ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

2458 HJ HB 588 - HB 619

Harrison had gone to the Unemployment Office and changed his mailing address from Hollands' to General Delivery. Harrison's plan was to put two of the anticipated checks into his restitution savings fund and hold one back, telling Mr. Holland he had not received it. He planned on blowing the money from the third check.

After this conversation, Harrison admitted it was originally his plan to run the "scam", but since hadn't received the checks yet, and therefore, hadn't pulled of the scam, he hadn't done anything wrong.

Mr. Holland I spoke at length with Harrison about the wrongness of this "scam", whether he had pulled it off or not. Harrison maintained that he had done no wrong. At this point, Mr. Holland left the room. I spoke with Harrison for about 5 minutes and then I left. During that 5 minues, Harrison had completely changed his story and, in Mr. Holland's absence, was again denying any of his wrong acts. As I left, I saw Mr. Holland and asked him to call me the next day if he decided he no longer could work with Harrison. Mr. Holland asked me to remove him immediately, that he felt he could no longer work with Harrison.

Since the Juneau Receiving Home in the past has refused to accept Harrison and he has no relatives in Juneau, I transported him to the Johnson Center for detention. The staff at Johnson was busy with adult prisoners, so Harrison and I had to wait in the lobby for 30 minutes.

During this wait, Harrison became more and more agitated about being detained. He started by saying the only reason for detention was a "personality conflict" between he and Mr. Holland. Then he said that he "was going to blow the whistle on Bernie tomorrow in Court". He explained that Mr. Holland had physically abused him saying that Mr. Holland had hit him in the arm with a stick on several occasions. In the most recent, Harrison said he shoved Mr. Holland onto the kitchen table after Mr. Holland struck him, breaking the table. Mr. Holland then jumped up and challenged him to fight. The matter diffused with no further blows. Harrison said Merick Habon, another foster child with the Hollands, could verify this.

On July 15, I conducted a low key interview with Habon. Bob Dannecker, Foster Care Coordinator, was present. Habon said he was quite happy at the Holland home, that he had not been subject to any verbal or physical abuse. (This is significant, since Habon comes from a very abusive natural home and was fearful upon placement that the foster home would function the same way). He said he had never seen Mr. Holland hit Harrison, either with a stick or a fist. He did say the two have engaged in "friendly" wrestling matches and shadow box with one another.

Habon said the kitchen table was replaced with a more sturdy picnic-type table several days ago because the other table was starting to sag towards the middle. (I was in the Holland house 10-14 days ago for a reception for Lt. Governor Miller and can verify the old table was rather wobbly).

In conjunction with allegations Twiggy Horchover made about Mrs. Holland using foul or abusive language, Habon said this had never happened. That it was his experience she was rather quiet. He did say that Mr. Holland does use foul language in the house occassionally.

Habon volunteered that Harrison had been in trouble at the house recently for failing to do chores and for being caught in the girls living area.

At 2:30 p.m. on July 15, a detention hearing was held on Harrison. Following the hearing, I asked Harrison in his attorney's presence to give me a taped statement about the physical abuse. I explained to the attorney that I had an obligation towards the other children placed there if an abusive situation existed. Harrison immediately went into private counsel with the attorney. The attorney then advised me that Harrison's only complaint was of a "personality conflict" between Harrison and Mr. Holland. He explained the "conflict" as being Mr. Holland calling Harrison a "shitbag" and "worthless" in front of the other children.

I told the attorney Harrison had alleged he had been hit with a stick and physically roughed up by Mr. Holland. The attorney again conferred with Harrison and returned to report that Harrison said he had never been hit or otherwise assaulted. Further, Harrison declined to give any taped statement about the "personality conflict".

#12

Complaint registered to: Division of Family & Youth Services
515 Willoughby Avenue
Juneau, Alaska 99801

000239

Regarding: Bernie & Mary Holland Foster Home (Name of Facility) [X] Licensed [ ] Unlicensed

Address: P.O. Box 67, Juneau, AK

Phone: 586-1724

Date complaint received: July 15, 1982

The following complaints were received by the Division of Family and Youth Services regarding the above facility:

1. Allegation that Bernie and Mary Holland yell and direct vulgar and abusive language towards foster children. [7AAC 50.450,(2)]

2. Allegation that Bernie Holland frequently hits foster children with a stick, ruler, yardstick and his hands. [7AAC.50.450,(1)(5)]

3. Allegation that Bernie Holland squirted lemon juice into a resident's mouth, as punishment, and in the process of the resident resisting, used force to open the resident's mouth by holding the jaw and applying pressure. [7AAC 50.450,(1)]

4. Allegation that Bernie and Mary Holland are providing Day Care in their home for from 2-5 children. [7AAC 50.430(b)(d)]

5. Allegation that there is not sufficient space for each foster child to have specific place to keep his/her own personal possessions. [7AAC 50.540(c)]

6. Allegation that the Holland children have played with, destroyed, broken or lost the foster childrens personal possessions. [7AAC 50.420(e)]

7. Allegation that the Holland children are allowed to annoy and "bug" the foster children. When a conflict arises over this issue, that the foster children are verbally abused, and that "the foster children are always wrong, and the Holland children are always right". [7AAC 50.450,(2)(5)]

8. Allegation that adult boarders are living in the Holland foster home and that they are sharing sleeping quarters with foster children. [7AAC 50.420]

NOTIFICATION OF COMPLAINT

Complaint registered to: Division of Family & Youth Services
515 Willoughby Avenue
Juneau, Alaska 99801

000249

Regarding: Bernie & Mary Holland Foster Home [X] Licensed
(Name of Facility)
[ ] Unlicensed

Address: P.O. Box 67, Juneau, AK

Phone: 586-1724

Date complaint received: July 15, 1982

The following complaints were received by the Division of Family and Youth Services regarding the above facility:

9. Allegation that adult boarders participate in the family meetings and trials and are allowed to vote on foster childrens punishment [7AAC 50.410(a)]

10. Allegation that three foster children and one adult boarder sleep in a bedroom with no windows. [7AAC 50.560(e)(3)]

11. Allegation that family meetings are held late at night and often last from 11:00 p.m. to 2:00 a.m., and that foster children do not get enough sleep because of this and that one foster child fell asleep at a meeting and was punished for it. [7AAC 50.410]

12. Allegation that Bernie Holland has belittled and used cruel and derogatory remarks when describing a foster child to other foster children, and to other persons who have entered the foster home. [7AAC 50.450(2)]

13. Allegation that Bernie Holland patted a female resident on the bottom, grabbed a female resident around the waist and while "wrestling, grabbed her legs to get a cheap feel." [7AAC 50.410

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: 588
Title: An Act providing for the award of costs & attorney's fees.
Sponsor: Tischer
Requestor:
Date of Request: 2/9/84

FISCAL DETAIL
Agency Affected: Commerce & Economic Dev.
Program Category Affected: Consumer Protection
BRU, Program or Subprogram(s) Affected: Alaska Transportation Commission

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		10.0				
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		10.0				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		10.0				
FEDERAL FUNDS		-0-				
OTHER		-0-				
TOTAL		10.0				

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

If the Bill was amended, the State agency could collect its cost and attorney fees when it prevails thus offsetting the costs when the respondent prevails.

