be laid off under AS 14.20.177 or is not to be retained for the following school year the employer shall notify the teacher of the layoff or nonretention by writing delivered on or before the last day of the school term or by registered mail postmarked on or before the last day of the school term.

(c) Notwithstanding a teacher's right to continued employment under AS 39.20.500 - 39.20.550, a school district may notify a teacher of layoff or nonretention under this section for the following school year for a permissible reason.

HB

193

HOUSE COMMITTEE REPO

(11)
Date Referred to Committee: April 11, 2007 — FURTHER REFERRALS:

Date of Committee Action: 2/28/08

The FINANCE Committee considered: — HB 193

HOUSE BILL NO. 193 — POLICE STANDARDS COUNCIL MEMBERSHIP

"An Act relating to the composition of the Alaska Police Standards Council; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [✓] CS for HB 193 / (STA)
For Senate Bills with new title: [ ] *Technical Title* [ ] *New Title: HCR*_____ [✓] Same Title [ ] New Title

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

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

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
COR				✓
DPS				✓

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

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Hawker			✓	
	CRAWFORD	X			
	Joule	X			
	KELLY		X		
	Thomas			X	
	Gara	✓			
	STOLTZE			X	
	NELSON	✓			
Chair:	Meyer			X	
Chair:	Chenault			X	

FISCAL NOTE

STATE OF ALASKA
2008 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB193(STA)-DOC-OC-2-15-08
() Publish Date:

Identifier (file name): CSHB193(STA)-DOC-OC-2-15-08
Dept. Affected: Corrections
Title "An Act relating to the composition of the Alaska Police Standards Council; and providing for an effective date."
RDU Administration and Operations
Component Office of the Commissioner
Sponsor Representatives Roses, Dahlstrom, Lynn, Gara, Crawford . .
Requester House Finance
Component Number 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2009**	**FY 2009**	**FY 2010**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other Interagency Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2008) cost: 0.0

POSITIONS

Full-time	0	0	0	0	0	0	0
Part-time	0	0	0	0	0	0	0
Temporary	0	0	0	0	0	0	0

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

Passage of this legislation should have no fiscal impact on the Department of Corrections.

Prepared by: Sharleen Griffin, Director
Phone (907) 465-3339
Division: Administrative Services
Date/Time 2/15/08 2 19 PM
Approved by: Dwayne Peeples, Deputy Commissioner
Date 2/15/2008
Department of Corrections

(Revised 10/05/2006 OMB)

FISCAL NOTE

STATE OF ALASKA
2008 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB 193(STA)
() Publish Date:

Identifier (file name): HB193CS(STA)-DPS-APSC-12-3-07
Title "An Act relating to the composition of the Alaska Police Standards Council: . . ."
Sponsor Representative Roses
Requester House Finance Committee

Dept. Affected: Public Safety
RDU Alaska Police Standards Council
Component Alaska Police Standards Council
Component Number 519

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	FY 2009	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2008) cost: _____

POSITIONS

Full-time							
Part-time							
Temporary							

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

House Bill 193 changes the make-up of the Alaska Police Standards Council by replacing one chief administrative officer or one chief of police position, one correctional officer administrative position, and one public member with three police officer positions. This change does not have a fiscal impact on the Department of Public Safety.

Prepared by: Terry Vrabec, Executive Director — Phone 465-4378
Division Alaska Police Standards Council — Date/Time 12/12/07 4:06 PM
Approved by: Walt Monegan, Commissioner — Date 12/4/2007
Department of Public Safety

(Revised 11/19/2007 OMB)

ALASKA STATE LEGISLATURE
House of Representatives

2/19/08

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(website:www.akrepublicans.org/roses.htm)

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STATE CAPITOL
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Representative Bob Roses
email: Representative_Bob_Roses@legis.state.ak.us

CSHB 193 (STA)
Sponsor Statement

CSHB 193 (STA) adds two certified police officers with at least five years of experience to the Alaska Police Standards Council (APSC). By doing this, those who are charged with the daily enforcement of the law will have input into the training and standards as participating members of the State's board which certifies police officers.

