MISC.

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☐ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

October 11, 1979

Senator Don Bennett
and members
Administrative Regulation Review Committee
Box 2801
Fairbanks, Alaska 99707

Dear Senator Bennett:

The enclosed packet was prepared for the Executive Regulation Reform Effort. We thought you and the members of your committee might also be interested.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF/PM:rj
Encl.

Ombudsman

MEMO

Date: September 28, 1979

To: Bill McConkey

From: Frank Flavin

Subject: REGULATION REFORM EFFORT

Last May, Diane LeResche asked that this office participate in your regulatory reform effort. We agreed to review our complaint files of the last four years in search of cases evidencing unnecessary, too restrictive, or duplicate regulations. This commitment has proven ambitious, and we admit that our review was not exhaustive.

We had anticipated finding many "problem" regulations. Instead, our complaints more frequently resulted from "problem" statutes, or at least their interpretation and administration. Likewise we have found misapplication of regulatory requirements.

And, probably the last thing you want to hear, our complaints have often resulted from the lack of regulations or written procedures where they are statutorily required or should be required.

Through Ombudsman recommendations we have been able to remedy some of these deficiencies and what we believe to be misapplication of requirements. The listing below includes regulations which continue to be a problem, for one reason or another, and areas which we think ought to be covered by APA regulations. We realize that this isn't exactly what you asked for, but perhaps our input can be used in conjunction with that provided by affected agencies.

11 AAC 16.030 requires people who want to use a geiger counter or metal detector on state park/historical site areas to get a permit. However, to be eligible for a permit, one must be a registered archeologist, according to the Division of Parks. (A79-0808)

3 AAC 33.060 and .100 require (indirectly) that firewood be sold only by the cord or percentage of a cord, as interpreted by Weights and Measures. (A79-0846)

5 AAC 81.055 (5) requires that persons applying for one sheep hunt cannot apply for another sheep hunt--even if that person did not get selected (by lottery, for example) to participate in the first hunt. (A79-0779)

12 AAC 60.030 allows for the granting of reciprocity to psychologists holding licenses in other states. This regulation is rarely used. It builds expectations for reciprocity that is seldom granted. (A79-0848)

12 AAC 80.010-060 requires that barbers be licensed through the Barber Board. The entire function of this Board could be eliminated with no disservice to the public. These sections allow too much subjective discretion to the Board. (A78-1427)

11 AAC 72.100 requires that persons using 5,000 gallons or more of water per day to get a water appropriation permit. The agency administering this regulation is backlogged by thousands of permit applications going back five years and is not currently enforcing the application requirement. (A79-0303)

17 AAC 40.220 requires that the commissioner of DOT approve all expansions and improvements of airports and landing fields. This regulation results in after the fact rubber stamp approval. (77-1818)

5 AAC 60.030 (a) (4) defines areas where fishing is permitted at the junction of two bodies of fresh water. This definition is based on intersection marks which are not easily determined by the fishing public. There is a different definition used to distinguish where fishing is permitted when salt water confluences are involved. (A79-0684) (see attachment #1)

8 AAC 77.005-905 provides for state inspection of elevators. The Municipality of Anchorage has the same authority and inspections have been duplicated. (A79-0678)

17 AAC 40.320 (b) defines classes of airport land use. (A78-1184) (see attachment #2)

11 AAC 20.010 allows for use of firearms in state parks but this conflicts (perhaps) with Fish and Game's regulation of hunting (A79-0950) and (A78-1000) (see attachment #3)

5 AAC 06.341 sets the maximum length of Bristol Bay fishing vessels. It is our finding that the regulation, as written, is ambiguous. (A78-1299) (A79-0647) (see attachment #4)

11 AAC 54.300 concerns procedures in land disposals. (A78-1420) (see attachment #5)

11 AAC 86.130 is a mining regulation which does not require the submission of recorded copies of documents. It does require submission of copies of recorded documents. We believe that the Division is requiring in practice more than the regulation requires. (A78-0899) (see attachment #6)

8 AAC 85.200 (b) (4) is an unemployment regulation which apparently conflicts with federal CETA regulations. (A79-0113) (see attachment #7)

12 AAC 24 - these regulations do not contain provisions for manicurists, demonstrators or consultants, school owners, owner only shops, or owner-operators. (J79-0037)

13 AAC 08 - these motor vehicle regulations need to define methods by which one can show financial responsibility. (J79-0113)

7 AAC 48.100 and 7 AAC 48.180--in our complaint the fair hearing appeal process took 215 days. (J79-0126)

19 AAC 05 and 19 AAC 10 - these Local Boundary Commission regulations are vague and permissive. For example, what is a "valid public purpose" in 19 AAC 05.010? At 19 AAC 10.120 the department may recommend and at 140 the majority may decide. 19 AAC 10.150 seems to allow too much discretion to the Commission in waiving regulatory requirements. (J78-0369) (J79-0041) (J79-0042) (J79-0064)

19 AAC 35.120 (4) - this senior citizen property tax exemption regulation has been interpreted narrowly through guidelines rather than on an individual case basis. (A79-0788)

Additional Regulations Necessary

ASHA appeal procedures differ depending on source of funding for individual projects--federal, state, or combined. Often project managers cannot advise aggrieved tenants of which procedure to use. (J79-0194)

There are no state medicaid regulations although the agency is developing a policy manual to be used in conjunction with federal regulations.

Professional Services Contract regulations are part of the Administrative Manual and, as such, the Attorney General's office has found them to be guidelines only. (J78-0367 et al)

The Division of Pioneer Benefits has no APA regulations for the Pioneer Homes or Longevity Bonus programs. Longevity Bonus is specifically exempted from APA requirements by AS 47.45.160. It is our feeling that both of these programs directly affect the public so should be subject to APA. We would expect more reasonable policies were the regulated to communicate with the regulators.

The Division of Retirement and Benefits, in this office's opinion, has frequently interpreted its statutory authority in a questionable manner. When queried, the Division has obtained a legal opinion upholding its application of the law based on consistent past administrative practice. The PERS and TRS Boards infrequently issue regulations, but these are not under APA procedures. We believe the Division of Retirement and Benefits ought to be subject to the Administrative Procedures Act.

Attachment #8 speaks to the need for regulations as a stop-gap solution concerning Occupational Licensing's release of bonds and cash or other acceptable negotiable security in lieu thereof. (A79-0181, A79-0165, A79-0688)

And lastly, attachment #9 concerns a complaint about Day Care Assistance. Our complainant asked that this information be sent to you. (77-1421)

rj
Attachments

Ombudsman

Frank Flavin

State of Alaska

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August 23, 1979

Re: Ombudsman Complaint A79-0684
(Closed)

Please be advised the above-captioned complaint, alleging that the Department of Public Safety's Fish and Wildlife Protection Division improperly closed the Yetna River for King Salmon fishing on June 16, has been fully investigated.

As my assistant earlier explained to you, Fish and Wildlife Protection Officers John Knudson and Joe Campbell patrolled the confluence of the Yetna River and Lake Creek that day. Lake Creek was open for King Salmon fishing; Yetna River was not. The agency officers were operating under state regulation 5 AAC 60.030 (a) (4), which allowed fishermen to fish just that area of the Yetna that was a direct line across the Yetna from both banks of Lake Creek. The regulation (as correctly interpreted by Officers Campbell and Knudsen) restricted fishing on the Yetna to the area shown in figure A, on the attached diagram.

In explaining this to the 200 fishermen on the Yetna bank with you, both officers felt the regulation unfair. They informed all the fishermen of the same legal restrictions on where people could fish that day. Officers Campbell and Knudsen reported that almost all the other fishermen moved to locations where they could legally fish.

However, upon returning to Anchorage, the two informed their supervisor (Lt. Wayne Fleeks) of the problem encountered. The agency then requested the Board of Fish consider substituting the fresh water regulatory definition with the one determining where fresh water intersects with salt water. As the water color in fresh water/salt water confluences is easily marked, the definition of those confluences is different in state regulations. Those regulatons (5 AAC 72.040 (8) provide for fishing in waters colored the same as the inflowing waterway as shown in figure B on the attached diagram.

Attachment #1

As the water coloring of Lake Creek is detectably different than Yetna River, even though both are fresh water, the agency felt it could ask the Board of Fish to substitute the latter definition. The Board of Fish expeditiously approved the change for Lake Creek and Yetna River, providing for fishing on the Yetna as outlined in figure C on the attached diagram.

Hence, when your acquaintance went back to the Yetna River shortly after June 16, he was given the new regulation interpretation of where he could legally fish on the Yetna.

We find the agency acted correctly when its officers told you fishing on the Yetna was prohibited. However, your basic complaint was partially justified, as even the agency saw the unfairness of restricting the fishing to just the bank-to-bank area. Since the agency remedied the basic unfairness, we believe no recommendation from us is warranted. Thanks to the agency actions, we further find the complaint partially rectified: the basic unfairness was corrected. Thank you for bringing this matter to our attention.

Sincerely,

for Frank Flavin
Ombudsman

FF/CA/jm

Attachment

FIGURE A

Black Areas: proper areas for fishing pursuant to 5 AAC 60.030 (a) (4)

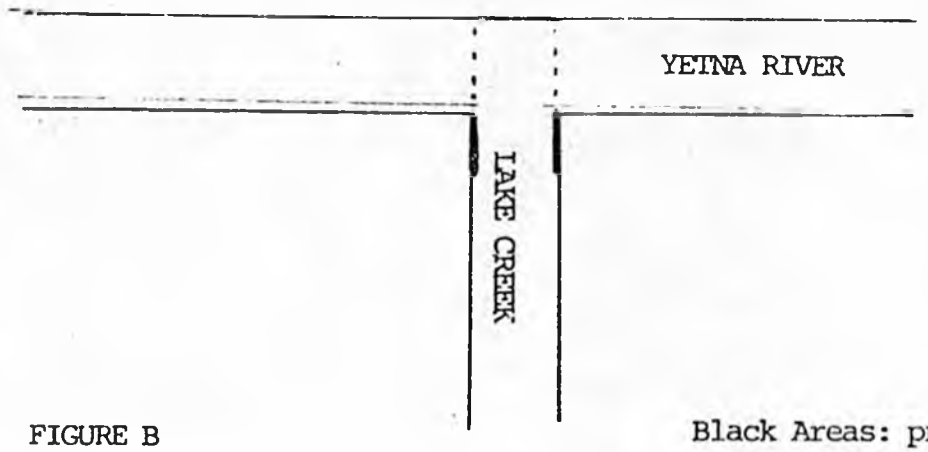


FIGURE B

Black Areas: proper areas for fishing pursuant to 5 AAC 72.040 (8)
Dotted Areas: Color of water more similiar to Lake Creek than Yetna.

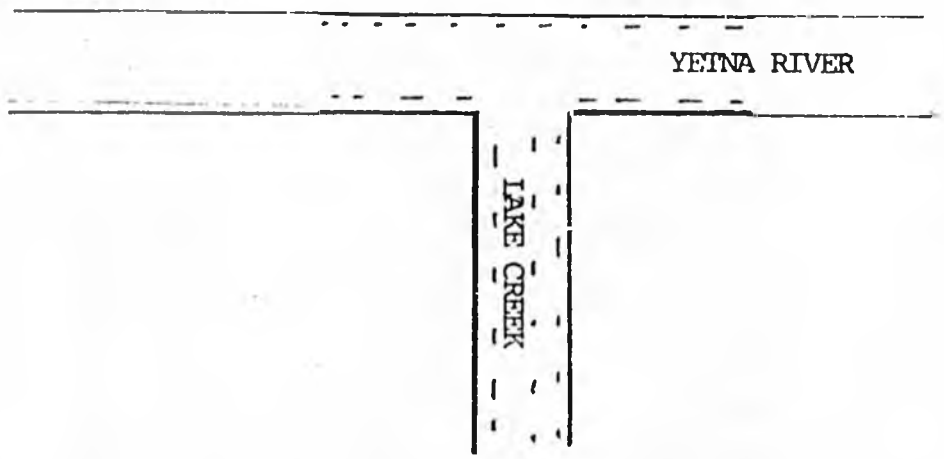
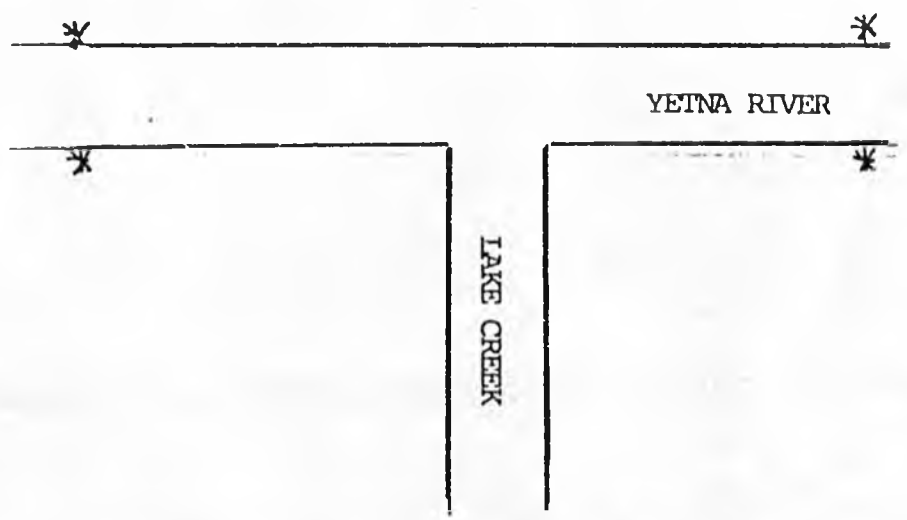


FIGURE C

* F & W Protection Markers



Ombudsman

Frank Flavin

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September 29, 1978

Dick Chitty, Director
Division of Lands, Leasing, Right-of-Way
and State Equipment
Department of Transportation
Pouch Z
Juneau, Alaska 99811

Re: Ombudsman Complaint A78-1184
(Pending)

Dear Mr. Chitty:

Please be advised that the above-referenced complaint, alleging that the Department improperly leased land at the Anchorage International Airport to the Alaska National Bank of the North, has been investigated. We find the complaint to be justified.

DOT POSITION:

Your September 4 letter to Steve Pavish states, "The Planning Division was consulted regarding the resolution of the Anchorage International Airport Master Plan Advisory Committee. We are advised that the planned usage by the bank for this specific piece of property is not incompatible with the master plan being developed. 'The center is totally dependent on data arriving on scheduled aircraft as well as on the bank's leased aircraft' according to Alaska National Bank of the North. Please process the lease in the normal fashion."

The Department argues that this lease was for an auxiliary aviation prupose and, therefore, non-controversial according to sound land use planning. Mr. Head's memo to you of September 6 states:

> "The general area in which this lease has been filed is recommended to have a land classification of 'aviation support' activities . . .'Aviation support' . . . reserves the land for any enterprise with a requirement for interfacing with air carriers . . . The needs of the Alaska Bank of the North were sufficiently compelling for the Lands and Leasing division to classify them as 'auxiliary aviation' . . . Once this decision was reached, the proposed location became non-controversial from the standpoint of the planned land use classification . . . this was an exercise of judgement within the realm of management . . ."