ANALYSIS: Attach a separate page for analysis

Prepared By: Keith H. Miller
Phone: 561-4216
Division: Alaska Transportation Commission
Date: 2/16/84

Approved by Commissioner:
Date: 3/1/84
Agency: Commerce and Economic Development

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

ANALYSIS FOR FISCAL NOTE

It is not possible to accurately predict the future fiscal impact of this bill with any certainty. The problems in predicting is that there is no certainty on the number of proceedings that will occur; there is no way of predicting the number wherein the respondent prevails; and there is no way of predicting the amount of fees that would be awarded.

A review of the 283 ATC proceedings that would appear to be covered by this legislation that were initialed in 1983 indicates that four cases might have justified the awarding of costs and attorney fees to the respondent. It should be noted that some of these proceedings are still open.

Ombudsman

John B. Chenoweth

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

MEMORANDUM

TO: John B. Chenoweth, Ombudsman

THRU: Duncan C. Fowler, Ombudsman Regional Representative

FROM: Bruce Aronson, Ombudsman Assistant

SUBJ: Ombudsman Complaints J82-0689, J82-0728, J82-1136, and J82-1188

DATE: January 28, 1983

Four complaints, J82-0689, J82-0728, J82-1136, and J82-1188, direct the attention of the office to investigatory and licensing practices of the Southeast Regional Office of the Division of Family and Youth Services. Due to the interrelationship of the four, they were examined at the same time by this investigator.

Throughout this memorandum, the names of minors involved in these complaints have not been used, rather initials were substituted for their names.

A summary of my investigation of each complaint is provided below:

J82-0689

Bernie and Mary Holland filed a complaint with this office on July 26, 1982, alleging that the Division of Family and Youth Services (DFYS) is failing to conduct a proper investigation of their foster home license, and is harassing them. Investigation of their complaint has focussed on whether the agency had sufficient reason to initiate an investigation, and whether the investigation was properly conducted.

The Hollands are Juneau residents with a decade of experience in foster care involving Juneau youth. Their complaints were filed with the Juneau office after they were served a NOTIFICATION OF COMPLAINT by officials of the Division's Juneau regional office. The officials advised that the notification, containing 13 allegations, was served in conjunction with information received by division personnel during the preceding 10 day period. Investigation of the allegations was a prerequisite to a decision by division officials to modify or revoke the Hollands' foster home license.

A copy of the notification is attached to this memorandum.

Background:

On July 14, 1982, Norm Anderson, Probation Officer II, transported a minor, D.H., to the Johnson Human Services Center for detention purposes. In a memorandum from Mr. Anderson to Lew Reece, Regional Administrator, DFYS, dated July 16, 1982, Mr. Anderson states:

> During this wait, D.H. became more and more agitated about being detained. He started by saying the only reason for detention was a "personality conflict" between he and Mr. Holland. Then he said that he "was going to blow the whistle on Bernie tomorrow in court". He explained that Mr. Holland had physically abused him saying that Mr. Holland had hit him in the arm with a stick on several occasions. In the most recent, D.H. said he shoved Mr. Holland onto the kitchen table after Mr. Holland struck him, breaking the table. Mr. Holland then jumped up and challenged him to fight. The matter diffused with no further blows. D.H. said M.H. (male), another foster child with the Hollands, could verify this.

Mr. Anderson also reports in this memorandum that M.H. (male) said the kitchen table was replaced with another table, since the older table was sagging. Mr. Anderson confirms that "the old table was rather wobbly." M.H. described Mary Holland as a quiet person, and that she did not use "foul or abusive language." M.H. does indicate that Bernie Holland has used foul language. No written statement from M.H. was taken by DFYS. .

In a memorandum from Candace Canfield, YCIII, Johnson Human Services Center to Marlyn Olson, Probation Officer III, dated July 14, 1982, it was reported that D.H. told both Ms. Canfield and Margaret Pugh, Program Director, Johnson Human Services Center, that Bernie Holland hit him, and that Mr. Holland uses a stick to hit people, including D.H. Also, D.H. and Bernie Holland, on more than one occasion, stayed up late arguing. D.H. closed by saying that M.H. (female) was also hit with a stick, and would confirm this information. Ms. Pugh then called Marlyn Olson and requested Mr. Olson immediately visit the Johnson Human Services Center.

Mr. Olson indicates in his file notes of July 14, 1982, that when Mr. Olson met with D.H., D.H. had already contacted his attorney. Mr. Olson reported that D.H. said his attorney advised D.H. to remain silent. Mr. Olson wrote in his notes that, "He did elude [sic] however two serious problems..." Mr. Olson also indicates that D.H. felt that M.H. (male) and M.H. (female) could corroborate his statements.

In his July 16, 1982 memorandum, Mr. Anderson states:

> On July 15, I conducted a low-key interview with M.H. (male). Bob Danneker, Foster Care Coordinator, was present. M.H. said he was quite happy at the Holland home, that he had not been subject to any

> verbal or physical abuse. (This is significant, since M.H. comes from a very abusive natural home and was fearful upon placement that the foster home would function the same way). He said he had never seen Mr. Holland hit D.H., either with a stick or a fist. He did say that the two have engaged in "friendly" wrestling matches and shadow box with one another.

The last two paragraphs of Mr. Anderson's memorandum describe a meeting with Mr. Anderson, D.H. and D.H.'s attorney. The meeting took place at 2:30 p.m. on July 15, 1982. The attorney (after conferring with D.H.) advised that D.H. had only one complaint, regarding a "personality conflict" between D.H. and Bernie Holland. Anderson also wrote that the attorney said the conflict was that Bernie Holland called D.H. a "shitbag" and "worthless" while other children were present. When the attorney was asked about D.H.'s allegation that Bernie Holland had hit D.H. with a stick, the attorney stated (after conferring with D.H.), "that D.H. said he had never been hit or otherwise assaulted. Further, D.H. declined to give any taped statement about the 'personality conflict'."

Robert Danneker's notes of July 20, 1982, describe a meeting with D.H. At that time, D.H. agreed to give a written statement to Danneker by Thursday, July 22, 1982. A statement was provided by D.H. on July 22, 1982, which said Bernie Holland and D.H. got into a scuffle, and Bernie challenged D.H. to fight. D.H. also said:

> Bernie was sitting on the couch next to M.H. (female) and I was sitting at the table when Bernie and M.H. started wrestling sort of and Bernie was grabbing M.H. around the waste [sic] and her leg's [sic] and it looked more like Bernie was trying to get a cheap feel off her he does this all the time and he has this stick that is about two and a half feet long that he smack's [sic] us with and it hurt's [sic] several times' [sic] I asked him not to smack me but he still does.