At present, the APSC is the only board in state government without representation by the group most affected by its decisions. Although the APSC has seats assigned to Chiefs of Police, to the Commissioners of Public Safety and Corrections and to members of the public, it has no line officers on the board. By contrast, according to a survey done by legislative research staff, of ten western states, only two had no line officers on their police standards boards.

The APSC has done a fine job, but it can benefit from the presence of line officers who can bring their particular experience and perspective to the board.

I urge your support of CSHB 193 (STA).

2-28-08

withdrawn

AMENDMENT 1

OFFERED IN THE HOUSE BY REPRESENTATIVE MEYER
TO: CS HB 193 (STA), Version 25-LS0712\C

Page 2, line 8

Delete "and correctional"

ALASKA STATE LEGISLATURE
House of Representatives

2/19/08

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SESSION:
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JUNEAU, AK 99801-1182
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Representative Bob Roses
email: Representative_Bob_Roses@legis.state.ak.us

Sectional Analysis
CSHB 193 (STA)

Section 1. Adds two police officers by reducing the number of chief administrative officers or chiefs of police from four to three and moves the correctional administrative officer to chief administrative officers or chiefs of police.

Section 2. Allows labor organizations that represent employees governed by the council a means to nominate police officers for consideration by the Governor.

Section 3. Provides a system of transition for the two police members to take positions on the APSC.

State of Alaska
Department of Public Safety
Alaska Police Standards Council

Sarah Palin, Governor
Walt Monegan, Commissioner

2/19/08

February 13, 2008

Honorable Bob Roses
State of Alaska
House of Representatives
Alaska State Capitol, Rm 416
Juneau AK 99801-1182

Re: House Bill 193

Dear Representative Roses:

In 2007 the Alaska State Senate considered SB 99, which sought to change the composition of the Alaska Police Standards Council. The bill proposed the removal of one (1) representative police chief, and two (2) public "members-at-large" positions, replacing these individuals with three (3) union-endorsed police officers. When sustained and uniform opposition to this proposal was voiced from all levels of Alaska's public safety community: the Department of Public Safety Commissioner's Office, Alaska Police Standards Council, Alaska Association of Chiefs of Police, as well as individual law enforcement administrators across the state, the legislation was appropriately dropped.

It has come to our attention that this proposal has resurfaced with these same goals as those being pursued under HB 193. After conferring with all members of the Alaska Police Standards Council, I am writing to inform you that our position has not changed on this issue. This letter seeks to explain the underlying reasons behind our position.

AS 18.65.150 mandates the current composition of the Alaska Police Standards Council, providing for a critical balance of rural and urban public members-at-large. This mandate requires that state and local chief executive law enforcement members carry out the policy and duties of the Council. Chiefs of police and public members that serve on the Council have high expectations of law enforcement officer behavior, accountability, work performance and training standards.

The current composition of the Council provides for a strong balance of decision-making, guarding against overzealous/punitive actions against officers, while promoting accountability and integrity among our law enforcement community. AS 18.65.220 charges the Council with the duty to "investigate when there is reason to believe that a police officer, probation officer, parole officer, municipal correctional officer, or correctional officer does not meet the minimum standards for employment". It has been the Council's experience that this accountability - required by statute - often differs from the accountability sought by labor unions. The ability to carry out of effective and warranted discipline is critical to the public trust.

HB 193 seeks to change the composition of the Council by reducing one (1) chief position and adding two (2) police officers whose appointments may likely be made through the nomination and endorsement of public safety labor organizations. This amounts to a rather thinly veiled attempt by organized labor to interject their influence into a regulatory body- a body that was never designed, nor intended, to be a collective forum for labor management disputes.