ATTACHMENT #2

The Department correctly published and posted the legal notice of Bank of the North's application to lease State airport lands for 45 years at a rate of $.08 per square foot, and allowed for public comment. The legal ad stated that a hearing would be held on the lease application if the Department received twenty written requests. Since less than this number of written objections were received, the lease was signed by the State on September 5.

OMBUDSMAN FINDINGS:

1. The Bank of the North lease for a data processing center was improperly justified as an "auxiliary" aviation use.

14 AAC 10.320(b) defines classes of land uses. (2) states:
"auxiliary" such as taxicab service; rent-a-car agency; cocktail lounge; gift shop; barber shop; cafe; skytel; hotel-motel; newsstand; insurance sales; arcade; and generally any business or service not included in "aviation function" which is located and operated for the convenience of the air-transient public and employees necessary to the maintenance and operation of the airport;

Section (3) defines "non-aviation" uses.
such as grocery store; cafe; liquor store; lumber yard; agriculture; golf course; automobile service station; shopping center; bowling alley; and generally any business or service not normally related to aviation or the air-transient public and which does not offer a product or service normally used by the air-transient public and which is located and operated to derive its income in major part from the general public;

By no stretch of the imagination can a data processing center for bank records be considered an "auxiliary" aviation use under the definitions in these regulations which are currently in effect. Mr. Head's reference to "aviation support" uses which have a requirement for interfacing with air carriers bears no resemblance to regulatory definitions of alternative land uses. It is not management's prerogative to designate types of use which conflict with legal regulations. Further, the legal notice on this lease stated it was for non-aviation purposes.

2. By improperly classifying this as an auxiliary aviation lease, the Department subverted its regulations which restrict issuance of non-aviation leases.

14 AAC 10.320(c)(3) reads in part:
Leases for non-aviation use. Such non-aviation use of the airport lands as may be permitted by the division

> may not interfere with the safe and normal operation of the airport; may not violate state or federal laws; and may be permitted only upon lands or facilities not immediately needed for aviation functions, auxiliary purposes, or for expansion or development purposes, and leases or permits which allow such non-aviation use may not extend beyond the time during which such lands or facilities can reasonably be expected to be unnecessary for expansion or development purposes.

By incorrectly justifying this as an auxiliary aviation lease, DOT staff contends that the requirements in this regulation need not be met. However, since the data processing center can only meet regulatory definitions of a non-aviation use, the requirements above do apply. According to Mr. Head's memo referenced above, the airport land involved in the Bank of the North lease "is recommended to have a land classification of 'aviation support' activities". Clearly, therefore, the Department has violated the restrictions in 14 AAC 10.320(c)(3).

3. By improperly classifying this as an auxiliary aviation lease and deeming it, therefore, non-controversial and by strictly interpreting legal notice provisions regarding requests for public hearing, the Department did not allow adequate public input on issuance of this lease and did not afford adequate weight to the input received.

Since this lease can be defined only as non-aviation, and since it was granted on lands generally classified as "aviation support" because "much of the surrounding land is irretrievably committed to leases of this nature", it must be considered controversial and, as such, should certainly have gone to public hearing.

The Department has argued that less than twenty written objections were received during the public comment period. The Department has failed to consider that each of the seven signers of Resolution 8/9-1 of the Anchorage International Airport Master Plan Advisory Committee represent a special interest relating to the airport. Each signed not as an individual, but as representative of a group of individuals who objected to the lease. The objection of seven organizations should be sufficient justification for a public hearing.

Further, since this lease application quite obviously had master plan land use implications, the written objection of the Master Plan Advisory Committee should have carried more weight. The Department argues that this group does not constitute a public forum and that "no source presently exists for ongoing public input on the airport." Nevertheless, this Advisory Committee is the only established external review mechanism on which the Department can call.

4. The lease to Bank of the North for a data processing center was issued at an unlawfully low rate.

A January 28, 1976 letter from Attorney General Cross to Commissioner Harris states ". . . it was brought to our attention that rentals at the airport are substantially below fair market value. Under the law, the property must be leased at market value. AS 2.15.090; 14 AAC 10. 340. A lease at less than market value is unalwful, and arguably, the lessee owes the State the difference between his actual rental and the actual value."

On June 12, 1976, Commissioner Harris responded, "We are sure you can appreciate the fact that a complete state-wide conversion to a fair market value system of airport land leasing would be an extremely costly endeavor . . . We are, therefore, initiating a program where leases for non-aviation land uses on Anchorage and Fairbanks International Airports will be issued on a fair market value basis. The program will call for the respective lease applicants to hire, at their own expense, an appraiser approved by the Division of Aviation. The appraiser's report would then be used as the basis of the lease rental. We believe this program will permit us to begin a fair market value rental system at a minimum of expense to the state."

Again, in a response to me on September 30, 1976, Commissioner Harris stated "Your recommendation has been reviewed and tentative conclusions reached. Leases for non-aviation uses will be appraised and leased at the greater of either the lot's appraised fair market value or a certain specified minimum amount."

I don't believe we need to belabor this further.

5. The Bank of the North lease application received preferential treatment by the Department.

We note a written comment that the Lease Application Review Committee received instructions from you on June 19 (six days after the lease application was received) to issue the lease as soon as possible per Commissioner Harris, Pat Ryan, and Jim O'Sullivan.

We note also an August 7 letter from Stephen Pavish to Mr. Elton E. Engstrom, President of Engstrom Brothers Company, which states in pertinent part "The fish operation as proposed (in Engstrom's lease application) is incompatible with sound airport planning and development in that land on the airport is in critical short supply . . . We, therefore, must hold available land for operations which must have an airport location. In the case of your proposed fish operation,

the time for transportation between the plane and the processing plant appears to be such that the product leaving a plane by trucks can equally well move to a processing station located off the airport."

In our view, the Chief of Airport Leasing correctly rejected this application for a non-aviation use of airport lands. We cannot understand, however, how the time for transportation between the plane and the data processing center could be any more vital than the time required to transport fish. We can only conclude that, had there not apparently been a "management" decision to call the Bank of the North lease "auxiliary", and had there not apparently been instructions from top management in the Department from the outset to process this application as quickly as possible, the disposition of this lease application might well have been different.

In response to a Legislative Audit recommendation that DOT develop comprehensive revenue plan for Anchorage International Airport, the Department responded in June, 1977 ". . . if the 'Division of Aviation' should foster sound economic conditions in air commerce among the air carriers in the public interest and promote adequate economical and efficient service by air carriers and promote reasonable charges without unjust discrimination, undue preferences, or disadvantages and unfair or destructive competitive practices, then the 'Division of Aviation' has done a commendable job of preserving the integrity of the operation."

While the Department was referring here to philosophical questions regarding lease rates for aviation purposes, the subject complaint makes us wonder how commendable a job of preserving the integrity of the operation the Department is now doing.

RECOMMENDATIONS:

Despite the auxiliary/non-aviation improprieties listed as findings, we are not recommending cancellation of this lease. I have noted with interest just how fast the Bank of the North data processing center is being constructed.

Two recommendations have resulted from this complaint, however:

1. DOT should immediately contact the Bank of the North, and instruct the Bank to hire an appraiser who meets with the approval of the Department. A fair market value appraisal of the leased land should be conducted, and the lease rental recomputed based on the true land

value. This recommendation conforms exactly to Commissioner Harris' promised policy changes and to recommendations of the Attorney General.

2. I am extremely concerned that the Department has no established mechanism by which to solicit representative public input on proposed airport land uses. It is recommended that such a body be constituted with powers and responsibilities specifically delineated.

I am also concerned about the duties and authority of the Master Plan Advisory Committee. I recommend that the role of this Committee be specified, and that its relationship to LARC be defined. The Department insists that this Committee's role is to advise on general policies only, and to have no input on the operational decisions which implement these policies. The Committee members are concerned that their advisory role is futile since their recommendations are rarely solicited and frequently ignored.

We thank the many DOT staff members who cooperated during the course of this investigation. I shall appreciate your written response to these recommendations within thirty days.

Sincerely,

for Frank Flavin
Ombudsman

cc: Don Harris, Commissioner , DOT
Dick Holden, Deputy Commissioner, DOT
Martha Mills, Attorney General's Office, Anchorage

PM:FF/gpw

STATE OF ALASKA

JAY S. HAMMOND, Governor

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF PARKS

Division of Parks
619 Warehouse Dr., Suite 210
Anchorage, Alaska 99501

September 18, 1978

Re: Ombudsman Complaint A78-1000

Mr. Frank Flavin
Ombudsman
840 "K" Street, Room 203
Anchorage, Alaska 99501

Dear Mr. Flavin:

Thank you for your letter of August 28, 1978 relative to Denali State Park.

There is one discrepancy which we wish to bring to your attention: control of hunting and fishing rests with the Department of Fish and Game. They continue to designate open areas and control these activities within State Parks. Use of firearms in state park areas is within the jurisdiction of the Division of Parks. Therefore hunting may be allowed in areas closed to firearms (by other methods). Denali is open to bow hunting and has generally been popularly received as such by hunters not wishing to compete with firearm hunters.

We are in the process of revising our Park rules and regulations and will include a specific provision relative to firearms in Denali State Park.

Sincerely,

JCJohannsen for

Terry A. McWilliams
Director

JC:pg

cc: Jeanne Comer, Chief of Maintenance and Operations

Attachment # 3

August 28, 1978

Re: Ombudsman Complaints A78-0947
and A78-1000

Your complaint against Fish and Game for inadequate hunting regulations regarding Denali State Park has been discontinued and a similar complaint opened against Natural Resources, Division of Parks. Fish and Game claims no authority to promulgate hunting regulations in state parks -- Parks does (see AS 41.20.020 (6) enclosed).

I'm also enclosing the entire statute on the Denali State Park. You will note that there is no section "Incompatible uses prohibited" similar to AS 41.20.270 on Kachemak Bay State Park, and like sections in the statutes on other state parks. Neither is there a section on "Discharge of firearms" similar to AS 41.20.280. The sections on firearms in other state park legislation provide that firearms use may be permitted when authorized by regulation. It is the position of the Division of Parks that since they have not allowed use of firearms in Denali State Park by regulation, it is therefore prohibited. Parks cites AS 11.55.050 in the criminal code as authority for prohibiting discharge of firearms in Denali State Park.

I have found your complaint against the Division of Parks, alleging inadequate hunting regulations in Denali State Park, to be partially justified. Although hunting in the Park is prohibited, it is very difficult for a citizen to determine why -- it was very difficult for us to find the information. Parks assures us that a specific provision will be included when their regulations are revised this fall. I, therefore, consider your complaint to have been rectified.

I hope that this information is helpful and thank you for your patience.

Sincerely,

Frank Flavin
Ombudsman

FF/PM:rj
Enclosures

August 28, 1978

Terry McWilliams
Director
Division of Parks
Department of Natural Resources
619 Warehouse Avenue
Anchorage, Alaska 99501

Re: Ombudsman Complaint A78-1000
(Closed)

Dear Ms. McWilliams:

The above-referenced complaint, alleging inadequate regulations on the discharge of firearms in Denali State Park, has been investigated and is found to be partially justified.

Your staff has explained that since discharge of firearms is not specifically allowed by regulation, it is prohibited. AS 11.55.050 was cited as authority. I also understand that the Denali State Park statute does not contain the specific language on discharge of firearms found in other state park statutes.

Although the Division's position may be technically correct, I have found this complaint to be partially justified due to the difficulties encountered by our complainant and ourselves in determining authority for closing the area to hunting. We have suggested, and your staff has agreed, that your revised regulations should contain a specific provision regarding discharge of firearms in Denali State Park. I consider this agreement to have rectified our complaint, and have explained to our complainant your authority for prohibiting hunting.

The cooperation and assistance of your staff in resolving this matter has been very much appreciated.

Sincerely,

Frank Flavin
Ombudsman

FF/PM:rj

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME
Ronald O. Skoog, Commissioner
Division of Commercial Fisheries
Steven Pennoyer, Acting Director

Contact: Michael Nelson
Bristol Bay Area Biologist
Box 199, Dillingham, AK
Phone 842-5227

NEWS RELEASE - FOR IMMEDIATE RELEASE

June 28, 1979

BRISTOL BAY VESSEL LENGTH CLARIFIED

It has come to the attention of the Department of Fish and Game and the Division of Fish and Wildlife Protection, Department of Public Safety, that some fishermen are considering adding temporary bow or stern sections to their fishing boats. The Department's position is that such additions would be in violation of 5 AAC 06.341, the regulation that sets the maximum length of Bristol Bay fishing vessels, if the additions resulted in an overall length greater than 32 feet.

# # # # #

Attachment #4

July 2, 1979 x

Steven Pennoyer
Director
Division of Commercial Fisheries
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: Ombudsman Complaints A78-1299
and A79-0647 (Closed)

Dear Mr. Pennoyer:

I don't think there is any question that 5 AAC 06.341 is ambiguous. Prosecution will result in legal certainty but at considerable hardship to the citizen thrust into the "test case" role.

The news release clarification is a good idea. I would like to see a copy of what is released.

I trust this issue will be put to rest in December.

Sincerely,

Frank Flavin
Ombudsman

FF:rj

cc: John Gissberg
Greg Cook
complainants

STATE OF ALASKA

MEMORANDUM

TO: Mike Nelson, Area Biolgist
Commercial Fisheries
Dillingham

DATE: June 25, 1979

FILE NO:

TELEPHONE NO:

FROM: Bob Clasby, Regulations Specialist
Commercial Fisheries
Juneau

SUBJECT: 5 AAC 06.341

Attached is correspondence between the division and the Ombudsman regarding temporary additions to the hulls of Bristol Bay boats and alleged vagueness. As you can see we are still of the opinion the regulation is not vague and that temporary additions to the hull that affect length will be considered in the overall length measurement of the hull proper.

Would you please put out the attached news release (or amend it if you feel it desirable) for the bay area, stating that the regulation does not allow temporary bows, sterns or fish boxes that, when attached to the vessel, would result in an overall length exceeding 32 feet.

We plan to submit a proposal for the December Board meeting that will deal with the subject of the above types of additions.

Please relay this information to and discuss our position with the local Fish & Wildlife Protection staff. Thanks.

cc: w/news release: Parker, Middleton, Frank Sharp

STATE OF ALASKA

JAY S. HAMMOND, Governor

DEPARTMENT OF FISH & GAME
Subport Building, Juneau, Alaska 99801

June 22, 1979

Frank Flavin
Ombudsman
840 K Street, Room 203
Anchorage, Alaska 99501

Re: Ombudsman Complaints A78-1299 and
A79-0647 (Pending)

Dear Mr. Flavin:

We have discussed with the Department of Law the recommendation contained in your letter of June 15, 1979 that an emergency regulation be adopted clarifying 5 AAC 06.341. Mr. John Gissberg's opinion was that at this time we would be unable to make a finding that the current regulation was injurious to the immediate preservation of the public peace, health, safety, or general welfare as required in AS 44.62.250 for the adoption of emergency regulations. We could only speculate as to findings, for we are still of the opinion that the regulation is not unconstitutionally vague. We will be circulating a news release in Bristol Bay explaining our interpretation of "hull proper" as used in 5 AAC 06.341.