D.H.'s assertion is deserving of independent verification. A psychological evaluation (a copy of which is in the DFYS files) prepared by Carol C. Greenough, Ph.D., and dated June 23 and June 25, 1982, cautions:

> . . .
>
> D.H. admits to being very good at lying and convincing himself as well as others of his lies.
>
> . . .
>
> D.H. is very manipulative, using people and situations to create gratification for himself.
>
> . . .

D.H.'s probation officer, Norm Anderson, told this office, on January 3, 1983, that D.H. thought Bernie Holland was mad at him, thus causing D.H. to be sent to the Johnson Human Services Center for detention purposes on July 14, 1982. D.H. became very upset at the prospect of detention, and that he was going to get back at Bernie Holland. On July 15, 1982, Anderson said, he believed that D.H. was lying.

Since D.H.'s credibility is called into question, corroboration of his statements by the two foster children he named, is important. There was no written statement by M.H. (male). However, Mr. Anderson's memorandum indicates that M.H. can only verify that Bernie Holland used foul language on occasion. Notes prepared by Marlyn Olson say that on July 14, 1982, M.H. (female) a foster child at the Holland home, volunteered information to Mr. Olson. A synopsis of Mr. Olson's notes includes the following incidents, as described by M.H. (female):

- Bernie Holland told her to get out of bed, using vulgar language,

- Mary Holland has called her names,

- M.H. was preparing guacamole, and to quiet J.H., M.H. squirted lemon juice into J.H.'s mouth. Mary Holland cursed at M.H. for this,

- Mary Holland cursed at M.H. for being late when called to the main floor of the house, from the basement, and

- Bernie Holland used coarse language upon M.H.'s return to the Holland home, after having run away from the Holland home.

Mr. Olson's notes for July 15, 1982, include the following:

> We [Sonja Brandman, Counselor, and Mr.Olson] discussed M.H.'s (female) behavior over the past three weeks, the fact that it has been very difficult for her having violated curfew, run, caught in several lies, and being on restriction much of the time. Sonja and I agreed that it was difficult to tell when M.H. is being truthful or not.

Shortly thereafter, M.H. (female) provided a handwritten statement of her allegations against the Hollands. M.H.'s statement includes descriptions of the following episodes:

- When M.H. was moving to another room, Mary Holland cursed at her,

- During a family meeting, Mary Holland described M.H.'s performance as a dishwasher, in vulgar terms,

- Mary Holland cursed at M.H. during an incident involving a television,

- Mary Holland, in vulgar terms, told M.H. to be quiet, when M.H. was slow in coming to the main floor of the house from her bedroom,

- When M.H. was making guacamole, one of the Holland children was irritating M.H., so M.H. squirted lemon juice into the child's mouth, and the child started screaming. Mary Holland then cursed at M.H.,

- When M.H. was slow in getting out of bed one morning, Bernie Holland cursed at her to get up,

- Bernie Holland hits D.H. with a stick during family trials and meetings, and

- "When I have my but [sic] up in the air reaching for something and I [have] been hit for no reason twice with [a] stick once with [a] hand and last night befor [sic] he hit me with his hand I caught him first a[nd] said don't hit me what's the reason. he [sic] said boy you [are] lucky I couldn't resist."

Mr. Olson said in his notes of July 15, 1982:

. . .

> I reviewed her statement and found that several of the things she told me yesterday were not addressed and that some of the incidents she wrote about that we talked about yesterday were or so what watered down. . . .
>
> Most of what she put in writing seemed to be directed towards conflicts that she was having with Mary instances in which she says Mary directed fould [sic] language towards her, telling her to shut up, calling her asshole, etc.

Mr. Olson also reported that M.H.'s (female) mother said M.H. seemed to be using vulgar language, and that the Holland home "...was the best placement for her."

The next day (July 15, 1982) a meeting was held with Mr. Olson, M.H. (female) and her father, Bernie Holland and Ms. Brandman. During this meeting, they reviewed the allegations M.H. had made regarding the Hollands. Mr. Olson noted that M.H. lied when discussing what she did one Sunday. Mr. Olson also wrote:

. . .

> We note that the conflicts she brought up involved she [M.H.] and Mary. I think we have to recognize the fact that there could be a great deal of transference going on here, meaning that a lot of the hostility, the anger, the hurt M.H. feels in her relationship with her mother are under difficult circumstances transferred to Mary, her foster mother.

. . .

> Before we closed the meeting and while M.H. was still meeting with us we questioned her in several different ways about whether or not the problems she told us about at the Hollands were so serious that they couldn't be worked out, that perhaps this difficult time will soon pass and once again, things will level out for her. Her response was that things could probably be worked out.
>
> . . .

M.H. (female), during a deposition taken on December 30, 1982, told me that she felt that her problems with Mary and Bernie Holland were resolved during the above described meeting.

From records retained by DFYS, staff then gathered statements from the following people:

- D.H. gave a statement on July 22, 1982, and signed it on August 2. D.H. later retracted this statement, in a written statement dated December 1, 1982.

- M.H.(female) gave a statement on July 22, 1982, and signed it on July 29, 1982. An unsigned statement given on July 23, 1982, was also given by M.H.

- K.S. signed a statement on July 29, 1982, which was originally given on July 20, 1982.

- A.J. gave a statement on July 22, 1982, and signed it July, 29, 1982.

- A.M. gave a statement on July 22, 1982, which was later signed on July 29, 1982.

- M.F. gave a statement on July 23, 1982, which was not signed.

- Gil Lucero gave a signed statement on July 28, 1982.

Allegations against the Hollands:

Based upon the statements that division personnel had received as of July 23, 1982, DFYS prepared a NOTIFICATION OF COMPLAINT. The notification included a description of 13 allegations against the Hollands. Each of the 13 allegations was reviewed by me to determine if there was adequate factual basis for the allegation, and adequate basis to begin and continue investigation of the allegation.

Since an administrative hearing regarding modification of the Holland foster license is being scheduled in the near future, the truthfulness of the allegations is not a matter within the jurisdiction of this office.

Summarized, the allegations provide as follows:

1. This allegation was that the Hollands "yell and direct vulgar and abusive language towards foster children." DFYS officials cited 7 AAC50.450(2).

Information provided by some of the foster children as of July 23, 1982, indicates this allegation had an adequate factual basis and was properly the subject of investigation.

2. This allegation was "that Bernie Holland frequently hits foster children with a stick, ruler, yardstick and his hands," and was presented with a cite to 7 AAC 50.450(1) and 7 AAC 50.450(5).

Information provided by some of the foster children, as of July 23, 1982, indicates this allegation had an adequate factual basis and was properly the subject of an investigation.

3. It was alleged that "Bernie Holland squirted lemon juice into a resident's mouth, as punishment, and in the process of the resident resisting, used force to open the resident's mouth by holding the jaw and applying pressure." The notification referenced 7 AAC 50.450(1).