Hoffman
OFFICE

Alaska Police Standards Council
P.O. Box 111200 - Juneau, AK 99811 - Voice (907) 465-4378 - Fax (907) 465-3263

Our Council's purpose is to uphold minimum employment and training standards for the entire Alaskan law enforcement community, and to seek appropriate censure and/or potential decertification when these standards are violated. I am one of two police chiefs currently serving on this Council who has also served as president of a local police labor union. As such, I can assure you that all of our Council's members are highly respectful of the rights of Alaska's rank-and-file law enforcement officers, and of their legitimate right to pursue and protect their interests through their resepctive agency's greivance and arbitration processes. However, by trying to introduce a "labor component" into this regulatory body, the sponsors of this bill are unwittingly attempting to create an inherent "conflict of mission" for the Council. By virtue of that very mission the Council often finds itself in a position where the maintenance of standards and professional values demands that a member of the public safety community be considered for decertification. Because labor organizations, by their very nature and mission, are charged with doing everything they can to minimize adverse effects upon their members. How can they (via their nominated representatives) possibly expect to act impartially in these circumstances?

I'm sure that everyone in the criminal justice system would agree that defense attorneys are a necessary and integral component of our legal system, and that criminal defendants deserve their vigorous representation. However, I would be shocked if anyone were to make the suggestion that someone representing the defense's interests should be included amongst a sentencing body. This analogy differs very little from the current proposal under consideration. By trying to introduce what is often an adversarial interest into an oversight/disciplinary body, the fairness and integrity of Council decisions would suffer in the eyes of the public, as well as within the law enforcement community.

Last year our Council adopted new regulations that require heads of law enforcement agencies to report serious officer misconduct to APSC. This was not seen as a favorable regulation from the standpoint of organized labor, which prefers to negotiate this reporting requirement as part of the employer/employee bargaining agreement. It would appear that SB 99, and now HB 193, are attempts on the part of organized labor to try and mitigate the effects of this regulation.

The Council respectfully requests that you withdraw your support of HB 193. It does not serve the integrity of our public safety community, nor does it in any way protect the public trust of our law enforcement institutions. I would be happy to speak with you further regarding this proposed legislation. Please feel free to call me at (907) 450-6513

Sincerely,

Daniel P. Hoffman
Chairman
Alaska Police Standards Council

cc HB 193 Co-Sponsoring Members:
- Representative Nancy Dahlstrom
- Representative Bob Lynn
- Representative Les Gara
- Representative Harry Crawford

2/19/08

City of Kodiak
KODIAK POLICE DEPARTMENT
Office of the Chief of Police

February 15, 2008

The Honorable Kevin Meyer
Co-Chair, House Finance Committee
State Capital, Room 512
Juneau, AK 99801-1182

Dear Mr. Co-Chair:

I have reviewed HB193 sponsored by Representative Bob roses which seeks to change the composition of the Alaska Police standards council. You may recall that last year SB99 also sought to change the composition of the Council by removing one police chief and two public representatives and replacing them with three union-endorsed police officers. This measure was abandoned after widespread opposition from Alaska's law enforcement community was voiced.

HB193 is yet another attempt by special interest groups to affect the policies and duties of the council. The council in its current form provides a balance of rural and urban public members-at-large with state and local chief executive law enforcement leaders that promote accountability and integrity in our law enforcement community.

It has been our observation that accountability required by statute and regulation often differs from the accountability sought by labor unions. Changing the composition of the Council by removing experienced law enforcement professionals and replacing them with union-nominated police officers will affect Council actions.

I respectfully request that you not support HB193. I would be happy to speak with you further, please feel free to call me at 907.486.8000.

Sincerely,

Charles "TC" Kamai
Chief of Police

OA + ILC

State of Alaska
Department of Public Safety
Alaska Police Standards Council

2/19/08

Sarah Palin, Governor
Walt Monegan, Commissioner

April 5, 2007

The Honorable Bill Thomas, Jr.
Alaska State House of Representatives
State Capitol, Rm. 434
Juneau, AK 99801-1182

RE: SB 99 and HB 193, Relating to the composition of the Alaska Police Standards Council

Dear Representative Thomas:

The Alaska Police Standards Council Chair, Vice-Chair and Executive Director, as well as the Vice-Chair of Alaska Association of Chiefs of Police have met with many senators and representatives since introduction of this legislation. No one at APSC had been approached regarding any change being made to the structure of the Council and because of the magnitude of the impact any change of this kind would produce, we added it as a priority to the agenda of our April 2, 2007, meeting in Anchorage this week.