Mr. Gissberg's recommendation is to wait until a person is cited for a violation of 5 AAC 06.341 and then if the court decides that the regulation is vague we can make findings that an emergency exists based on the judge's decision. The adoption of an emergency regulation regarding vessel length, no matter how concise, without such legal direction could be struck down because the findings under which it was adopted were speculative as to the existence of an emergency.

We still plan to propose amendments to 5 AAC 06.341 at the December meeting of the Board of Fisheries. This is the best method for amending the regulation as it allows public input as required under the Administrative Procedures Act.

Sincerely,

Steven Pennoyer

Steven Pennoyer, Acting Director
Division of Commercial Fisheries

cc: John Gissberg, Attorney General's Office, Anchorage
Greg Cook, Board of Fisheries and Game, Juneau

11-K8LH

Ombudsman

Frank Flavin

State of Alaska

Reply to:

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June 15, 1979

Steven Pennoyer
Director
Division of Commercial Fisheries
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: Ombudsman Complaints A78-1299 See
and A79-0647 (Pending)

Dear Mr. Pennoyer:

Subsequent to your letter of March 29, 1979, concerning the interpretation of 5 AAC 06.341, I contacted John Gissberg and Greg Cook. (Contrary to your letter, Fish and Wildlife Protection of the Department of Public Safety was contacted by us. Ms. Holden discussed this case with Captain Sharp on October 25, 1978.)

We still feel that the regulation is ambiguous in that "hull proper" is not defined. Your interpretation is that "hull proper" means any section added to the boat whether temporary or cosmetic. In reviewing this section a coast guard documentation officer felt that cosmetic and non-permanent additions would not be included in measuring the "hull proper." Again, the regulations are silent.

Ambiguity exists within the meaning of the principles of statutory construction when a statute (or regulation) is capable of being understood by reasonably well informed persons in two or more different senses. Procedural due process and fairness demand that regulations with a possible criminal sanction be definite.

Clearly the subject regulation is unfair. We recommend that an emergency regulation be adopted defining hull proper.

Thank you for your patience and consideration.

Sincerely,

Frank Flavin
Ombudsman

FF:rj

cc: SE Ombudsman Office
John Gissberg
complainants

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

SUBPORT BUILDING
JUNEAU, ALASKA 99801

March 29, 1979

Ombudsman Frank Flavin
Pouch WO
Juneau, Alaska 99811

Dear Mr. Flavin:

Upon reviewing my February 14, 1979 letter to you concerning Ombudsman Complaint A78-1299 and discussion with the Department of Law, I am submitting additional information to you concerning the matter.

A substantial amount of confusion concerning the legality of temporary fixtures being added to vessels employed in the Bristol Bay salmon net fishery would have been eliminated had the Departments of Law and Public Safety been consulted at the beginning of the investigation process. Both Departments have developed policies to handle this matter.

The Coast Guard register length definition does not apply to 5 AAC 06.341, thus Mr. Feero's statement that temporary sections can be added to a vessel without changing its registered length does not apply to the case at hand. The only State law that refers to Coast Guard registers length is AS 16.05.835 regarding the length of salmon seine vessels. The statute limits overall length to 58 feet and Coast Guard register length to 50 feet, thus indicating that the State recognizes a difference between the two types of measurement. While the Coast Guard may allow additions to a hull that affect the vessels overall length without affecting its registered length the State does not.

5 AAC 06.342 sets a limit on the ~~maximum~~ overall length of a vessel and relates that length to the hull proper. Bolt on bows, stern sections or tanks, no matter how temporary, become a part of the hull when attached and will be considered so for overall length measurement under sec. 342.

The Department will submit a proposal at the Board of Fisheries December 1979 meeting that will clarify the intent of the regulation.

Sincerely,

for

Steven Pennoyer, Acting Director
Division of Commercial Fisheries

cc: Col. Fred M. Woldstad, Fish and Game Protection
Dept. of Public Safety, P.O. Box 6188 Annex,
Anchorage, Alaska 99502

Mr. John Gissberg, Asst. Attorney General,
Dept. of Law, 420 L Street, Suite 100,
Anchorage, Alaska 99501

11-K11LH

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

SUBPORT BUILDING
JUNEAU, ALASKA 99801

February 14, 1979

Ombudsman Frank Flavin
Pouch WO
Juneau, Alaska 99811

Dear Mr. Flavin:

Thank you for your letter of January 9, 1979 updating me on the status of Ombudsman Complaint A78-1299.

Your recommendation for regulatory action would alleviate the confusion associated with the Bristol Bay gill net vessel length limit. However, last fall the Board of Fisheries reviewed a public proposal to eliminate the Bristol Bay vessel length limit altogether. At that time it was the concensus of the Board that additional public input was required before a final decision could be reached. Accordingly, they deferred the matter until the next fall meeting scheduled for December 1979. Considering the status of this regulation, I believe it best to also defer your recommended regulatory changes until the fall meeting. At that time the Board can adopt any housekeeping regulations needed if they decide to retain the vessel length limit.

Sincerely,

Steven Pennoyer

Steven Pennoyer, Acting Director
Division of Commercial Fisheries

-K11LH

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☐ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☒ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

January 19, 1979

RECEIVED
FEB 5 1979
JUNEAU
OFFICE OF THE OMBUDSMAN

Mr. Steve Pennoyer
Acting Director
Division of Commercial Fisheries
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

RE: Ombudsman Complaint A78-1299 (Closed)

Dear Mr. Pennoyer:

This is to inform you that the Ombudsman's Office has completed its investigation into the above referenced case and determined it to be justified and rectified.

This matter pertains to an alleged ambiguous regulation, 5 AAC 06.341, "Vessel Specifications and Operation." Prior to contacting this office for assistance, the complainant was unable to obtain a clear explanation or definition of the referenced regulation. Following dialogue with many individuals from various relevant state and federal agencies, it was found that there was no consensus on that regulation's true definition, nor its intent. Based on the results of our inquiries, we agree with the complainant; the regulation is, in fact, ambiguous.

Enclosed is a copy of a letter (written at our request) from Mr. John E. Feero, Supervisory Documentation Officer with the U.S. Coast Guard's Marine Inspection section. He has attached a copy of 46 CFR 69.03-13(c), which defines the specifications used when a vessel is documented, and he explicitly states that a section (a pointed bow piece in this case) may be added to a vessel following documentation, providing it is bolted (or otherwise temporarily affixed) and not made a permanent (welded or fiberglassed) fixture to the hull. We understand that the intent of the Fish and Game regulation is to control the tonnage capacity, or earning capacity, of the fishing vessel. Therefore, if a section is added on, but not affixed in a permanent manner, and does not change the storage capacity of the hull, it is not in violation.

The complainant's problem was rectified through Mr. Feero's letter of explanation dated December 14, 1978. However, in

an effort to prevent a similar incident from occurring, and/or the possibility of an individual being erroneously charged with a regulation violation, we recommend that a clear definition of the term "hull proper" (such definition to include the intent of the regulation) be added to 5 AAC 06.341. In addition, we recommend that the Division of Commercial Fisheries provide a clarification of the information provided in Mr. Feero's letter; that clarification to appear in any manuals, brochures, and forms which supply information on vessel regulations and measurement data for fishermen and boat builders. We have also requested that the Fish and Wildlife Protection Division of the Department of Public Safety, and the U.S. Coast Guard's Marine Inspection Documentation Branch supply similar clarifications in their information documents.

Inasmuch as this is a formal recommendation, please respond as required in 21 AAC 05.070 and 080. The Ombudsman's Office appreciates cooperation and assistance received from the various individuals contacted during this investigation. If you have any questions regarding this investigation, please call me at the Anchorage number listed above, or contact Judith Holden, the Juneau investigator who handled the case, at 465-4970.

Sincerely,

Frank Flavin

Frank Flavin
Ombudsman

FF/JAH/lm
Enclosure
cc: Col. Fred M. Woldstad, Fish & Game Protection, Dept. of Public Safety, PO Box 6188 Annex, Anchorage 99502
John E. Feero, Marine Inspection, Documentation Branch, U.S. Coast Guard
Rear Admiral Robert A. Duin, PO Box 3-5000, Juneau, 99802
SE Regional Ombudsman Office

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

EPARTMENT OF NATURAL RESOURCES

DIVISION OF FOREST, LAND AND WATER MANAGEMENT

323 E. 4TH AVENUE
ANCHORAGE, ALASKA 99501

June 26, 1979

Frank Flavin, Ombudsman
840 K Street, Room 203
Anchorage, Alaska 99501

Re: ADL 200820 - Ombudsman Complaint A 78-1420 (Pending)

Dear Mr. Flavin:

This is in response to your June 1, 1979 letter concerning Ombudsman Complaint A 78-1420 regarding the payment schedule in the land sale contracts from the Wasilla West land sale.

The Department of Natural Resources is not required by statute or regulation to adopt the payment plan which Mr. [redacted] wants. Under the existing statutes and regulations, in effect at the time of the Wasilla West sale, we had discretion to adopt the payment plan which is included in the land sale contracts from the Wasilla West sale. In the Commissioner's May 18, 1979, letter to you as well as the meeting that we had in my office on May 3, we explained our reasons for adopting the payment schedule set forth in the Wasilla West land sale contracts. Without repeating or reiterating everything we have said before, I would like to respond to several specific statements contained in your most recent letter.

The contract presented to Mr. [redacted] provides for a retroactive effective date of August 19, 1978, the date of the auction. This was done for necessary administrative reasons as we have previously explained. Parties to a contract can provide for a retroactive effective date. It is fairly common practice. It is not illegal or even highly unusual as you imply. In fact, your own recommendation in this matter is that we now offer Mr. Breeding a contract with an effective date of November 19, 1978 which is a retroactive effective date.

Attachment #5

You contend that the effective date of land sale contracts for sale by auction should be the date that the contract is signed. What date is that? The purchaser signs the contract on one date and the Commissioner on another date. It is impracticable and would be a great inconvenience to most purchasers to require the purchaser to come into our office in person for a simultaneous signing with the Commissioner. Our practice, based on administrative necessity and convenience to the purchaser, has been to send out the individual contracts by mail for the purchaser's review and signature. After the contract is returned signed by the purchaser, the Commissioner signs for the State. Unlike a real estate transaction in the private sector, there is no single closing date.

Until the land sale contract is executed, we treat the ten per cent deposit paid on the auction date as earnest money. After the contract is signed, we deem the amount paid on the auction date to include the first payment due under the contract in order to relieve the purchaser of having to make another payment so close in time to the ten per cent down payment required on the date of the auction. Our practice does not result in a payment and interest levy before the purchaser has agreed to borrow the money and is bound to the State's terms since the deposit is not treated as part payment until after the contract is signed. Until the contract is signed, the deposit is subject to forfeiture under 11 AAC 54.400 if the purchaser fails to perform as required by the contract.

The payment schedule for the Wasilla West sale, included in the contract presented to Mr. [redacted], does not require interest to be paid in advance, nor have we ever so stated. Under our payment plan, the interest is in arrears but the payment must be made in advance e.g., at the beginning of the applicable quarter. The first payment, which we consider as included in the ten per cent paid on the auction date, does not include interest. The second payment, due on November 19, 1978 at the beginning of the second quarter, includes interest from the date of the auction to the date of payment. You seem to be confused on this despite the fact that we went over our computer calculations in detail with you during our May 3 meeting.

You have recommended that we change our policy prior to the next auction sale. We consider our present policy, which was applied to the Wasilla West sale, to be fair, reasonable and within our discretion under existing law.

As to your specific recommendation regarding Mr. [redacted] contract, the effective date will remain at August 19, 1978 with the first quarterly payment due on November 19, 1978.

Therefore we will require the submittal of the signed contract and payment for all arrearage by June 29, 1979 or Mr. [redacted] will be subject to forfeiture under 11AAC 54.190.

Sincerely,

THEODORE G. SMITH, Director
Division of Forest, Land and Water Management

Ombudsman
Frank Flavin

State of Alaska

Reply to:

☐ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

FOR RELEASE June 25, 1979

State land sale contract procedures have been criticized by the Ombudsman in two reports of findings on the same complaint. The allegations investigated resulted from last year's Wasilla West land auction, but also concern subsequent and future disposal programs.

Natural Resources is requiring a payment and interest before the borrower has agreed to borrow money and before the borrower is bound to the state's terms. These procedures result in larger quarterly payments and may result in a higher total purchase price for land.

The Ombudsman found that the Department is improperly: 1.) considering the deposit to be a downpayment, including a first payment; 2.) beginning the ten year payoff period from date of auction rather than from date of contract of sale; and 3.) backdating the contract to date of auction and charging interest from date of auction. State Ombudsman, Frank Flavin said these procedures constitute a "time warp theory of contracting."

MORE

According to the Ombudsman's report, "A 'deposit,' as used in the statute, means earnest money and cannot at the same time be a first payment. The state land auction is not an auction 'without reserve,' and the sale is not consummated until the contract is executed."

Flavin stated that there is no authority for backdating contracts of sale to the date of the land auction. Most of the contracts were not ready for signature until a month after the auction.

In his response to the Ombudsman's findings, Commissioner Robert LeResche argued that a 'date certain' for the sale was required due to other statutory requirements for pre-sale appraisal and public notice, and for determining residency discounts. The Ombudsman's report finds that the "sale" referred to in appraisal and notice sections speaks to the public event (auction), while "sale" for purposes of contracts and payment schedules means the actual transfer of title.

Right of possession does not transfer when the gavel is pounded at a state auction, according to Flavin. State law and regulations provide for an appeal period and Commissioner's review prior to offering a contract of sale to the high bidder for signature.

30 - 30 - 30

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☐ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

June 1, 1979

Robert E. LeResche
Commissioner
Department of Natural Resources
Pouch M
Juneau, Alaska 99811

RE: Ombudsman Complaint A78-1420 (pending)

Dear Commissioner LeResche:

Neither our May 3 meeting with Ted Smith, nor your May 18 letter, has convinced us that your "interpretation of the statute is reasonable, is fair to the purchaser and does not violate any reasonable expectations of a participant in a land sale by public auction."

The Positions

Natural Resources	Ombudsman
8/19/79 Downpayment (including first payment)	Deposit (earnest money)
Contract (backdated)	
10 years starts	
interest starts	
5 day appeal period	5 day appeal period
Commissioner's decision within 45 days	Commissioner's decision within 45 days
Notice period - 30 days	Notice period - 30 days
Contract (real contract date)	Contract (deposit becomes downpayment)
	10 years starts
	interest starts

Natural Resources	Ombudsman
	one quarter from contract: first payment (39 more) interest in arrears (this payment includes interest from contract date to date of payment) $64,046.40 total $1601.16/quarter --------- OR ---------- contract date: first payment (39 more) interest in advance (this payment includes interest from date of contract to second payment) $63,100.00 total $1577.50/quarter
11/19/78: second payment (38 more) interest in arrears (this payment includes interest 8/19 - 11/19) $63,617.58 total $1631.22/quarter	

The Errors of Your Ways:

1. That the deposit is a down payment and a first payment.

"Deposit"* is not defined in AS 38.05.065(a); caselaw and real estate practice establish deposit as "earnest money," "guarantee" or "pledge." As used in AS 38.05.055 and AS 38.05.065(a), the deposit is clearly intended to guarantee the high bidder at the auction will sign the "contract of sale" at a later date. Indeed "deposits" at auctions are generally considered earnest money. (See 7 Am. Jur. 2d,258 Auctions and Auctioneers § 45.)