Information provided by one foster child, as of July 23, 1982, provided sufficient basis for the allegation, and the matter was properly the subject of an investigation.

4. "Allegation that Bernie and Mary Holland are providing Day Care in their home for from 2-5 children," accompanied by reference to 7 AAC 50.430(b) and 7 AAC 50.430(d). As of July 23, 1982, six different sources reported that day care services were being provided for as many as four children.

The two regulations cited by DFYS provide:

> 7 AAC 50.430. NUMBER OF FOSTER CHILDREN PERMITTED IN THE HOME.
>
> . . .
>
> (b) No more than eight children in all are permitted in any one home.
>
> . . .
>
> (d) No more than five children of any age who are unrelated to the foster parents are permitted.

Read together, these two regulations do not appear to have any direct relationship to the issue of day care services. Rather, the regulations seem to describe the maximum number of foster children and other unrelated children a foster home may have (five), and the total number of children, including foster and natural children that may live in a foster home (eight).

Since the allegation mentions day care as well as number of children, DFYS may have been relying on 7 AAC 50.440(a):

> (a) Day care of children and commercial care of the aged, or maternity, or convalescent patients may not be combined with foster care of children without prior approval of the division representative.

As of July 23, 1982, there was not sufficient basis for the allegation that the Hollands were providing day care services for up to and including five children. Pat Monroe, Licensing Coordinator, told me that DFYS always requires foster homes to secure a day care license, when day care services are going to be provided, in addition to divisional approval. Since it appears that a day care license is required only if day care services are provided in the home to more than four children, it does not appear that the Hollands would be required by law to secure a day care license. AS 47.35.020(2). In addition, providing day care services in a foster home, per se, does not appear to violate the foster care regulations cited by DFYS.

There is confusion concerning day care licensing obligations within a licensed foster home, and it is not at all clear that, in citing 7 AAC 50.430, the division made the point it had intended. Taking the cite provided as the basis of my review, it does not appear that the allegation has a sufficient basis. The Hollands might have admitted the truth of the allegation but it is far from certain that the admission or the finding will support revocation of the license.

5. The fifth allegation held that there was not sufficient space for foster childrens' personal possessions. As of July 23, 1982, there appeared to be sufficient basis for the allegation, and there appeared to be an adequate amount of information to warrant the investigation of the allegation.

6. Allegation 6 stated that "the Holland children have played with, destroyed, broken or lost the foster childrens[']] personal possessions." The notification in which the allegation was contained included a reference to 7 AAC 50.420(e), a provision which states:

> (e) The foster parents shall allow the child to bring personal possessions into the foster family home, and allow him to acquire possessions of his or her own, within reason with regard to space and comfort, and safety.

The above cited regulation only directs that personal possessions of foster children may be brought into the home, with certain limitations. That the regulation supports an investigation of the allegation is at best arguable.

7. It was alleged that children of Mr. and Mrs. Holland annoy the foster children, that, when a dispute arises, the foster children are always wrong and the natural children right, and that the foster children are verbally abused. The allegation referred to 7 AAC 50.450(2) and 7 AAC 50.450(5).

The "verbal abuse" portion of this allegation is identical to the one included in allegation number 1 above. The applicable regulation for it appears to be found in 7 AAC 50.450(2).

The other regulation, 7 AAC 50.450(5), states:

> 7 AAC 50.450. DISCIPLINE.
>
> (5) disciplined by shaking or by delivering a forceful blow with a hand or a weapon, however, controlled hand spankings of one to three slaps on the buttocks are allowed when appropriate;

Allegation 7 appears to be partially redundant with the first allegation. In addition, the second regulation cited, 7 AAC 50.450(5), bears no direct relationship to any part of allegation 7. Accordingly, it is not possible to conclude that the allegation is supported by any part of the regulations cited, and I question whether it ought to have been the basis for subsequent investigation and finding.

8. Citing 7 AAC 50.420, it was alleged that "adult boarders are living in the Holland foster home and that they are sharing sleeping quarters with foster children." The applicable portion of this regulation is part (a):

> 7 AAC 50.420 RESPONSIBILITIES OF FOSTER PARENTS
>
> (a) The foster parents shall report to the division representative any significant changes in the household such as employment, housing, or serious illness, that would affect the ability to care for foster children.

There was sufficient evidence from foster children that, in addition to Mary and Bernie Holland, other adults may have been living at the home. Although the allegation refers to these adults as "boarders," the regulations cited do not appear to prohibit boarders, and the use of the term is of no impact on the allegation.

The main point of the allegation is that the Hollands failed to notify the DFYS that additional adults were staying at their home. DFYS apparently believes that the addition of the residents is a significant change impairing the ability of the Hollands to properly care for foster children. As the regulation is written, it is not clear who is to determine, for purposes of reporting, what constitutes "a significant change." In this instance, DFYS should have identified the impairment resulting from the additional adults. The failure to provide this in the allegation suggests that the allegation is flawed, and should not have been investigated.

9. This allegation was that "adult boarders participate in the family meetings and trials and are allowed to vote on foster childrens [sic] punishment." 7 AAC 50.410(a) was cited.

Although there appears to be sufficient evidence for this allegation to be included and investigated, the cited regulation does not clearly indicate such activity is improper. The cited regulation, a provision that describes the qualities of a good foster parent, says:

> 7 AAC 50.410. QUALIFICATIONS OF FOSTER PARENTS AND OTHERS IN THE HOUSEHOLD.
>
> (a) The foster parents must show evidence of being responsible, mature individuals of reputable character who exercise sound judgement and display the capacity to provide good care for children.

If DFYS is concerned about discipline aspects in the Holland home, the applicable regulation seems to be 7 AAC 50.450, which describes standards for discipline.

10. It was alleged that "three foster children and one adult boarder sleep in a bedroom with no windows," citing 7 AAC 50.550(e)(3). This regulation states that each bedroom used by foster children must have a large window exit for emergency use. It does not mention boarders.

Based upon statements from two foster children, there appeared to be sufficient basis for the allegation that foster children were sleeping in a bedroom without a window large enough for emergency use. In addition, there appeared to be enough evidence to warrant investigation of this allegation. The allegation, as prepared by DFYS is poorly stated.

11. It was alleged that family meetings were conducted until late in the evening, and because of the late meetings, foster children were not able to get sufficient sleep, citing 7 AAC 50.410 as authority.

Statements from two foster children indicate there was sufficient basis for this allegation, and that it should have been investigated.

12. The next to the last allegation was that "Bernie Holland has belittled and used cruel and derogatory remarks when describing a foster child to other foster children, and to other persons who have entered the foster home." Reference followed in the notification to 7 AAC 50.450(2), which states:

> 7 AAC 50.450. DISCIPLINE.
>
> The foster parents must be able to show evidence of ability to work with children without recourse to physical punishment or psychological abuse and must be positive in their approach to discipline. Any discipline or control must be appropriate to the child's age and developmental level, but in no event may a child in care be:

> (2) subjected to verbal abuse, derogatory remarks about himself or members of his family, or threats to expel the child from the foster home;

Four foster children gave information which provided the basis for this allegation and the need to investigate it. One of these four foster children indicated the remarks by Mr. Holland were not intentional.