APSC extended a formal invitation to Mr. John Cyr, Executive Director of PSEA, to attend the meeting and explain to the Council the request for structural change to its composition. Mr. Cyr did attend and presented to the Council the rationale for requesting this legislation and what the Public Safety Employees Association hoped to accomplish by its passage.

Mr. Cyr advised the Council that the main thrust of these bills is *equity*, stating that the 'rank and file' want an equal voice in the business of the Council. He advised that, although the proposed legislation was aimed at replacing existing membership with organized labor-nominated, front line officers, PSEA would consider adding these officers to the current structure of the Council, as long as the legislature would accept a fiscal note for the additional seats.

Various Council members asked Mr. Cyr what had prompted the push to change the make-up of the Council and also if there was a perception that something was "broken" or ineffective in some way. Mr. Cyr clearly stated that the Council was not broken or negligent in any way with respect to training or certification. He was complimentary of the work the Council carries out.

On further questioning, Mr. Cyr could only identify one actual request from PSEA membership – that the Council provide more "current & relevant" training. Mr. Cyr could not define exactly what aspect of training standards were not relevant or current, only that he was being told it was a problem by some of the officers.

Council members advised Mr. Cyr that, although APSC coordinates and funds statewide training, it is up to the individual agencies to create and maintain their own ongoing departmental training programs. While each department must require its officers to meet APSC minimum standards, best practices and standards are developed and administered by the respective law enforcement

Alaska Police Standards Council
P.O. Box 111200 - Juneau, AK 99811 - Voice (907) 465-4378 - Fax (907) 465-3263

Voice ON FILE

agencies, not APSC. There was obviously a gap in understanding between what PSEA thought Council's role was with respect to training as opposed to its actual role and responsibility.

Mr. Cyr concluded his presentation with the statement, "the political reality is that the Governor is cutting $150,000,000 to the state budget, and we (PSEA) need representation", relating to decisions resulting from these budget cuts.

A poll of each Council member showed deep concern over changing the current composition of the Council. Council membership is extremely concerned that PSEA is attempting to push Council into a "labor-management" role by their use of the term *equity*. APSC has never been a labor-management influenced group, and for good reasons. The Council is an executive level decision-making body that deals with complex decertification matters of police, correction and probation officers. It is these decisions that require seasoned executives of law enforcement, correction/probation, and of our public, all of whom are appointed by the Governor to provide a necessary balance of professional knowledge, training with public transparency and trust.

The attempt to remove chief administrative officers and public members from the Council and replace them with organized labor-nominated, line officers severely impinges on the professional standards and certification role of Council – the number one priority here is to maintain the public trust. Organized labor's number one priority is to its membership.

The Council fully supports the establishment of an ad-hoc Training Advisory Committee to make recommendations on best practices and standards. This committee could be made up entirely of non-command level personnel.

In conclusion, the Alaska Police Standards Council strongly opposes HB 193 and SB 99.

Sincerely,

Terry Vrabec
Executive Director

Committee Distribution:

Senate Commerce & Labor
Senate State Affairs
Senate Finance
House State Affairs
House Finance

2/19/08

Adding Two Police Officers to the Alaska Police Standards Council.

The bill will:

- Keep the composition of the APSC at 11 members to keep operating expenses and budget neutral.

- Adds two police officers by reducing the number of chief administrative officers or chiefs of police from four to three; moves the correctional administrative officer to chief administrative officers or chiefs of police.

- Allows two representatives of police, who are working law enforcement officers with 5 years of experience in policing, an opportunity to offer their valuable insight as to all phases of police standards.

- Improves the quality of decision making by including those who are charged with the mission of enforcing the law a means for input as participating members of the APSC.

- Allows labor organizations that represent employees governed by the council a means to nominate police officers for consideration by the Governor.

- Provides a system of transition for the two police members to take positions on the APSC.