Treating deposit as first payment as of the date of auction results in a payment and interest levy before the borrower has agreed to borrow the money and is bound to the state's terms. Under the departmental analysis, if a person pays the full purchase price on executing the contract, do you still charge interest from date of auction?

The departmental analysis results in a rather strange down payment of 9.?% which is not provided for in statute or regulation and is, frankly, absurd. The rest of the 10% deposit is, according to your position, the first payment.

AS 38.05.055, the bid deposit receipt, and the contract all refer to a "deposit." Only after there is a contract in 11 AAC 54.300 is there a "down payment."

Never before this complaint was raised did you refer to the deposit as a down payment and first payment.

11 AAC 54.190 provides for possible forfeiture of the deposit only. 11 AAC 54.400 allows forfeiture of payments only after there is a contract. If the deposit is a down payment and first payment, how could it be forfeited under .190?

2. That the 10 years starts from date of auction.

AS 38.05.065 provides that the remainder be paid over 10 years, as does 11 AAC 54.300. The "remainder" is unknown until there is a contract. Were the "remainder" known at the date of auction perhaps the contract could be signed then with a provision for cancellation should the commissioner sustain an appeal or otherwise disapprove the sale.

---

*Deposit: "A 'deposit' is anything given as a pledge or security, as earnest money, or a forfeit, and as used in the clause of a contract for the sale of real estate providing for liquidation of damages in case of default by purchasers included judgement note executed and delivered at time of signing of agreement as well as cash payment." (12 Words and Phrases at p. 247)

A "Deposit" in brokers' parlance means the money paid down to bind the bargain, that is, earnest money. (12 Words and Phrases at p. 225)

3. That the interest runs from date of auction.

11 AAC 54.310 states that interest shall be charged on all contracts of purchase. There is no contract of purchase on the date of the auction.

4. That the contract can be backdated.

There is no authority for the Department to backdate the contract of sale to date of auction. Until contract execution neither party is bound beyond the earnest money or pledge amount. How the borrower is projected through a time warp back to the date of auction to bind him or her at that time defies us.

5. That the date of auction is the date of sale. That date of sale and date of contract of sale are one in the same.

AS 38.05.055 and 38.05.065 are distinguishable from AS 38.05.050, 058, 305, 310 and 345. The latter sections deal with the public event -- auction, lottery, etc., while sections 055 and 065 deal with the actual transfer of title from the state to the individual.

Again, "sale"** is loosely used and undefined by the statute. "Black letter law" dictates that there is no sale until title and possession of the property pass from seller to buyer. In the state disposal, the bid deposit document clearly states that no title passes upon receipt of the deposit at the auction (nor can it until the commissioner reviews, appeal periods run, possible agricultural preferences are asserted, etc.).

**Sale: The general definition of "sale" clearly indicates that title and possession must pass before a sale is consummate (in the case at hand, sale is consummated at time of contract of sale -- not at auction.)

Black defines sale as "a contract between two parties, called respectively the "seller" (or vendor) and the "buyer" (or purchaser) by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property. (Black's Law Dictionary, Fourth Edition at page 1503)

Ballentine's defines "sale" as "an actual transfer of title to the land from grantor to grantee by an appropriate instrument of conveyance executed for a consideration in money or equivalent of money." (Ballentine's Law Dictionary, Third Edition at page 1134)

In Noto v. Blasco, 198 So. 429 (La., 1940) the court held that where a purchaser deposited $50 on purchase price of lots, and the vendor and purchaser contemplated completion of the sale in the future by execution of deed transferring ownership, contract was a mere "promise of sale" and was not a completed sale. The court also treated the "deposit as earnest money. The court's rationale was followed in Southern Pacific Transp. Co. v. Port-o-call, Inc. 314 So.2d,758 (La. App, 1975) and is the same situation as the state land sale.

Your citation that the sale is consummated when the auctioneer pounds the gavel is inapplicable here because at a "normal" auction title and right of possession (generally actual possession) transfer when the gavel is pounded. In state auctions no such transfer occurs.

The Department relies strongly on 7 Am. Jur. 2d, 237, 38 Auctions and Auctioneers § 19, which states that the common practice and the general rule of law applicable to sales by auction is that the sale is consummated when the auctioneer accepts a high bid by pounding the gavel. If the entire Am. Jur. section had been analyzed it would have been noted on page 238 that at an auction "where the seller reserves the right to refuse to accept any bid made, a binding sale is not consummated between the seller and bidder until the seller accepts the bid." (The Department cannot accept the bid or consummate the sale until the commissioner's review, appeal periods run, agricultural preferences are asserted, etc.)

In Wilcher v. McGuire 537 S.W.2d 844 (Mo. App. 1976) the court found that an auction sale subject to confirmation by the landowner was not consummated and the landowner could refuse to sell or sell to another. Obviously the sale was not over when the gavel came down. Likewise, at the state land auction the auction is subject to confirmation and the sale is not complete until the contract is executed.

6. That it's not reasonable to assume that there's no "deal" until the contract is signed.

The bid deposit receipt clearly states that no real property interest is being conveyed by execution of the receipt. How could there be a "deal" at the auction if this is the case. What would be the purpose of your regulatory provisions allowing appeal and commissioner disapproval of the transaction if there already was a "deal"?

7. State land sales by public auction are not analogous to the typical private sale of real estate whereby the sale occurs when the contract is signed by all parties on the closing date after escrow."

On the contrary, the transactions are analogous. At the state sale the deposit should bind the buyer while commissioner review, preference rights, appeal rights, discount, etc. (in lieu of title search) are determined. Indeed, financing terms are a primary reason for the escrow period in both situations.

The departmental position dictates a first payment before a financing agreement is reached. By treating the deposit as a first payment, instead of earnest money, the Department has accepted part performance by the buyer and created an equitable interest. Further, the Department, under its theory, has no right to compel forfeit of the deposit as it is not treated as earnest money, but part payment. The backdating amounts to a "Nunc Pro Tunc" entry which is only allowed to supply omission in record of action really had but omitted through inadvertence or mistake. (See Black's Law Dictionary, Fourth Edition at page 1218 and 28A, Words and Phrases at page 110, emphasis added.) There is no mistake or inadvertence to justify backdating the contract of sale to the auction date, nor was a sale really had on the auction date due to appeal periods, commissioner's approval, etc.

8. That you're charging, per [redacted]'s contract as written, interest in advance.

Your second payment, due in November, includes interest from date of auction to date of payment. You have calculated that Mr. [redacted] owes $1631.22 per quarter for 39 quarters. This is interest in arrears for a total purchase price, after down payment and deduction of discount, of $63,617.58. Are you now saying that the deposit is down payment and first payment plus interest?

Were [redacted] to make 40 quarterly payments with interest in advance (first payment when contract is signed) he would pay $1577.50 per quarter for a total of $63,100.00

Forty payments with interest in arrears (first payment one quarter from date of contract) would be $1601.16 per quarter with a total of $64,046.40. You are correct that the last payment in this instance would have to be timely to meet the ten year statutory requirement.

Conclusion

A "deposit," as used in the statute, means earnest money and cannot at the same time be a first payment. The state land auction is not an auction "without reserve," and the sale is not consummated until the contract is executed. There is no authority for backdating the contract of sale to the date of auction.

Further, the remainder due is to be paid off in equal payments over a ten year period. There is no remainder until the contract is executed. If you wish to charge interest in advance, the first payment is due upon signing of the contract and there are 39 more quarterly installments. If you wish to charge interest in arrears, the first payment is due one quarter

from signing of the contract and there are 39 more. The last of these quarterly installments must be timely to satisfy the ten year payoff.

Last summer, when we investigated the Wasilla West complaints, we thought that time and place had passed. Now, through the Department's time warp theory of contracting, we're all projected back to those thrilling days of yesteryear to relive yet another misadventure in the twilight zone of State land policy.

Our original recommendation stands. We would appreciate your response by June 15.

Sincerely,

Frank Flavin
Ombudsman

FF:rj

cc: Ted Smith
Shelly Higgins

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER / POUCH M – JUNEAU 99811

May 18, 1979

Frank Flavin,
Ombudsman
840 K Street,
Room 203
Anchorage, Alaska 99501

Dear Mr. Flavin:

This is in response to your March 23, 1979, letter concerning Ombudsman Complaint A 78-1420 (Pending) dealing with the payment schedule under ADL 200820 for payments due the State for land purchased by [redacted] on August 19, 1978, at the Wasilla West Land Sale.

Your letter mentions several reasons in support of your recommendation that the Commissioner change the contract provision for payments in accordance with Mr. [redacted] objections. I would like to respond to each of the reasons that you have cited and to attempt to explain clearly why we adopted the payment schedule as provided in the land sale contracts from the Wasilla West sale.

First, your recommendation is based on the incorrect premise that the payment schedule set forth in the sale contract causes Mr. [redacted] unfair expense over the 10-year repayment period. In fact, when the payments which would be due under a 40-installment schedule are properly calculated, based on a balance of $47,900 with interest beginning on the date of sale, Mr. [redacted] would pay $407.00 more in interest over the 10-year repayment period than he is required to pay under the 39-installment schedule provided in the contract.

10-J9LH

Mr. [redacted] calculations which result in 40 payments of $1,577.50 are erroneous. His calculations are apparently based on interest beginning November 19, 1978, which is the date that the first installment is due, instead of August 19, 1978, which is the date of sale and the contract date. The correct figure for 40 equal installments would be $1,601.16 as compared to 39 payments of $1,631.76 as required by the contract.

Your letter fails to address the critical issue and point of difference between the State and Mr. [redacted] The question is whether the date of the sale by auction, August 19, 1978, should be used for the purpose of calculating the interest due on the remainder of the purchase price after the bid deposit or down payment is subtracted, and for the beginning of the 10-year period for the payment of the balance due plus interest. Mr. [redacted] contends that November 19, 1978, or the date on which he finally gets around to signing the contract should be used for calculating the interest and the 10-year repayment period.

> AS 38.05.065 provides in pertinent part:
>
> Terms of Contract of Sale. (a) The contract of sale for land sold at public auction shall require the remainder of the purchase price to be paid in monthly, quarterly, or annual installments over a period of 10 years, with interest at the rate of not less than five per cent a year. Installment payments plus interest shall be set on the level-payment basis.

We believe that we have reasonably construed this statute to require payment of the full contract price plus interest within 10 years of the date of sale by auction, not the date on which the formal land sale contract is executed.

This statute is somewhat ambiguous, and, read alone, can arguably be interpreted to provide that the full purchase price plus interest must be paid in installments within a 10-year period from the date that the formal land sale contract is signed by all parties. However, when read in conjunction with the other statutes applicable to land sales by public auction, the only reasonable interpretation of AS 38.05.065 is that the land sale contract must provide for payment in full plus interest within 10 years from the date of sale.

In order to meet all the statutory requirements applicable to sale by public auction, including pre-sale appraisal and public notice, and to apply the land discount program, we

must have a date certain for the sale. (See, AS 38.05.050; AS 38.05.058; AS 38.05.305; AS 38.05.310; AS 38.05.345). Of necessity, we use the date of auction as the date of sale for the purpose of appraisal, notice, and determining eligibility for land discounts when the sale is by public auction.

It would be illogical to use a different date as the effective date of the contract for the purpose of computing interest and determining a schedule for paying the remainder of the purchase price. Accordingly, all of the sale contracts relating to the Wasilla West Land Sale, including the one offered to Mr. [redacted], provide for an effective date of August 19, 1978, which is the date of the auction, although most of the contracts were not actually ready for signature until approximately a month after the auction because it takes that long to determine eligibility for land discounts. This is a reasonable way, and apparently the only way, to conduct a sale by auction in order to meet all of the applicable statutory requirements and to administer the land sale contracts in a consistent manner. Moreover, given the fact that a purchaser at public auction may delay signing the contract for various reasons, as Mr. [redacted] has in fact done in this instance, it would not make good sense or good policy to do what Mr. [redacted] suggests, which is to calculate interest charges and the 10-year repayment period from the date that the contract is signed.

It has been the long-standing policy of the State, as well as standard commercial practice, to require payment in advance i.e. payment at the beginning of a payment period. We could set up a payment schedule whereby the remainder due plus interest is paid in advance in 40 equal installments within 10 years of the date of sale (as required by AS 38.05.065) however, such a system would require the purchaser to make his first quarterly payment at the same time as the initial deposit of 10% of the purchase price. We decided to construe the down payment as including the first payment in order to avoid requiring the purchaser to pay additional up-front money. The only alternative, in order to allow the purchaser to pay in 40 installments while keeping the total length of the payment within the 10 years required by statute, is to allow payments in arrears i.e. payments due at the end of the determined payment period. This would deviate from long-standing practice as well as standard commercial practice. Moreover, if the purchaser were late in making his last payment, he would violate the statutory requirement that the total purchase price plus interest be paid within 10 years. Based on the foregoing, we think it is more equitable to treat the bid deposit, or down payment, whichever you want to call it, as including the first payment. It needs to be emphasized that under this payment schedule, the purchaser has slightly higher installment payments but the purchaser also saves interest and therefore pays less over the 10-year period.

In support of your recommendation you state that commercial practice would treat the bid deposit as a down payment, not a first payment. Of course the State is not obligated to follow commercial practice. State law obviously imposes some requirements that differ from commercial practice. Furthermore, no purchaser can reasonably expect that the State will follow commercial practice in all respects. In fact, the credit terms extended by the State on sales by public auction are considerably more favorable to the purchaser than the terms available from commercial lending institutions. For example, the interest figure of 6 percent applicable to the Wasilla West Sale is considerably lower than prevailing commercial rates.

Moreover, I believe that any individual familiar with sales by auction in the private sector would assume that the sale occurs on the day of auction and that the interest and payments would be computed from that date. Common practice and the general rule of law applicable to sales by auction is that the sale is consummated when the auctioneer accepts a high bid by pounding the gavel. 7 Am. Jur. 2d, 23738, Auctions and Auctioneers ¢ 19. State land sales by public auction are not analogous to the typical private sale of real estate whereby the sale occurs when the contract is signed by all parties on the closing date after an escrow period during which title is searched and financing arranged. For this reason, it does not seem reasonable for the successful bidder at public auction to assume that there is no deal until the formal conveyance document is executed.

As an additional reason for your recommendation, you state that nowhere in the statutes, regulations, bid deposit receipt, or contract of sale is it clearly stated that the deposit shall be considered a first payment. This is true. The regulations in effect at the time of the Wasilla West Sale and the sale documents could have more clearly spelled out the fact that the 10year payment schedule and interest would run from the date of sale. However, there was no statement which would mislead a potential purchaser into thinking that he would have 40 installments over ten years from the date the formal contract is executed in which to make full payment. Moreover, our new regulations do specify that interest is to be computed from the auction date. (11 AAC 67.877(b).)