13. The last allegation was "that Bernie Holland patted a female resident on the bottom, grabbed a female resident around the [illegible] and while 'wrestling, grabbed her legs to get a cheap feel.'" The [illegible]ation was supported in the notification by reference to 7 AAC 50.410. (Presumably, the agency meant to cite subsection 410(a) in support of this allegation.)

The applicable portion of D.H.'s July 22 written statement, on which this allegation is based, states:

> Bernie was sitting on the couch next to M.H.(female) and I was sitting at the table when Bernie and M.H. started wrestling sort of and Bernie was grabbing M.H. around the waste [sic] and her leg's [sic] and it looked more like Bernie was trying to get a cheap feel off her he does this all the time . . .

In the course of my investigation, Robert Danneker told me the quoted portion of this allegation came from D.H. He acknowledged, however, that he had provided the phrase regarding sexual contact to D.H. On July 22, 1982,. D.H. provided a second written statement, signed on August 2, 1982, which says in part:

> Danneker: Read a quote from written statement regarding Bernie wrestling with M.H.(female)
>
> D.H.: Said that Bernie grabs her from behind under the arms. Stated that he didn't think Bernie should do this. M.H. got up to go somewhere and was bending over to pull down her pants (said she wears tight pants and had to pull them down when she got up). This was when Bernie swatted her (hit her on the bottom).
>
> Danneker: Have you seen him do this with any other girl in the house?
>
> D.H.: No.
>
> Danneker: What was M.H.'s reaction?
>
> D.H.: Walked away. It appeared to be done in fun but ...

In addition to the obvious inconsistencies in the two statements provided by D.H., the incorrect quotation provided by Mr. Danneker, and the phrase regarding sexual contact which had been provided by Mr. Danneker, there is the July 15, 1982 written statement of M.H. (female), which says in part:

> When I have my but [sic] up in the air reaching for something and I have been hit for no reason twice with [a] stick once with [a] hand and last night before he hit me with his hand I caught him first a[nd] said don't hit me what's the reason. he [sic] said boy you are lucky I couldn't resist.

Read together, the three statements do not seem to accurately describe the same or similar incidents. In addition, M.H. (female) is reported to have had the following conversation with Robert Danneker on July 23, 1982:

> Danneker. Have you ever wrestled with Bernie?
>
> M.H.: He likes to tickle us and stuff like this.
>
> Danneker: When he hugs you is it from behind or from the front?
>
> M.H.: Front. It's mostly when I'm feeling down.
>
> Danneker: Is he sexual towards you?
>
> M.H.: No. He told us he'd never do anything like that. If he wanted to bad enough he has a wife.

When asked if the incident she described in her July 15, 1982 statement included any sexual connotation, M.H. (female) told me on December 30, 1982, "not even, Bernie's not that way." Marlyn Olson, told me on January 4, 1983, that when he took the first written statement from M.H. (female) that although there appeared to be physical contact between M.H. and Bernie Holland, it was probably not of a sexual nature. Finally, Robert Danneker told me on January 10, 1983, that, "There's no sexual connotation in there. I am just saying it's inappropriate behavior." Mr. Danneker also said this allegation did not concern any illegal activities.

From the information provided by D.H., M.H. (female), Marlyn Olson, and Robert Danneker, investigation of allegation 13 should have been terminated after preliminary inquiries by DFYS.

Presentation of the allegations to the Hollands:

The NOTIFICATION OF COMPLAINT was given to the Hollands on July 23, 1982, during a home visit by Robert Danneker, and Carolyn Tuovinen, a Community Care Licensing Supervisor. Both Bernie and Mary Holland have

stated to me that Mr. Danneker and Ms. Tuovinen were pushy and rude during the meeting. As an example of this, Mary Holland recalled that "they pushed themselves through the front door." Another example given by the Hollands, was that Mr. Danneker told Bernie Holland, "hey asshole, just answer the allegations." In addition, the Hollands stated that Mr. Danneker and Ms. Tuovinen threatened to remove the foster children if the Hollands refused to answer the allegations.

Both Mr. Danneker and Ms. Tuovinen denied; that they were pushy, that Mr. Danneker used the language described above, and that they threatened to remove the children if the allegations were not answered. However, Ms. Tuovinen did admit there may have been a discussion about removing foster children, but this was not a threat.

Before leaving the Holland home, Ms. Tuovinen and Mr. Danneker examined the sleeping quarters for the foster children. He told the Hollands that children could not sleep in the basement bedroom if it did not have had an adequate fire escape. As reported in DFYS notes, Ms. Tuovinen and Mr. Danneker also told the Hollands DFYS would be in touch. Ms. Tuovinen told me that DFYS hoped to be in touch the same day as the visit (July 23, 1982).

Later that night, at approximately 10:30 p.m. a call was placed by DFYS to the Hollands to tell them that DFYS would be in touch the next day (July 24, 1982) regarding the allegations, and to inquire if the foster children sleeping in the basement bedroom had been moved to an bedroom with an adequate fire escape. Bernie Holland believes this telephone call was a form of harassment, especially considering the time the call was placed.

The following morning (July 24, 1982), Mr. Danneker visited the Holland home to deliver a letter (detailing three of the thirteen allegations, and having the NOTIFICATION OF COMPLAINT and foster care administrative regulations attached) signed by Ms. Tuovinen and Mr. Danneker and dated July 23, 1982. Mr. Holland claims that Mr. Danneker told him, "I've got my ass covered, so I'm not sweating it." Danneker admitted to me on January 10, 1983, that during this visit of July 24, 1982, he did say that to Bernie Holland.

Refusal to respond to the allegations:

In a letter dated July 24, 1982, Mr. Holland advised Mr. Danneker that the foster children formerly in the basement bedroom, had been assigned to an upstairs bedroom. Mr. Holland refused to answer the allegations, and encouraged DFYS to investigate the allegations. Mr. Danneker responded to the above correspondence by stating in a letter dated July 27, 1982:

> By not responding you have interfered with the Division's authority to supervise and enforce standards as allowed by Alaska Statutes 47.35.010, (1) (2) (3) in regard to facilities. Also, by not replying, the Division may be forced to make a

> determination of the allegations based soley [sic] on the information gathered by the Division without having your input. If this becomes necessary, it will be done.
>
> I am again requesting that a reply to the allegations be submitted. You and your wife, and/or your legal counsel, are requested to reply within ten (10) days of the date of this letter. I look forward to hearing from you.

A person violating any of the statutes or regulations regarding foster care "is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $200". AS 47.35.070. In light of the criminal penalty, the reluctance of the Hollands to further discuss the 13 allegations appears understandable. Although DFYS presented the 13 allegations as a licensing issue, any information gathered by DFYS through discussions with foster children and or the Hollands could nevertheless provide the basis for a criminal prosecution.