Finally, you contend that treating the bid deposit as including the first payment is inconsistent with 11 AAC 54.300 and with the language in the bid deposit receipt and contract of sale. There is no clear inconsistency. You cite language to the effect that the remainder of the purchase price is to

be paid in installments. The payment plan which we have adopted requires payments of the remainder of the purchase price, after the down payment is deducted, in quarterly installments. This conforms with the express language you have cited. There is no provision in the rules, the bid deposit receipt or the contract of sale which would prohibit construing the down payment as including the first payment or which would require that the purchaser have 40 installments and ten years from the date the formal contract is signed in which to pay the remainder of the purchase price plus interest.

Hopefully, the foregoing explanation of why we adopted the payment schedule provided in the sale contract presented to Mr. [redacted] is clear and will serve to persuade you that our interpretation of the statute is reasonable, is fair to the purchaser and does not violate any reasonable expectations of a participant in a land sale by public auction. As I stated in a previous letter to Mr. [redacted] regarding his complaint, his interpretation of AS 38.05.065 may arguably be reasonable but we cannot administer land sales according to each individual's interpretation of an ambiguous statute since to do so would greatly complicate administration. I reaffirm my earlier decision in this matter.

Sincerely,

Robert E. LeResche
Commissioner

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WD
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

March 23, 1979

Commissioner Robert E. LeResche
Department of Natural Resources
Pouch M
Juneau, Alaska 99811

Re: Ombudsman Complaint A78-1420 (Pending)

Dear Commissioner LeResche:

After much consideration and calculation, the above-captioned complaint has been thoroughly reviewed by this office and we are requesting reconsideration of opinions voiced by you in a letter to [redacted] dated November 29, 1978. This complair.. concerns some of the same points presented to you at that time by our complainant, [redacted]

[redacted] complained that the figures determined by the Divison of Forests, Lands and Water Management were improperly calculated, causing him unfair expense during the ten year repayment schedule for ADL 200820. Mr. [redacted] bid for the proposed property at the Wasilla West land auction on August 19, 1978 and was the apparent high bidder with the total bid of $81,000 for which he paid a $8,100 deposit. Upon determination that [redacted] was eligible for a $25,000 discount on the land through the newly-enacted residency discount program, his purchase price was then $56,000.

In reviewing similar sales in the private sector, we can understand why Mr. [redacted] believed the remainder of purchase price that he owed the State for the land was $56,000 minus the deposit paid for the land at the time of the auction ($8,100) or $47,900.

In your letter to Mr. [redacted] dated November 29, 1978, you stated:

"I note your interpretation of the payments would result in a down payment, plus 40 equal quarterly payments thereafter, but no statute requires this. Our practice has been to count the down payment as the first payment and require 39 equal payments thereafter. I think this is not an unreasonable interpretation of our obligation

under the statute, and therefore see no reason to change department policy even though there is no reason to quarrel that your interpretation is also a correct interpretation of the statute. We cannot of course administer contracts according to each individual's reasonable interpretation of the statute, where more than one reasonable interpretation is conceivable, since to do so would result in greatly complicating the administrator's burden. For that reason I affirm Director Smith's contract to you, with the exception noted above."

We believe you should reverse your position for the following reasons:

1) Commercial practice would treat the deposit as a downpayment. Even if the deposit is considered earnest money, commercial practice is to treat it as a downpayment and not a first payment.

2) Nowhere in the statutes, regulations, bid deposit, bid deposit receipt, or contract of sale is it clearly stated that the deposit shall be considered a first payment.

3) The statute AS 38.05.055 is ambiguous as to the treatment of the deposit. However, Departmental regulations clearly treat the ten percent deposit as a downpayment. 11 AAC 54.300 states:

"Persons purchasing state land under contract of sale shall be required to pay the principal sum remaining after the 10 percent downpayment in annual installments . . ." (emphasis added)

We seriously question an administrative practice (treating the ten percent as a first payment) that is clearly inconsistent with an APA adopted regulation.

4) Treating the deposit as a first payment rather than a downpayment is inconsistent with the language in the bid deposit receipt and contract of sale.

The bid deposit receipt correction states:
"The contract of sale for land sold at public auction requires the remainder of the purchase price to be paid in quarterly installments on the dates specified in the contract over a period of ten years, with interest at the rate of six percent per year. Installment payments, including interest, are set on the level-payment basis." (emphasis added)

If the ten percent deposit is not to be treated as a downpayment, the word "remainder" is meaningless and should not be included. You only have a remainder if you subtract the downpayment and it is the remainder which is to be paid in quarterly installments.

The contract of sale states:
"the amount of $8,100.00 which is ten percent (10%) of the total price, has been paid by the Purchaser of the unexecuted contract. The balance of said total price shall be paid in equal quarterly installments . . ." (emphasis added)

Again, you only have a balance if you treat the deposit as a downpayment and it is the balance that is paid in equal quarterly installments.

To explain, the 39 payment plan devised by the Department rounds out to quarterly payments of $1,631.22, as payments "in arrears" (payments due at the end of the determined payment period). In considering that the payment plan the State devised more closely resembles the traditional "payment in advance" (payment at the beginning of a payment period), Mr. [redacted] was correct in determining that his payments, when figured over 40 equal payments, come out to $1,577.50. The difference (predominately in the interest accruing over the span of the contract life) figures out to $517.58 over the next ten years. This $53.72 per quarter is money the complainant alleges he will not be able to use--and it is money he thinks he should not have to pay. We agree. We do not feel the State should adopt harsher terms than banks.

RECOMMENDATIONS:

We recommend the Department treat the ten percent deposit as a downpayment and recompute Mr. [redacted] quarterly payments to 40 equal payments beginning with the November payment due last fall. We also recommend that this policy change be accomplished prior to the next land sale.

Thank you for your time and consideration in this matter. Your expedient consideration would be appreciated in light of the fact that Mr. [redacted] has been issued an ultimatum to pay the two back quarterly payments due at this time. He is willing to do so as soon as the amount to be paid is resolved.

Sincerely,

/S/

Frank Flavin
Ombudsman

CA/FF:gpw

Ombudsman

Frank Flavin

State of Alaska

Reply to:

☒ 840 K Street, Room 203
Anchorage, Alaska 99501
(907) 276-4011

☐ Pouch WO
Juneau, Alaska 99811
(907) 465-4970

☐ P.O. Box 74358
Fairbanks, Alaska 99707
(907) 452-4001

August 14, 1979

Robert LeResche, Commissioner
Department of Natural Resources

Tom Cook, Director
Division of Minerals and Energy Management

Re: Ombudsman Complaint A78-0899
(Pending)

Dear Mr. LeResche and Mr. Cook:

Copies of our April 16, 1979 letter to Ethel H. Nelson, Leasing Manager, were sent to each of you. The information we presently possess indicates that the Division of Minerals and Energy Management will continue to require recorded copies of documents under penalty of loss of lease. This continues despite our recommendation and despite the lack of a new regulation authorizing the practice.

As stated in our letter of April 16, and in previous correspondence in this case and in case A79-0202, 11 AAC 86.130 does not explicitly require copies of recorded documents, but only copies of the documents which were recorded. Given the potential loss of a mining claim for failure to provide recorded copies, notice of such potential penalty should be provided in the appropriate manner to the affected population.

The sole appropriate method would be the promulgation or amendment of a regulation stating that the documents to be provided under 11 AAC 86.130 must be copies of the documents filed with the recorder's office and stamped received with date and time by that office. Neither an internal policy nor an item in an informational brochure can satisfy the due process requirements that underlie promulgation of regulations in the Alaska Administrative Code.

We ask for your response to our recommendations of

1) Cessation of penalties for non-recorded copies and
2) Promulgation of new regulations requiring recorded copies.

Your responses would be appreciated within 30 days of receipt of this letter.

Sincerely,

Frank Flavin
Ombudsman

FF/NSB/jm

SEE ATTACHMENT #6

STATE OF ALASKA

JAY S HAMMOND, GOVERNOR

DEPARTMENT OF LABOR

DIVISION OF EMPLOYMENT SECURITY
Affiliated with U S Employment Service

P. O. BOX 3-7000
JUNEAU, ALASKA 99811

May 8, 1979

Re: AK (PRI 10-3 A)

Ms. Paddy Moriarty
Deputy Ombudsman
840 K Street, Room 204
Anchorage, AK 99501

Dear Ms. Moriarty:

Subject: Receipt of UI Benefits While In CETA Training (Ombudsman Complaint A79-0113)

Our regulations regarding the payment of unemployment insurance benefits to claimants attending vocational training have been in effect for many years. These regulations, however, have been interpreted and re-interpreted several times over the past couple of years. Mr. B. W. Finley's memo, to which you refer, dated June 20, 1978, states the intent of then newly received CETA regulations. Our policy pertaining to this subject was clarified in UICL 7-92 dated July 19, 1978, stating, basically, that CETA claimants would be treated no differently than other UI claimants receiving vocational training.

This policy was restated in a rewrite of UICL 7-92 on August 24, 1978, denying benefits to any UI claimant receiving a training allowance. On September 15, 1978, an amendment to UICL 7-92 was issued clarifying that only the waiver of availability provided in 8 AAC 85.200(b)(4) would not be granted. On April 25, 1979, a restatement of the above policy was made. Basically, according to our regulations, CETA classroom trainees receiving a training allowance cannot be granted a waiver of availability and suitable work refusal. They must, therefore, meet the same conditions of availability as any other claimant.

For your information I have attached copies of all of the above referenced UICL's as well as a copy of 8 AAC 85.200 of our regulations.

If we can be of any further assistance in this matter, please feel free to contact us.

Sincerely,

A. G. Zillig

A. G. Zillig
Director, ESD

7-G7LH

ATTACHMENT #7

(E) a doctor's certificate may be required periodically by the director or his representative for extended illness or disability.

(d) Pregnancy is not an "illness or disability" as referred to in AS 23.20.380(1) and treated above. (Eff. 10/25/68, Reg. 27; am 8/20/70, Reg. 35; am 8/1/74, Reg. 51)

Authority: AS 23.20.045
AS 23.20.380

8 AAC 85.200. PAYMENT OF UNEMPLOYMENT INSURANCE BENEFITS WHILE ATTENDING A VOCATIONAL TRAINING OR RETRAINING COURSE. (a) An unemployed individual who has filed a claim for benefits may make written application to the director for approval of payment of unemployment insurance benefits during attendance at a vocational training or retraining course. The applicant shall provide the following information:

(1) his most recent employer, his occupation with his employer, and the reason he is no longer working for him;

(2) the nature of the training or retraining course he is attending or plans to attend;

(3) the reason or need for taking this training;

(4) the name and address of the training facility providing the training or retraining; and

(5) the beginning date of the training or retraining course, its duration and the number of hours per day and week the course is conducted.

(b) Approval of payment of benefits to a claimant attending a vocational training or retraining course of less than six months' duration may be granted by the director or the assistant director of unemployment insurance or his authorized representative if the director, the assistant director or his representative finds that

(1) reasonable employment opportunities for which the claimant is already fitted by training and experience are minimal and are not likely to improve in the foreseeable future, or that the claimant is not using his full skill potential and the training or retraining relates to an occupation which would more fully use his potential capabilities; and

(2) the training or retraining course relates to an occupation for which there are, or are expected to be, reasonable work opportunities; and

(3) the training or retraining course is offered by a reliable vocational school or educational institution; and

(4) the claimant is not receiving a training or retraining allowance under any public or private training or retraining program; for the purpose of this paragraph, "training allowance" does not include subsistence and transportation allowances or veterans' education allowances.

(c) Approval of payments to a claimant attending a vocational training or retraining course of six or more months' duration may be granted by the director when, in addition to the requirements of (b) of this section

(1) the claimant is disabled to a point at which he can no longer pursue his usual occupation; or

(2) certification for entry into the occupation for which the training or retraining is being taken is contingent upon completion of a specific number of hours or months; or

ALASKA DEPARTMENT OF LABOR
Employment Security Division
P.O.Box 3-9000 Juneau, Alaska 99811

UICL: 7-92

July 19, 1978

SUBJECT: Receipt of UI Benefits While in CETA Training

PURPOSE: To give guidelines in processing UI claims for claimants who are in CETA training.

The department issued a memo on June 20, 1978, outlining it's policy regarding UI benefits while in CETA training.

To further clarify our position on this matter, UI claimants attending CETA training must meet the same criteria as other UI claimants attending regular training. Each case must be determined on it's own merits.

Local offices will send these claims to the Central Office for adjudication in the normal manner.

If you have any questions regarding this UICL, please contact the Supervisor of Technical Support.

David Gale

David L. Gale
Director

ATTACHMENTS: Memo dated June 20, 1978

DISTRIBUTION: Per UICL Distribution List

RESCISSIONS: None

Rescinded

ATE
ALASKA

MEMORANDUM

DEPARTMENT OF LABOR
Employment Security Division

TO: All Employment Centers &
Pertinent Benefit Sections

DATE: June 20, 1978

FILE NO: AKE (EMS 12-26)

TELEPHONE NO:

FROM: B. W. Finley
Acting Deputy Director

SUBJECT: Receipt of UI Benefits While In CETA Training.

This memo will replace the Director's memo of February 25, 1975, on the above subject. The CETA regulations, Title I Section 95.34 (d), and Title III Section 97.134 (c), both dealing with training allowances, state that CETA participants should be encouraged to apply for and claim unemployment insurance benefits if they are not already receiving such benefits.

It is clearly the intent of the regulations that CETA participants in training programs be encouraged to apply for unemployment benefits. CETA trainees will be allowed to receive benefits which will be augmented by CETA training allowances to bring the total amount received up to the maximum CETA training allowance amount. However, if a CETA trainee applies for unemployment insurance after training has already been started, no UI will be payable for back weeks. The new claim date will remain the date the trainee first contacts our office. Having already started training will not be a reason for backdating a claim.

For administrative purposes, this policy will be effective July 3, 1978.

ALASKA DEPARTMENT OF LABOR
Employment Security Division
P.O. Box 3-9000 Juneau, Alaska

UICL 7-92 August 24, 1978

SUBJECT: Receipt of UI Benefits While in CETA Training

PURPOSE: To rescind the agency policy for the payment of UI Benefits to CETA trainees as outlined in UICL 7-92, July 19, 1978.

After researching the payment of UI benefits to trainees receiving training allowance it has been determined that the agency cannot pay benefits to anyone receiving a training allowance.

The Alaska Administrative Code 8AAC 85.200(7) states, "the claimant is not receiving a training or retaining allowance under any public or private training or retraining program, except that for the purposes of this section, training allowances shall not include subsistence and transportation allowances, nor veterans educational allowances."

In a meeting with Community and Regional Affairs, it was determined that CETA allowances are training allowances and therefore no UI benefits can be paid.

If you have any questions regarding this UICL please contact the Supervisor of the Technical Support Unit.

David Gale

David L. Gale
Director

ATTACHMENTS: None

DISTRIBUTION: Per UICL Distribution List

RESCISSIONS: UICL 7-92, dated July 19, 1978

ALASKA DEPARTMENT OF LABOR
Employment Security Division
Box 3-9000 Juneau, Alaska 99811

UICL 7-92 (Amendment 1) September 15, 1978

SUBJECT: Receipt of UI Benefits While in CETA Training

PURPOSE: To clarify the lication of the Law and Statutes as they pertain to the receipt of training allowances and how the UI benefits are affected.

UICL 7-92 outlines the agency's policy regarding the receipt of UI benefits to claimants who are receiving CETA training allowances. This policy also pertains to all training allowances. Under Section 23.30.382 and 8AAC 85.200, the receipt of training allowances only affects the granting of the waiver of availability while attending a training or retraining course. If a claimant is attending a training or retraining course and is determined to be available under Section 23.20.380(1), the receipt of training allowances does not apply and benefits will be allowed.

Under the present circumstances, 8AAC 85.200(b)(4) only applies to the waiver of availability while attending school. There is nothing in any other section of the Law or the Statutes which allows us to disqualify a claimant from receiving benefits if a training allowance is being received. The example under A&A 40 of the Precedent Manual dealing with training allowances specifically states that the claimant was unavailable and therefore does not apply in this instance.

We realize that this does not reflect the intent of the agency, however, until such time as the Law and/or the Statutes are amended we will abide by the above procedures.

If you have any questions regarding this UICL, please contact the Supervisor of Technical Support.

David L. Gale
Director, ESD

ATTACHMENTS: None

DISTRIBUTION: Per UICL Distribution List

RESCISSIONS: None

ALASKA DEPARTMENT OF LABOR
Employment Security Division
P.O. Box 3-7000 Juneau, Alaska 99811

UICL 7-92 April 25, 1979

SUBJECT: Receipt of UI Benefits While Receiving a Training Allowance

UI claimants who are receiving a training allowance are not automatically denied benefits under 8 AAC 85.200(b)4 but, simply, cannot be granted a waiver of availability and suitable work refusal. This means that, since the waiver does not apply, they must meet the same conditions of availability as other claimants.

Attendance at a training course during the hours normally worked in a claimants occupation raises a serious question as to his availability for work and such cases are adjudicated on that basis.

In some cases, CETA classroom trainees may apply for UI benefits. Since the waiver cannot be granted, the question of availability must be pursued. CETA participants, in committing to an employability plan, virtually remove themselves from the labor market during their training and must be adjudicated with this in mind.

If you have any questions regarding this UICL, please contact the UI Technical Support Unit.

A. G. Zillig
Director, ESD

ATTACHMENTS: None

DISTRIBUTION: Per UICL Distribution List

RESCISSIONS: UICL 7-92 dated 8/24/78; UICL 7-92 (Amendment 1) dated 9/15/78

June 27, 1979

Don Hostack, Director
Division of Occupational Licensing
Department of Commerce
Pouch D
Juneau, Alaska 99811

Re: Ombudsman Complaints A79-0181,
A79-0165 and A79-0688 (Pending)

Dear Mr. Hostack:

The first complaint referenced above was filed in February by [redacted], who alleged that Occupational Licensing was unfairly withholding refund of his contractor bond desp[redacted]he fact that he had not activated his registration. Mr. [redacted] had submitted a request for refund with an affidavit that he had never done business as a contractor. Despite earlier intentions, he had never obtained a business license.

The second complaint was filed by [redacted], alleging that Wage and Hour had delayed unduly long in satisfying her wage claim. A79-0688 is a complaint we have opened against Occupational Licensing on the same subject.

I know that you are familiar with both cases. Our complainants have now been paid. Each time the Attorney General's office was called in to issue an opinion as to the propriety of refund or release of bond under your statute. Each complainant experienced a prolonged delay while a legal interpretation or resolution was obtained. We feel that both complaints are at least partially justified despite statutory ambiguity. Although they have now been rectified, the ambiguity remains.

It is our understanding that regulations are being proposed to clarify these issues. We would appreciate a copy of these drafts, as well as notices for public comment so that we may advise our complainants.

While it is hoped that AG opinions formalized into regulations will provide an interim solution for these problems, we are still concerned with the whole question of the adequacy of contractor bonds, and the inequity of protection afforded by cash or TCD in lieu of bond. We hope that the Division

ATTACHMENT #8

will have clarifying legislation introduced and advocate for its passage. We understand that Wage and Hour is at least conceptually behind amendments to AS 8.18.071 as it relates to their ability to satisfy wage claims.

This office would prefer, however, that legislation introduced at the request of Occupational Licensing propose a method for payment of claims against contractors which offers an alternative to the bond or cash in lieu thereof. It's our feeling that current law is perhaps ambiguous, but certainly inadequate and unequal in degree of protection. We realize that there must be a balance between the contractor's ability to obtain a bond and the degree of public protection afforded. It would seem that this question could be bypassed through creation of a new method of payment. We believe that the Legislature ought to face this question square on rather than attempt to patch a policy of questionable benefit to anyone.

We would appreciate being kept informed of discussions leading to proposed statutory changes, and will hold these complaint files open pending resolution of the problems they raised.

If we can be of assistance, please ask. Although I don't recall past complaints on point, we have received numerous bond complaints which could add to justification for a statutory revision. Thank you for continued cooperation. Let us know when you go back to wearing one hat.

Sincerely,

Frank Flavin
Ombudsman

FF/PM:rj

cc: Dale Cheek

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
Division of Occupational Licensing
Pouch D, Juneau, AK 99811

BRUCE BOTELHO
AAG

2/16/79

465-2536

Richard H. Long
Chief Investigator

Custom Carpentry
[redacted]
Specialty Contractor Nbr 6214

Attached is a copy of the contractor's registration file for the above subject. The applicant, Mr [redacted], has and continues to press for release of his cash deposit which he submitted in lieu of a bond.

If this gentlemen has not in fact activated the use of his registration then it is doubtful that the chance of suit against his deposit could arise. Even so, we are bound to follow the rules, which in this case appear not clear.

Please review and advise whether not the deposit may be released based on current documentation. If not, what do you advise?

Possibly one additional piece of documentation would suffice. That is, Mr [redacted] submit a sworn affidavit that he has not activated his registration and cannot have any possible suits pending against him which would apply against his deposit. This could be done before my staff in Anchorage.

Lacking clarity under AS 08.18.115 regarding such instances as this, I feel I need your input before I can make a recommendation to the director.

Your assistance is appreciated.

Attachment

RHL

cc. Jane English.

STATE OF ALASKA

MEMORANDUM

TO: Richard H. Long RHL.
Chief Investigator
Division of Occupational Licensing
Department of Commerce and Economic Development

DATE: February 26, 1979

FILE NO:

TELEPHONE NO:

FROM: AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Custom Carpentry [redacted]

By: BMB
Bruce M. Botelho
Assistant Attorney General

This memo is in response to your communication of February 16, 1979 regarding the above specialty contractor.

Please be advised that in my opinion an affidavit submitted by Mr. [redacted] indicating that he has not activated his registration would suffice as justification to release his cash deposit submitted in lieu of a bond.

Should you have any further questions, please do not hesitate to contact me.

BMB:vr

to: Jane English
Contractor Desk

3/2/79

FM: Richard H. Long
Chief Investigator

subj: As above

Proceed as noted in BB memo above. This should be retained in the permanent file as back-up for the release, file subject as above.
This should close this matter and enable you to release the C.D.
BHL.

March 5, 1979

Eric Olson
Assistant Attorney General
Attorney General's Office
Anchorage

Don Hostak, Director
Division of Occupational Licensing
Department of Commerce and
Economic Development

State of Alaska v. Paramount
Paint and Decorators, Inc.

Upon recommendation of our attorney, the division is prepared to pay the amount of the judgment in the above captioned subject matter from the proceeds of the cash deposit, provided that an affidavit is submitted to this division by Harold Mosher, President of Paramount Paint and Decorators, Inc., indicating that the company is no longer engaged in business of any sort and that the company has not been so engaged since prior to the time Mr. Mosher signed a confession of judgment on behalf of the corporation.

As a second condition precedent to paying from the cash on deposit, I would request that you submit an affidavit of publication that makes clear the intent of the State to pay from the proceeds of the deposit unless any person having a claim to that deposit files a lawsuit prior to the specified date of the payment which should be fixed at a time at least two weeks subsequent to the publishing date of the notice.

Should you have any further questions, please do not hesitate to contact me.

DH/kkkl/3

Sec. 08.18.031. Certificate of registration — issuance, duration, renewal. A certificate of registration expires on June 30 of each year following the date of issuance or renewal and shall be renewed under the same requirements as for an original registration. The commissioner shall issue to the applicant a certificate of registration upon compliance with the registration requirements of this chapter. (§ 2 ch 100 SLA 1968; am § 1 ch 49 SLA 1972)

Sec. 08.18.041. Registration and renewal fees. The applicant shall pay to the commissioner a registration or renewal fee as follows:

(1) general contractor $100
(2) specialty contractor 50

(§ 2 ch 100 SLA 1968)

Sec. 08.18.051. Registered name. Except as provided otherwise by state law, no person who has registered under one name as required by this chapter may act in the capacity of a contractor under any other name unless that name also is registered. All advertising, contracts, correspondence, cards, signs, posters, papers and documents prepared by a contractor which show his name and address shall show his name and address as registered under this chapter. Individual contractors and partners, associates, agents, salesmen, solicitors, officers and employees of contractors shall use their true names and addresses at all times while acting in the capacity of a contractor or performing related activities. (§ 2 ch 100 SLA 1968)

Sec. 08.18.061. Requirements of political subdivision. A contractor who is licensed by the state under this chapter may not be required to give bond in applying for or holding a license issued by a political subdivision. (§ 2 ch 100 SLA 1968).

Article 2. Bond and Insurance.

Sec. 08.18.071. Bond required. (a) Each applicant shall, at the time of applying for a certificate of registration, file with the commissioner a surety bond running to the State of Alaska conditioned upon the applicant's promise to pay

(1) all taxes and contributions due the state and political subdivisions,

(2) all persons furnishing labor or material or renting or supplying equipment to the applicant, and

(3) all amounts that may be adjudged against him by reason of negligent or improper work or breach of contract in the conduct of the contracting business or by reason of damage to public facilities occurring in the course of a construction project.

(b) If the applicant is a general contractor the amount of the bond shall be $5,000; if he is a specialty contractor the amount of the bond shall be $2,000. In lieu of the surety bond the applicant may file with the commissioner a cash deposit or other negotiable security acceptable to the commissioner of commerce, in the amount specified for bonds.

(c) The bond required by this section remains in effect until cancelled by action of the surety, the principal, or the commissioner. No action may be commenced upon the bond later than three years after its cancellation. (§ 2 ch 100 SLA 1968; am § 1 ch 15 SLA 1977)

Effect of amendment. — The 1977 amendment added subsection (c).

Sec. 08.18.081. Claims against contractor. (a) A person having a claim against a contractor for any of the items referred to in § 71 of this chapter may bring suit upon the bond in the superior court of the judicial district in which the work is done or of any judicial district in which jurisdiction of the contractor may be obtained. A copy of the complaint shall be served by registered or certified mail upon the commissioner at the time suit is filed and the commissioner shall maintain a record, available for public inspection, of all suits commenced. Two additional copies shall be served upon the director of the division of insurance with the payment of $5 to the director taxable as costs in the action. This service upon the director shall constitute service on the surety and the director shall transmit the complaint or a copy of it to the surety within 72 hours after it has been received. The surety upon the bond is not liable in an aggregate amount in excess of that named in the bond, but in case claims pending at any one time exceed the amount of the bond, the claims shall be satisfied from the bond in the following order:

(1) labor, including employee benefits;
(2) taxes and contributions due the state, city and borough, in that order;
(3) material and equipment;
(4) claims for breach of contract;
(5) repair of public facilities.

(b) If a judgment is entered against the cash deposit, the commissioner, upon receipt of a certified copy of a final judgment, shall pay the judgment from the amount of the deposit, in accordance with the priorities set out in (a) of this section. (§ 2 ch 100 SLA 1968; am § 9 ch 127 SLA 1974)

Effect of amendment. — The 1974 amendment, in subsection (a), inserted the present third sentence and inserted "upon the director" and substituted "director shall transmit" for "commissioner shall transmit" in the present fourth sentence.

As the rest of the section was not affected by the amendment, it is not set out.

Legislative committee report. — For report on ch. 127, SLA 1974 (SCSHB 817 am S), see 1974 House Journal, p. 657.

Sec. 08.18.091. Cancellation of bond. Nothing in this chapter impairs the right of a bonding company to cancel its bond of a contractor for lawful reasons. (§ 2 ch 100 SLA 1968)

Sec. 08.18.101. Insurance required. Each applicant, at the time of applying for registration, shall file with the commissioner satisfactory evidence that the applicant has in effect public liability and property damage insurance covering his contracting operations in the sum of not less than $20,000 for damage to property, $50,000 for injury, including death, to any one person and $100,000 for injury, including death, to more than one person. (§ 2 ch 100 SLA 1968)

Sec. 08.18.111. Advertising bond and insurance. — No contractor may advertise that he is bonded and insured simply because he has complied with the bond and insurance requirements of this chapter. (§ 2 ch 100 SLA 1968)

Sec. 08.18.115. Return of cash deposit. (a) A contractor who has filed a cash deposit and who ceases doing business as a contractor may request the return of as much of his cash deposit as is held by the commissioner by

(1) filing a notarized statement with the commissioner that he has ceased doing business as a contractor; and

(2) filing a notarized statement with the commissioner at least three years after filing the statement in (1) of this subsection which

(A) requests return of the cash deposit;

(B) certifies that the former contractor has not been engaged in business as a contractor for at least three years; and

(C) certifies that to the best of his knowledge no action has been commenced upon the cash deposit which has not been dismissed or reduced to a final judgment which has been satisfied.

(b) The commissioner, after paying any judgments against the cash deposit under sec. 81(b) of this chapter, shall return the remainder of a former contractor's cash deposit to him if

(1) the former contractor has complied with (a) of this section; and

(2) no action has been commenced upon the cash deposit which has not been dismissed or reduced to a final judgment which has been satisfied. (§ 2 ch 15 SLA 1977)

Article 3. Enforcement.

Ombudsman

Frank Flavin

State of Alaska
360 "K" Street, Room 246
Anchorage, Alaska 99501

(907) 276-4011

October 20, 1977

Eric Lee, Director
Division of Community and Rural Development
Department of Community and Regional Affairs
Bayview Commercial Building Suite 230
619 Warehouse Avenue
Anchorage, Alaska 99501

Re: Ombudsman Complaint 77-1421
(Findings)

Dear Mr. Lee:

Please be advised that the above-noted complaint has been investigated and has been found to be a partially-justified complaint. However, based on conversations with my assistant, I believe we can come to a mutual agreement regarding future action in this case.