I briefly reviewed the legal basis for a person suspected of violating a licensing law, to refuse to answer questions during the investigation for fear of self-incrimination. A discussion of this issue is found in State of Alaska, Department of Revenue v. Oliver, 636 P.2d 1156(1981), and several other cases. This review leads me to believe there is no clear answer to the question of when a person may invoke the right against self-incrimination during an investigation, particularly when the investigation initially appears to be non-criminal in nature. As to DFYS saying that refusing to answer allegations is interference of an investigation -- such a belief does not appear to be well founded.

Investigation of allegations completed:

On August 17, 1982, Danneker completed his report on the investigation of the 13 allegations. Danneker found that allegations 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, and 13, are valid. He also found that allegation 3 was not substantiated by the evidence and allegation 10 was valid upon inspection, but had since been resolved.

The report included three problems noted during a standard-by-standard inspection of the Holland home during August, 1982. In closing his report Danneker states:

> EVALUATION AND RECOMMENDATION
>
> All of the above allegations are of a serious nature. Since they were found valid through investigation of the available information, they require immediate correction for the foster home to remain in operation. A serious matter is the Holland's refusal to respond to the allegations. Refusal to respond, either from the Hollands or their legal counsel, has not only interfered with the Division's

> authority to supervise and enforce standards for foster care allowed by statute, but also has demonstrated a lack of responsibility on the part of the Hollands and placed those children entrusted to their care at an unacceptable risk level.
>
> The Hollands have repeatedly violated the foster home regulations and have made no attempt to correct some of the violations, or if they have corrected them have failed to inform the Division. Foster parents who are seriously concerned about the welfare of children would normally be willing to cooperate with the Division to resolve any problems of [sic] misunderstandings that may arise. The Hollands have demonstrated a total lack of co-operation with the Division in dealing with the allegations.
>
> It is therefore recommended that the foster home license for Bernie and Mary Holland be revoked.

Though the report determined that "The Hollands have repeatedly violated the foster home regulations...", identification or explanation of these previous violations was not given in the report.

In a letter dated September 27, 1982, Lew Reece, Regional Administrator, DFYS, told the Hollands that the investigation of the 13 allegations had been completed, and, with the exception to allegation 10, the Hollands had failed to respond to the allegations. The letter notes allegations 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, and 13 are valid. Mr. Reece also said that allegation 3 was not supported by the evidence, and that allegation 10 although true at the time of inspection(July 23, 1982), is now not valid since the foster children have been moved. Mr. Reece closes the letter by telling the Hollands:

> Given the pattern of violations, and your refusal to respond or to formulate a corrective action plan, the Division is referring your case to the Department of Law for consideration of license modification, license suspension, or revocation. You will be informed of the Department of Law's recommendation to this Department.

Related incident:

Mr. Holland also alleges that the DFYS was harassing him by asking the Troopers to investigate an incident involving him and another foster parent. Mr. Holland believes he was the focus of this investigation, and that the investigation centered on Mr. Holland's alleged obstruction of an investigation conducted by DFYS. The relevant facts on this matter are that Mr. Reece, via a memorandum dated December 10, 1982 to 1st Sgt. John Murphy, requested the Troopers investigate how information (concerning another DFYS investigation) from Reece's office was transmitted to Bernie Holland. Mr. Reece was concerned that a state employee was illegally leaking confidential information.

On December 28, 1982, the Troopers concluded that, "...investigation indicated the information regarding the investigation was passed from #6, M.H. (female), to #4, Holland, who called C. and advised him he was being investigated."

M.H. (female) was the source of the information DFYS was investigating in the other matter. Therefore, one person not a state employee (M.H.) gave the information to another person who was not a state employee (Bernie Holland). Because of this, the final report indicates there was no "leak" from the offices of DFYS. Also, the focus of the investigation was not Holland, rather, it was to determine if there was a state employee leaking confidential information. This has been confirmed by 1st Sgt. Murphy.

FINDING:

As to the allegations that the Division of Family and Youth Services failed to conduct an investigation properly, and is harassing the Hollands, the following problems are noted:

1. The referenced regulations in allegation 4 (7 AAC 50.430(b),(d)) do not appear to directly relate to the issue of providing day care services in a home licensed for foster care. Therefore this allegation lacks sufficient legal basis and should not have been investigated;

2. Allegation 6 indicates that 7 AAC 50.420 is the applicable regulation regarding destroyed, lost or broken personal possessions of foster children. However, the regulation only addresses the ability of the foster child to bring possessions into the home, not what happens to these possessions after arrival in the foster home. The allegation does not appear to have sufficient legal basis;

3. At best allegation 7 appears to restate the essence of allegation 1 and therefore is redundant, and the second regulation cited, 7 AAC 50.450(5) bears no known relationship to any portion of the allegation;

4. The Division used the word "boarders" in allegation 8, yet the cited regulation does not prevent boarders from living in a home that is licensed for foster care. Rather, the Division seems to be concerned that the Hollands failed to report "any significant changes in the household". The DFYS should have identified any impairment in the care of foster children resulting from additional adults at the Holland home. This allegation lacks sufficient specificity, and should not have been investigated;

5. Regulation 7 AAC 50.410(a), as cited in allegation 9 (that "adult boarders participate in the family meetings and trials and are allowed to vote on foster childrens [sic] punishment") is not directly related to the allegation. The regulation regarding discipline, 7 AAC

50.450, describes the applicable discipline standards, which should have been used to measure conduct against;

6. The Division used the word "boarder" in allegation 10, yet the regulation only talks about fire safety, and does not mention boarders. Therefore, one has to question the reason for using the word, and the allegation is poorly stated;

7. Based upon the information available to the Division as of July 23, 1982, investigation of allegation 13 should have been terminated after preliminary inquiries and the Hollands so notified in the letter given them on July 24, 1982;

8. Robert Danneker used vulgar language when transmitting a letter to Bernie Holland on July 24, 1982.

Of the above noted problems, numbers 1, 2, 3, 4, 5, and 7, appear to constitute harassment of the Hollands.

The secondary allegation, relating to the later investigation undertaken by the Alaska State Troopers initiated by Lew Reece is not supported.

J82-1136

Bernie Holland filed a complaint with this office on November 18, 1982, alleging that an official of the DFYS improperly ordered employees not to place children in the Holland home for foster care purposes. In a letter from Lew Reece, Regional Administrator, to Mr. Holland dated December 1, 1982, Reece said:

. . .

> On August 25, a certified letter of license non-compliance was sent to you and again you failed to contact us. On September 27, 1982, the investigation was concluded and a copy of the findings was sent to you and the Attorney General's office for further action.
>
> It was only after the investigation was concluded and you had been given approximately 2 months to respond to the Division that I instructed the Juneau District Office to suspend juvenile placements until the alleged licensing violations in your foster home had been resolved.
>
> I would be more than happy to meet with you at your convenience, with our licensing specialist, to assist you in developing a corrective action plan for your foster home. Without this meeting I cannot recind [sic] the instructions I have given the Juneau District Office not to place children in your foster home. [Emphasis added]

At the time of this letter, Holland held a valid foster care license which had not been suspended, modified, denied or revoked.