The complaint, filed by Dr. Frank Gold of Fairbanks, alleged that your office improperly and unfairly prevented him from obtaining a contract to administer the Day Care Assistance Program within the area of the Fairbanks North Star Borough. Letters from your office to the Borough Assembly and the Borough Mayor became the basis upon which that governmental body determined not to award a second year's day care contract to Dr. Gold.

Dr. Gold has charged that action, based on erroneous grounds outlined in the letters, was an abusive overextension of the State's authority in administering monies for the program.

We have reviewed the files, both in Anchorage and Fairbanks, interviewed several administrators of the day care program, Community and Regional Affairs personnel, Fairbanks officials, day care assistance recipients, and of course, Dr. Gold.

As the entire complaint and resulting situation is to be considered by the Borough assembly again soon, we find it appropriate, and hopefully helpful to all parties, to detail the history of this day care assistance administration in Fairbanks; our findings regarding the Division of Community and Rural Development; and our recommendations, based on those findings. Our intent, by means of the recommendations, is

ATTACHMENT # 9

to afford an impartial look at the record, set that past record straight, and hopefully, to suggest improvements for this needed program.

SUMMARY OF BACKGROUND RECORD

After the Fairbanks Borough determined there was need for day care assistance, as provided for in AS 44.47.250, the Borough began implementing its own program through funds provided by the Department of Community and Regional Affairs.

The program was administered directly by the Borough through the end of 1976. Due to a transfer of the Central Child Care Coordinator's office from Juneau to Anchorage in the summer of 1976, a timely approval of the FY 1977 Day Care Assistance grant to the Fairbanks North Star Borough was not possible until September, 1976. In a letter dated August 26, 1976, F. Harvey Pitts, the Child Care Coordinator, stated he had received the application for the next year's program funds. At that time, he said the proposal "appears in order and has my approval", but said until the final authorization came through, he would extend the FY 1977 contract to the end of September, 1976. It is important to note here that a copy of that letter was sent to Dr. Frank Gold, who had previously signed a contract with the Borough to begin administering the Day Care Assistance Program on July 1, 1976. Although the FY 1977 contract from the Department to the Borough was not finally approved until September 24, 1976, it was backdated to become effective July 1, 1976.

The Borough, State and Dr. Gold's files all are in agreement that Dr. Gold began administering the Day Care Assistance program in July of 1976. He had not solicited the contract, but rather, he had been approached and asked by borough officials if he would be interested in a contract. He was interested and soon took over full administration of the program.

Regarding legislative intent corcerning the statute requiring the Department's permission prior to subcontracting, the record and your recollection of this provision indicate the inclusion was aimed at rural areas. Fairbanks is not a rural area, but the law does not distinguish a difference, between urban and rural areas, thus letting the Fairbanks Borough Assembly opt for subcontracting.

In FY 1977, (contract signed in September, 1976) there was no discussion of the merits of in-house versus subcontracting the program, nor was there any request or demand for permission to subcontract. The reading of the law at the time and the

interpretation up until this past May was that "permission to subcontract" meant the State could allow a municipal government to move the Day Care Assistance Program administration out of its own offices and subcontract. The involvement the State had in the actual subcontractor choice was negligible, at least according to the Borough's interpretation and the 1976 experience.

After a month and a half of program administration, Dr. Gold found he had more applicants than he had anticipated money for the rest of his contract term. Part of this reason was the expressed desire of the State that the program be advertised widely in the North Star Borough area. And, examination of the contract, the regulation manual and the statute are in conflict regarding what the responsibility of the administrator actually is in meeting the demands of all those applicants that qualify for the assistance.

The statutes potentially (from AS 44.47.250 through AS 44.47.3.0) allow for the Department to establish guidelines for parent eligibility, provides for subcontracting the assistance program administration, and sets out the parent responsibility in finding a licensed day care facility for his or her child. It does not directly address how eligible families are to be cut from the program.

The Day Care Assistance Manual (page 2) states: "It is not the purpose of this program to provide free day care to all qualifying for assistance. Current funding does not permit the State to subsidize all eligible families; therefore, lower income families will be given priority."

The contract between the State and the North Star Borough as well as the subcontract between the North Star Borough and Dr. Gold, however, both contain the following section (5) as part of Appendix A, which is to be considered a part of both contractual agreements:

"(5) The contractor agrees to serve all families with reasonable access to licensed day care facilities within the Fairbanks North Star Borough."

Observing that he had reserve money to fund AFDC and WIN recipients, and in light of the aforementioned conflict in interpretation limiting subsidies amongst eligibles, Dr. Gold chose to exercise the flexibility called for in the Day Care Assistance Manual's stated purposes and goals of the program. These purposes, directly quoted, are:

"The act gave responsibility for administration of the program to the Department of Community and Regional Affairs in the hope of encouraging local government participation in the delivery of day care services.* The Department will contract with local communities for direct program administration in order to allow as much local responsibility as possible while assuring the requirements of the law are met."

Where the law gave the department responsibility for allocating its appropriated funds, it also allowed -- and actually encouraged where applicable -- the local governments to subcontract to a local administering agency. The law (AS 44.47.250 (b) (2)) requires C&RA's permission to subcontract; the manual and subsequent contracts call for that permision to be in writing.

Less than one month after the State and Borough had firmed up their mutual contract for FY 1977 funds (on September 24, 1976), Dr. Gold determined that the contractual amount would be far short of the Fairbanks North Star Borough's demand. On October 18, 1976, he wrote to Pitts requesting an additional $70,000 to $100,000 to meet the needs projected for the entire fiscal year. Pitts responded in an October 20, 1976 letter that an additional $22,125 was allocated to the Fairbanks program. He stated, "The problem is, of course, insufficient funding to accommodate all persons eligible for Day Care Assistance." He further suggested that a maximum monthly mean subsidy be established as a monthly ceiling. This would allow for continued funding of AFDC families for the entire year. Pitts stated that after the additional October allocation, there would be "no more additional funds which can be made available" to the Borough during fiscal '77. He suggested that to stay within the monthly ceiling allocations, Dr. Gold curtail assistance beginning with those recipients in the higher income groups.

On October 26, 1976 (or two days after receiving Pitts' letter), Dr. Gold computed a monthly average and sent out a letter to some of the recipients that their assistance would be dropped November 1, 1976. Copies of this letter were sent to both Pitts and Helen Blevens, the Borough's Treasurer.

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* This is consistent with the statutory powers and duties of C&RA "to advise and assist local governments" (AS 44.47.050 (1); and to supervise, monitor, and otherwise help make local governments eligible for State, federal and other grants.

That letter, which became the form for future notification of other applicants who would have to be dropped to allow Dr. Gold to stay within his monthly mean averages, included the following paragraph:

"Due to the inadequate amount of funds provided to the Fairbanks North Star Borough Day Care Assistance Program, it is impossible to continue funding all day care payments for the entire year."

Pitts' Anchorage file shows this copy with no corresponding letter even mentioning--much less criticizing--the explanation Dr. Gold was using.

More low income applicants continued to apply for new Day Care Assistance, thus mandating Dr. Gold to rework his allowable "eligibles" list to stay within his monthly mean. In order to continue giving priority to applicnats with lower incomes, even if they were newer applicants than some other higher income eligibles still getting subsidies, Dr. Gold had to revert to cutting off new groups of eligibles within the higher income brackets. This is his understandable explanation of the necessity of staggered elimination of higher income group recipients as the fiscal year progressed.

Admittedly, the above was not his only reason for delaying notification of those who eventually were cut from the program with only a few days' notice. Dr. Gold operated under apparently acceptable interpretations of the cortractual terms of serving all eligible families in the Fairbanks Borough area and under the expressed C&RA desire for local flexibility. Dr. Gold considered this short notice (which caused some admitted hardships) as serving the client community until he was forced to cut them from the program. His explanation is that at least four Fairbanks legislators were openly working to expedite a speedy supplemental allocation to the Statewide program, with special attention to the Fairbanks plight.

More money from within C&RA was forthcoming on February 10, 1977, when Pitts and Dr. Gold discussed the new availability of $18,054 which came from unspent day care assistance money not used by another community. With the initial $106,495 contract monies, the October $22,125 monies and this new February allocation of $18,054, the Fairbanks North Star Borough allocation was a total of $146,674. This figure was still some $55,000 short of Dr. Gold's first forecast of the Fairbanks day care needs of $200,000 in early fall--and about half his January, 1977 forecast to legislators based on increased demands for the assistance from Fairbanksans.

The administration of the program by Dr. Gold was of no serious concern to the Department's Chief Day Care Coordinator, as is evident in the letter Pitts sent Gold confirming the above additional allocation. Pitts, in a letter dated February 18, 1977, stated, "As in the past, Frank, keep up the good work. I still plan to stop by and visit with you as soon as I can find the time to get out of the office."

File records show that Dr. Gold had incurred no major criticism by the Department, at least through Pitts' previously mentioned letter. The first signs of unrest due to Dr. Gold's management can be evidenced in your trip report dated February 9, 1977 (which was prior to Pitts' above comments of good work.) In that report where you detail discussions with Dr. Gold, you stated, "It is difficult to get the idea across that this is not a "welfare" type program where everyone who meets the guidelines is entitled to service . . . We must address this as a political issue. I would strongly recommend against any supplemental appropriations to Fairbanks or other communities. In my opinion, a supplemental would be rewarding poor planning and mismanagement and penalizing those communities who have conducted a responsible program. They wanted flexibility and authority but are quick to shirk responsibility for problems created . . . We need to work more closely with the grantee communities in preparation of the FY '78 program to avoid a repeat of this years problems."

Ironically, it is about this time when Dr. Gold and other day care administrators Statewide began to address this funding supply as a political issue also. They began intense lobbying with their respective legislators for more funds to last the FY '77 year. And since Pitts' letter followed your report to Commissioner McAnerney (with no subsequent comment to Dr. Gold), we cannot assume he was placed on any notice for rectifying any major or minor concerns you expressed.

Shortly after this public testimony before the legislature, apparent conflicts arose between the day care administrator (Dr. Gold) and the Department. After one visit by the Department's field officer (Jan Brewer) on March 30th, several errors (according to Brewer's March 31st field report) were noted in the administrator's operations. Since Dr. Gold had just hired a new program administrator, Brewer recommended that a subsequent visit to the Fairbanks office take place within a month to better review all the files

after the new program person was more familiar with the job and files.

Brewer returned to the Fairbanks office on April 11, 12 and 13, at which time relations between the local administrator and the agency deterioriated significantly. Dr. Gold, who admits he was made aware of the impending visit by Brewer, was reluctant to allow her access to any files, except the terminated ones, until his program assistant returned to work. He had said his assistant was out sick and Brewer reviewed only the closed files. The next day, (April 12) the assistant was still out sick and Brewer was denied access to the files. She had reminded Dr. Gold of Article VII in his contract with the Borough that mandated the files be open to the Department during regular business hours. Whether Dr. Gold opened his files to her on the following day (April 13) due to the fact his assistant had returned to work or because Borough Treasurer Helen Blevins had called him (at Brewer's request) to mandate Dr. Gold open the files (or a combination of both) is a matter of interpretation. In any event, the files revealed some audit exceptions.

Of the $3,068 in auditable exceptions which Brewer reported on return from her April visit, $822 were cancelled by the Department when adequate back-up paperwork was provided. Of the remaining exceptions, it is unclear where the responsibility falls in regards to the errors as the Borough paid at least portions of those exceptions. According to Borough Administrator Ron Garzini and Dr. Gold, several of the exceptions were based on miscalculations made while the Borough still administered the program in-house. Dr. Gold has stated he has not paid any of those audit exceptions in question.

Shortly after the April staff visit, Dr. Gold received a copy of a letter written by Pitts to Blevins in which he outlined the disallowed audit exceptions and detailed the problem regarding access to the files. The letter did not outline actions which Pitts thought were mandatory to insure continuation of the program with Dr. Gold nor did Pitts notify Dr. Gold of the severity of the actions in regard to denying access to the files. We refer here to the Department's Day Care Assistance Application Manual; Page 19, Article 5 of the Department's responsibilities in this program:

"5. When the Director finds that the local agency is not in compliance with the work program and contract, he shall notify the agency of the problem and the requirement for compliance. If after a reasonable period satisfactory

adjustments are not made, he shall notify the agency that further payments will be withheld until the deficiencies are corrected."

Pitts' April 19 letter to Blevins, however, prompted Dr. Gold to fire off a rather inflammatory letter to Commissioner McAnerny asking that Pitts apologize for the letter, and for Pitts' failure to talk with Dr. Gold before concluding Dr. Gold was in the wrong. Dr. Gold recalls hand-delivering the letter to the Commissioner on April 26.

Dr. Gold received no response from the Commissioner, nor did he receive any letter from Pitts. However, the Anchorage file shows an interesting (however irrelevant) memo from Pitts which carries a date of April 27. It concerns a proposal by Dr. Gold for a drug abuse grant he applied for in another department--the Drug Abuse Office. The memo was initially written by Pitts on non-ordinary stationery and the copy in the Anchorage file we copied, shows a stamp as having been received by the Drug Abuse Office on May 16, 1977. The memo was written to McAnerney, but the only paragraph to mention Pitts' involvement with Dr. Gold in the day care contract experience vaguely questions Dr. Gold's management of the day care program and Dr. Gold's refusal to allow Brewer access to the files. The last paragraph recommends the following:

"I recommend that the A-95 Grant Request referenced above be denied and that a search be undertaken for a more suitable Drug Abuse Program Administrator."

During the same time Dr. Gold was testifying against C&RA day care proposals in front of legislative committees, the Department began collecting a variety of paperwork regarding Dr. Gold's other involvements.

For example, in the Anchorage day care assistance file on the Fairbanks program, there are some 61 different documents (at least as recorded in September by my assistant, Cathy Allen). Of those 61, 31 documents deal with subjects other than the day care program. A large portion detail problems and criticisms other people had with Dr. Gold's proposed mental health clinic. Eight other pieces of paper dealt with Borough zoning problems--some dating back two years.

Barbara Morse, a Departmental employee directly under your supervision, was also receiving day care assistance through Dr. Gold's administration. She had recorded problems with Dr. Gold's administration of the program as he had required more back-up paperwork in order to adjust the level

of her income to what she thought was appropriate. The problems with her individual subsidies were not major ones, but it does cloud any involvement she might have had in discrediting Dr. Gold's administration of the program. Borough officials have reported she inquired about several different problem areas, including whether or not proper advertisement had preceded the request for new bidders. In the meantime, John Swan had also been interested as a potential administrator and Morse had been working to interest Swan in the day care program administration. He had been running a day care facility where Morse had taken her child. When you traveled to Fairbanks for your May 19 meeting with Blevins, Morse was in attendance.

That same trip report includes the following statement: "it was the borough's responsibility to monitor the activities of their subcontractor." You also stated, "that we would be very reluctant to approve a subcontract with Dr. Gold for next year, and recommended that they heartily consider operating the program in-house next year."

Regarding Brewer's field report from the next departmental trip on May 31, she reflected a much brighter picture of Dr. Gold's operation of the program. Although she details one case where a family had to have its payments terminated and the notice was somewhat short and indirect (the day care center was informed), the incident prompted her recommendation that a form and standard termination notice be worked out.

This Brewer report appears to contain other unfavorable impressions concerning Dr. Gold, but no examples were provided; they were requested for the future. Brewer's report states of Dr. Gold's administration of the program that applications were now complete; the back-up data was in place and no other close monitoring would be required before the "contracts are ready for renewal."

In the "Effectiveness of Program In Meeting Goals," Brewer wrote, "The program's effectiveness apparently has improved since the last visit. Applicants are now more carefully screened and clients are not being assisted at correct percentages for their income group."

To maintain a proper perspective, we should point out that the April field trip report with the same evaluation forms, detailed several problem areas: audit exceptions, refusal to allow access to all the files, files were incomplete, etc. To adequately insure we don't overlook that report, we have also included a copy of it as an attachment. The point is that

with the prior report or without it, Dr. Gold's administration of the program as is reflected by Brewer, certainly improved.

There are two final letters (one June 24 and a second dated July 25) which culminated in the Borough's action of not awarding a contract renewal to Dr. Gold.

On June 24, you responded to a June 22 letter from Fairbanks Mayor John Carlson which indicated the Borough's intent to apply for day care funds for fiscal 1978. This letter includes the following paragraph:

"Alaska State Law (AS 44.47.250) allows the borough to subcontract its obligations only with the consent of the Department of Community and Regional Affairs. The Department in examining and evaluating the appropriateness of the grant application, must weigh the commitment, the plan and capabilities of the Borough in administering the program."

It also states:

"Unless the borough can present evidence to indicate and guarantee a significant change in the program management by Dr. Gold that will assure a proper level of performance, the Department will not grant approval to the Borough to subcontract.

Prior to this letter's arrival on Mayor Carlson's desk, the borough had informed Dr. Gold that he was the only agency that responded to the Borough's request for bidders. He was told that he would receive the contract though no official paperwork had been signed. The mayor then informed Dr. Gold of the Department's letter.

Dr. Gold took great exception to your letter in public testimony. The Borough opted to operate the program in-house until it could gather more information about the entire matter and seek proposals from others who might also wish to administer the program. Garzini, in public testimony said had there been no letter from C&RA threatening a discontinuation of the day care assistance funding with Dr. Gold, he would have had little objection to the Borough's renewal of the contract with Dr. Gold.

In a July 25 letter from your office, you further outline other problems with Dr. Gold's past administration of the program and offer the following:

"Subsequent to our initial rejection, the Department has become aware of many other circumstances related to Dr. Gold and his other business activities, contracts and zoning

problems which would preclude Dr. Gold from being acceptable as the administrator of this program under any conditions."

Since that second letter, the borough has requested and accepted applications from six sources. These applicants all presented proposals for the day care program's administration based on new proposal guidelines that we feel your agency properly assisted in developing. Certainly, with this relatively new program, guidelines for those who might administer the program would be hard to develop based on no prior experience. Also, since your office has noted problem areas--not only in Fairbanks but Statewide--it is appropriate you should assist the local governments in proposal guidelines.

Dr. Gold has since charged the nature of these guidelines was such that it sought to exclude him. Since some valid concerns with his administration of the program prompted such proposal guidelines, we do not find your involvement here to be faulty.

Presently, the Borough is operating the day care assistance program in-house, awaiting the settlement of this Ombudsman complaint, as well as other factors (such as the local election) before opting to award a contract to any of the six proposal applicants (which includes Dr. Gold).

According to Phil Younker, the Borough will take action--one way or another--on this matter in the near future.

FINDINGS:

Pursuant to AS 24.55.150, we have found Departmental actions: 1) to be arbitrary regarding the enforcement of rules set out in the Day Care Assistance Manual; 2) to be based, in part, on improper grounds; 3) to be unfair, procedurally; and 4) unreasonable in the scope of information and materials collected in regard to Dr. Gold.

A. Actions Found to be Arbitrary

In many areas, you have held Dr. Gold accountable for following rules and procedures outlined in the Day Care Assistance Applications' Manual (which was made part of the contract to the Borough and also the subcontract to Dr. Gold). His refusal to allow Brewer access to files; exact compliance with the subsidy scale; required back up information for each applicant; his determination of who should continue to receive subsidies and who should be cut off; and the Borough's failure

to secure written permission from your division are all covered in the contract and/or manual.

Yet, page 19, article 5 of the manual calls for the Director (identified as you by manual definitions), to notify the agency (identified as Dr. Gold by means of the same manual definitions) of those problems inconsistent with either the work program or contract. If "after a reasonable period satisfactory adjustments are not made" the Director is then to notify the agency that payments will be withheld until the deficiencies are corrected."

Notification of the audit problems went to the Borough Treasurer almost immediately upon Brewer's filing of her trip report. The money was to be immediately withheld and Blevins was warned of the seriousness of Dr. Gold's refusal to allow the C&RA field worker access to all the files. No notice for compliance was given Dr. Gold.

B. Actions Found to be Based Upon Improper Grounds

The July 25 letter to Assembly Chairman Dave Brennan specifically outlined six major criticisms you defined as problems with the day care program administration by Dr. Gold. We find fault with four of those items discussed.

Item #2 and Item #4

We would like to couple Item #2 and Item #4 together as they are similar in our comparison of the facts regarding both. These criticisms deal with the original grant ceiling for the program being $106,495; that Dr. Gold should have apportioned an equal amount each month for the program's subsidies so that the money would last the year; that there was no mandate to serve all "eligibles" (as you allege is clearly stated in the contract); and that his expressed shortcomings due to improper training is invalid due to four trips made by your staff for auditing and training purposes.

First, we find that although the original grant amount was $106,495, Dr. Gold had been told from the start of his administering the program that there would be more money available. Pitts had told him that pending reports from other communities regarding whether these other areas would be able to use their allocated day care funds, more money would become available. Extra money was already accumulated from communities which could not get a program established for fiscal 1977 by the time Dr. Gold took charge of the Fairbanks program.

Dr. Gold chose not to apportion money on a month-to-month average, which was reasonably his prerogative based on the manual, law and contract (plus subcontract). The contract does not state, as you say, "that not every eligible person in the Fairbanks area must or should be served". The contract (in Appendix A) states that the contractor "agrees to serve" all families with reasonable access to licensed day care facilities in the Fairbanks area. The contract states just the opposite, according to our reading, of what you list as its clear statement regarding who should be served.

Whether or not Dr. Gold chose to apportion his total amount on a month-by-month average seems to fall in the category of local flexibility. How else would you interpret Pitts' suggestion that a monthly average be determined and adhered to as was stated in his October 22 letter to Dr. Gold? As long as Dr. Gold held enough money aside for the total subsidizing of WIN and AFDC recipients, then he was not in violation of the contract, according to our review. And, as new applicants qualified as eligibles and had lower incomes than those still receiving subsidies, we believe Dr. Gold was following the priority expressed by the law, guideline manual, contract and subcontract to favor lower income eligibles.

Finally, the lack of training or auditing Dr. Gold alludes to as reason for his shortcomings in administration of the day care program is difficult to determine as valid or invalid. You indicate that he cannot blame base line data projections as his basis for not terminating higher income eligibles. From the first moment he realized he would run short on funding for the year at the maximum subsidizing of all those eligibles, you indicate he should have averaged out his funds based on a month-to-month average. Since the funds did increase (and he had confidence there would be more coming) and there were more new applicants with lower incomes applying for subsidies, we believe Dr. Gold showed a management plan that was not prohibited by his contract--nor even criticised by your agency until after he had terminated many of those on the program under his plan of serving as many as he could as long as he could. Regarding training and auditing help, the field trip report for October only states that Dr. Gold wasn't able to make a meeting. Your February report does not mention any training or auditing other than your attempt to bring home the point the program was not "a free lunch". (And, Dr. Gold's records show the meeting as more of a strategy one for the legislative effort for supplemental

and fiscal 1978 funding of the program). Brewer's March report allows that new staff were on baord and that she would await that staff's familiarization with the back files before auditing. The April field report was covered above and the May report also indicates the Department's action in training Dr. Gold's staff and auditing the Fairbanks files. Proper training and auditing prior to the acknowledged problems in April are hard to detail in light of the field reports on file.

Item #5

The letter to Brennan questions Dr. Gold's method of cutting eligibles from the program; the short time frame in notifying eligibles that they are being cut; the explanation used in the form letter; and the lack of proper monitoring and analysis. The latter, you theorized, might have resulted in fewer cutbacks sooner and addition of new eligibles with lower incomes through natural attrition. Dr. Gold, however, cut eligibles, upon your October suggestion of terminating those from Group V, the Group IV, the Group III, etc. The time frame was short as he expected more funding and exercised his local management flexibility to keep eligibles in the program until the last moment. Regarding the misleading explanation you fault, Dr. Gold had sent the same letter terminating eligibles three different times (with copies to Pitts each time) using the same standard form letter he initiated in October for the first cut-off. No criticism was voiced until your July letter. Had Pitts voiced his concern over the explanation Dr. Gold used, it is likely (according to Dr. Gold) that the form letter would have been changed. Additionally, in the October 20, 1976 letter from Pitts which preceded Dr. Gold's first form letter, Pitts declared the problem "is, of course, insufficient funding to accommodate all persons eligible for Day Care Assistance." Dr. Gold's terminology to recipients of day care subsidies was, "Due to the inadequate amount of funds provided to the Fairbanks North Star Borough Day Care Assistance Program, it is impossible to continue funding all day care payments for the entire year." We don't find the two explanations significantly different.

Since it was (by contract and manual guidelines) the responsibility of both the Borough and the State to "monitor" the local program, we find it inconsistent to solely fault Dr. Gold with failure to properly monitor the program with regard to analyzing the list of eligibles in time to cut higher income eligibles to accommodate new applicants with lower incomes. In fact, the Borough received notice of its

monitoring problems, but the actual local administering agency (Dr. Gold) received none. Also, Dr. Gold's records show no natural attrition where he could have added those new eligibles in question with lower incomes.

Item #6

Here, you report that there were several audit exceptions "for which the borough is financially responsible." You further stated these exceptions "were due primarily to inadequate and inaccurate applicant screening on the part of Dr. Gold's staff". This is not true, according to your files and those of Dr. Gold, as well as information from Garzini. Your contract with the Borough and the subsequent subcontract with Dr. Gold holds the administrator responsible for problems in subsidy eligibility. The Borough paid all the audit exceptions that weren't adjusted after back-up information was obtained from the eligible applicants. Although Garzini states that Dr. Gold paid "a negligible amount" of the exceptions, his files show he paid none. Garzini clarified that most of the exceptions could be traced back to screening work done by the Borough when it first began the program--before Dr. Gold was contracted for the program's administration.

Information regarding the timely filing of monthly reports is difficult to detail except that the departmental files show the reports were late. Exactly how the reports should be filed, and what route each report should take through what local, Borough and State offices is unclear, but it is our finding that these reports were received in your offices late in at least three cases.

C. Action Found Unfair

Even if all the above criticisms and problems with Dr. Gold's administration of the Fairbanks program were accurate, we find it unfair to notify Dr. Gold (and at that, notify him indirectly through a letter to Mayor Carlson) of his total unacceptability for a contract renewal after the Borough has asked him to submit a letter requesting a contract renewal.

We have considered your argument that it was easier not to inform Dr. Gold of each problem as it arose in the hopes he would become a more conscientious administrator as time went by, but it, nevertheless, came as a surprise to him that you would not accept him as a subcontractor. Dr. Gold, and several other agency and local officials, certainly admit there were conflicts of philosophy between him and the Division. All admit there were deep personality conflicts (evident in Dr. Gold's letter to the Commissioner of April 26 and

Pitts' letter to the Commissioner of April 27). The Borough obviously did not think the problems so severe that they would not have rejected the contract renewal with Dr. Gold. Dr. Gold, after Brewer's May 31 trip, did not think his administration so faulty that a contract renewal would be jeopardized or, he felt, he would have received some feedback, as the Department certainly had been vocal about the program in the past few months.

In addition, Brewer's last field report shows Dr. Gold as improving, though each piece of correspondence from the State to the Borough gets progressively worse in its assessment of Dr. Gold's operation of the day care program in Fairbanks.

In the interest of making the Fairbanks program viable, it is understandable your field worker would attempt (and is evident by her continued patience) to try and correct problem areas as opposed to confronting Dr. Gold and his assistants with each error or criticism. But this same patience also lent to the lack of due process we feel Dr. Gold should have been afforded according to the manual procedures which call for the Director's calling attention to contract and work program problems.

Brewer's last comments in the May field report that additional monitoring in person was not necessary until the "contracts are ready for renewal", raises an inference that the subcontract to Dr. Gols would be acceptable.

The paragraph precluding Dr. Gold from "being acceptable as the administrator of this program under any conditions" based on "other circumstances related to Dr. Gold and his other business activities, contracts and zoning problems," is an unreasonable statement concerning Dr. Gold. The paperwork in his Anchorage file regarding establishment of a new mental health association for possible State grant funding does not show any positive letters about the fledgling group (which is now in the final stages of being approved for funding). The Borough zoning problems you allude to are being pursued through the court system. The "other business activities" reflected in paperwork in the file could include the proposal by Dr. Gold for continued grant allocations for drug treatment programs. Although Pitts' letter pointed out problems with his proposal, Dr. Gold received another year's funding approval just recently. And last, references made by Pitts to my assistant about other "alcoholism" grants awarded Dr. Gold that might interfere with day care recipients using Dr. Gold's same premises,

simply do not exist. He does not now have (nor has he had recently) any alcoholism programs which he is running or administering.

It is in addition to the voluminous paperwork in our files that are not direcly germane to the day care program's administration; the somewhat unprecedented letter by Pitts regarding Dr. Gold's drug abuse proposal; the harshness about Dr. Gold's running the program, as is reflected in your letters at the same time his field report evaluations by Brewer were showing improvement the questionable involvement of staff in Fairbanks; and the cloud of doubt by the non-specific paragraph cited above that prompt us to find your agency's actions unreasonable. These unreasonable statements figured heavily in Dr. Gold's not being awarded a second year's subcontract for the Fairbanks North Star Borough Day Care Assistance Program.

AGENCY ACTION JUSTIFIED

A. Statewide perspective needed and obtained through C&RA monitoring

Since the entire amount of day care assistance monies comes from the State with no federal matching monies, the State is in the best position to judge Statewide need and it can best ascertain how the money should best be allocated to the different programs. Through surveillance and monitoring, it is in a better position to determine how any one program measures up to another. In this regard, it was indeed proper that C&RA did outline all problem areas; we only would ask that more time be afforded in reviewing the cited grounds presented to the Borough Assembly as background for the action against Dr. Gold. Careful review of the Department's file would have cleared up the most serious and certainly the majority of problem areas cited.

B. Program problems properly outlined by the agency

The untimely filing of monthly reports, the refusal to allow field workers to review day care assistance recipient files at any time during the work day, as well as smaller, case-by-case details that required clarification or more attention are best brought out by the State agency. In some cases, the local government might not watch nor wish to closely monitor a program. The State, which has the background and knowledge of program administration throughout the State, is in a better position to pick up administrative