There is no known regulation which permits the state to "suspend juvenile placements" when "alleged licensing violations" in a foster home holding a valid foster license (which has not been suspended, modified, denied or revoked) have not been resolved to the satisfaction of the Division of Family and Youth Services. State law provides that a foster license may be revoked or modified "if it [the Division] determines that a facility is not in compliance with AS 47.35.010 - 47.35.080 or the regulations adopted under AS 47.35.010 - 47.35.080." AS 47.-35.040(b).

On September 27, 1982, the Hollands were told in a letter from Mr. Reece that several of the allegations were found to be true, yet their license was not modified or revoked at that time. The agency determined the Hollands failed to meet several of the regulations found in 7 AAC 50.310 - 7 AAC 50.620, and because of this the Holland license should have been revoked at that time (see 7 AAC 50.390(a)).

> 7 AAC 50.390. DENIAL OR REVOCATION.
>
> (a) If the division finds that a foster home does not comply with the provisions of 7 AAC 50.310 - 7 AAC 50.620, or the specific terms of a license which has been issued, it shall deny or revoke the license. [Emphasis added]

In addition to 7 AAC 50.390(a), a statutory provision states the following:

> AS 47.35.040. LICENSING.
>
> (e) The department shall give written notice of revocation or modification under (b) of this section 30 days before the effective date of the action. However, if the health or well-being of children or dependent adults is in jeopardy, the revocation or modification action is effective immediately upon the issuance of written notice by the department.

This complaint presents the unusual situation in which the agency has determined the Hollands do not comply with the regulations for foster homes, then their foster home license should have been revoked (per 7 AAC 50.390(a)) and they should have been given 30 days notice of the effective date of the revocation of their license (per AS 47.-35.040(e)). None of this was done. If the Holland's license had been revoked, the agency would not have been able to place children there (See AS 47.35.020).

On this subject, Mr. Reece in a letter to this office, dated January 10, 1983, notes the following regulation:

7 AAC 50.360. SCOPE OF LICENSING.

> The licensing of a foster home by the division does not create an obligation for the state or any child placement agency to support the foster home financially, nor obligate the state or any child placement agency to place or maintain any child in the home. The issuance of a license means only that the home, the family, the physical environment, and services have been evaluated and determined to meet required standards.

Mr. Reece said in the letter:

> Respondents, Bernie and Mary Holland, refused, on numerous ocassions [sic], to respond to the allegations against them, made it difficult, if not impossible, for the development of ongoing professional relationships between the Division and the licensed home, a prerequisite to determine compliance with State law.

FINDING:

Based upon the available evidence, the Division of Family and Youth Services acted without the benefit of clear legal authority when it suspended placement of foster children in the Holland home. For reasons discussed in the report of a later complaint, the agency apparently should have acted to revoke the Holland license, a procedure that would have prevented placement of foster children in the Holland home.

Still, the regulation cited above entails no obligation on the part of the Division to place foster children in an approved home. Placement is discretionary with division personnel. Though the division appears to have been in error in basing its decision on the events preceding Mr. Reece's September 27 letter, the decision to direct no further placements in the Holland home until licensing violations were corrected was one that the division could properly make.

J82-1188

A complaint was filed with this office on December 12, 1982, alleging that the Division of Family and Youth Services erred in either determining the Holland foster home was not safe, or in leaving foster children in their unsafe home. This complaint concerns the Hollands' foster home license.

Since the DFYS did not immediately revoke or modify the foster home license as provided by AS 47.35.040(e), when the health or well-being of the children is in jeopardy, division personnel apparently concluded that the violations found during its investigation were not serious. The notice to the Hollands that they were not in compliance was given on September 27, 1982. The Hollands had 14 days to correct the compliance problems (7 AAC 50.370(2)). If at the end of the period corrective

action had not been taken, any foster child would be removed from the foster home.

As of October 28, 1982, the Hollands had not corrected problems identified in the letter to them dated September 27, 1982. In the case at hand, K.S., a foster child, remained at the Holland home until October 28, 1982, which is approximately two weeks beyond the time allowed for either satisfactory corrective action(s), or removal from the home.

FINDING:

Based upon the available evidence, the Division of Family and Youth Services incorrectly left K.S. in the Holland foster home more than 14 days after the agency determined the home failed to meet the applicable standards.

J82-0728

Ombudsman Complaint J82-0728 was filed with this office on August 11, 1982. The complainant, Jan Still, alleged that DFYS wrongfully took a statement from his 14-year-old daughter concerning allegations involving the foster home where she was living. Mr. Still also alleged that his daughter was not able to have an attorney, nor her parents present, during the interview by the DFYS and that the agency refused to give a copy of the statement to him.

The child at the center of this complaint provided a statement during the later part of July, 1982, to the DFYS concerning the investigation of the Holland foster home license by the DFYS. At that time she was under the custody of the DFYS. The child admitted to this office the statement was given voluntarily to the DFYS, and that she was not coerced. She also said that at the time of the interview she did not request either her parents or an attorney be present. Since the subject of the interview was the foster home where she lived and not possible illegal activities on her part, there was no apparent reason for her to have an attorney or her parents present while being interviewed.

Based upon conversations with Linda Scoccia, Assistant Attorney General, Department of Law, and staff at the DFYS, it appears that the child was initially refused access to the written statement given to DFYS. Only after a subsequent consultation with Ms. Scoccia was the statement released. The child refused to give her parents access to the statement at the time she received it from DFYS. Ms. Scoccia also advised that the statement should not be released to Mr. Still because the statement is considered confidential in nature. When I asked Ms. Scoccia if the statement could be released at the time the parents regained full custody of the child, she said no.

The child in this complaint was considered a "child in need of aid" at the time of the request for the statement. The rights of the parents of a child in need of aid are stated under AS 47.10.084(c):

> When there has been a transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation, consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 09.65.100, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section.

From this statute, it seems the parents may not have had the legal right to examine statements provided by a child when the child is in state custody. I checked with Lt. Roger McCoy, Alaska State Troopers, and inquired as to their procedures in this type of case. Lt. McCoy told me that the Troopers will give a child a copy of a statement taken by the Troopers, as well as to the legal custodian of the child. Also, if the parents of a child do not have custody of the child, a copy of the statement will not be given the parents until they regain legal custody.

The anxiety of the father in not being able to examine the statement provided by his daughter is described in his letter to this office, dated October 4, 1982:

. . .

> On about August 10th (9-11) I questioned Mr. Danniker [sic] (social worker) who stated that he had obtained the statement from [Still's daughter] and that I could have a copy. I arrived at Mr. Dannikers [sic] office about 10 minutes after talking to him on the phone and was ushered into an office by Mr. Danniker [sic] and Mr. Reese [sic], his supervisor. Mr. Danniker [sic], who seemed excited, then informed me that he had signed statements from 6 children concerning mental, physical and sexual abuse and that he had told [Still's daughter] that she could move out of the Holland foster home anytime she wanted to. Mr. Danniker [sic] also mentioned an after hours meeting at H&SS with [Still's daughter]. He reported that she was visibly shaking as the result of questioning and pressure from Mr. Holland.

. . .

FINDING:

Based upon the available evidence, the Division of Family and Youth Services did not wrongfully take a statement from a child while investigating allegations of violations of foster home laws. The child in question did not request to have either an attorney or her parents present when giving the statement, and the investigation was not directed at any possible illegal activities of the child. The agency did refuse to give a copy of the statement to Jan Still, and apparently did so properly. (However, the agency could have handled the request in a more sensitive manner, and if the allegations were in fact serious, the child should have been removed from the foster home immediately, and or the license should have been revoked or modified. (See 7 AAC 50.370 and AS 47.35.040(e)). Also, based upon the procedures of the Troopers, the agency could have given a copy of the statement to Still when legal custody of the child was regained.)

RECOMMENDATIONS:

By way of immediate personal remedy to the complainants in J82-0689, I recommend:

Recommendation 1. The Division of Family and Youth Services should prepare and send a written apology to the Hollands concerning the harassment aspects to these complaints, and the foul language used by Mr. Danneker.

The following recommendations should be made to the Division of Family and Youth Services to prevent recurrence of the problems found during the investigation of these complaints:

Recommendation 2. The Division should state as clearly as possible any allegation regarding a foster home. The allegation should have sufficient basis to be stated, and be directly related to a standard established by statute and/or regulation.

Recommendation 3. The Division should refrain from demanding that a foster home secure a day care license unless and until it is clear that the law so requires.

Recommendation 4. The Division should notify the subject of an investigation, at the earliest opportunity, when investigation of an allegation has terminated because the allegation lacks sufficient legal basis or proof, or is shown to be false.

Recommendation 5. In its revision of its office manual, the Division should examine, with the Department of Law, the issue of self-incrimination by a licensee in the course of a licensing investigation, and prepare and include discussion of this issue in the policy and procedures manual.

Recommendation 6. The Division, with the assistance of the Department of Law, should revise the applicable portions of the policy manual and Alaska Administrative Code to guarantee to persons providing statements to the DFYS a copy of that statement upon request.

Recommendation 7. The Division, with the assistance of the Department of Law, ought to examine the legal basis for denying information retained in DFYS files to the parents and legal custodians of children receiving services from the DFYS. A definitive policy on this matter appears to be in order. The policy adopted ought to be included in the policy manual and Alaska Administrative Code.

Recommendation 8. Division personnel should strive to handle matters as identified in Ombudsman Complaint J82-0728 in a sensitive manner. The Division may wish to consider sending a letter of apology to Mr. Still.

Recommendation 9. The Division should review current policy regarding employee discipline and should; if warranted, consider appropriate disciplinary measures for the employee(s) involved with the harassment matters and the use of vulgar language by one employee.

BA:mm
Attachment

STATE OF ALASKA

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF FAMILY AND YOUTH SERVICES

In the Matter of the Application for Licensure as a Residential Child Care Facility by B.G. HOLLAND Respondent.	License No. 235005 (Denied)

RECOMMENDED DECISION

This proceeding involves the issue of whether the Department of Health and Social Services, Division of Family and Youth Services (DHSS) acted properly in denying respondent Bernie G. Holland's application for a license to operate a residential child care facility in Juneau. The proceeding was initiated by the filing of a statement of issues by DHSS on June 15, 1982. On June 25, 1982, respondent submitted his notice of defense, and on August 9, 1982, DHSS filed an amended statement of issues. The hearing briefs were filed and evidence was taken during a hearing held between October 4th and October 7, 1982. At the conclusion of the hearing, respondent presented an oral closing argument and DHSS, by its attorney, and with the approval of the hearing officer and respondent, submitted a written closing argument.

I. FACTS

While there is disagreement among the parties as to the inferences to be drawn from the facts, there appears to be little disagreement as to most of the primary facts. In September of 1981, Mr. Holland submitted an application for a license for a "foster family group home," to be known as "Holland House." Document 66. On November 19, 1981, respondent was notified by Alinio Lobo, licensing specialist at the Southeast Regional Office (SERO) in Juneau, that the office was looking forward to respondent's submission of an "improved final version of the proposal." Document 16.

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On January 12, 1982, respondent submitted to the SERO Office of DHSS at least two copies of a document entitled "Family Group Home Proposal." Document 403. That document was intended by respondent to be the expanded program description requested by SERO in the letter of November 19, 1981. For some inadequately explained reason, SERO had numerous problems handling the document. The testimony indicated that some of the recipients of the document at SERO thought it was merely a proposal for a program being considered by respondent that was unrelated to the September 30, 1981 application for a license. Consequently, at least one of the copies of the proposal was passed on to the Central Office for informational purposes only. At least one other copy of the proposal was retained in respondent's license application file at SERO. At some time between its submission on January 12, 1982 and June 8, 1982, the proposal disappeared from respondent's application file. Testimony indicated that this disappearance was merely an accident in that the document fell out of respondent's file and into the back of a drawer in a desk at SERO.

In April of 1982, Alinio Lobo, the licensing specialist responsible for reviewing respondent's license application, began a series of on-site visits to the proposed facility. These visits were in furtherance of the completion of a standard by standard evaluation of the proposed facility, the satisfactory completion of which was necessary prior to issuance of a license by DHSS.

On May 20, 1982, new regulations for residential child care facilities in Alaska became effective. This was prior to completion of the standard by standard evaluation by Mr. Lobo. On June 4, 1982, Ms. Kay Smith, supervisor of the Southeast Regional Office, reviewed the Facility Information Summary (CWS 80) presented to her by Mr. Lobo. Document 22. That CWS 80 recommended that respondent be issued a provisional license for the facility applied for, with the license to run from June 15, 1982 to December 15, 1982. On the same date that she reviewed it, Ms. Smith signed off on the document. According to the language next to her signature block, her signature confirmed that she had reviewed the study and that she concurred that "the facility meets specified requirements." According to the testimony

of Ms. Smith and Ms. Connie Hansen of the SERO Office, Ms. Smith left town that same day and instructed Ms. Hansen to sign the program evaluation and licensing recommendation for her as soon as the document was typed. On June 8, 1982, Ms. Hansen in fact did sign the typed version of the program evaluation and licensing recommendation. Document 41. In that document, Mr. Lobo recommended that the application submitted by respondent in September of 1981 be approved and a license issued. By the signature of the Acting Regional Manager, Ms. Hansen, SERO concurred with Mr. Lobo's recommended approval. However, Ms. Smith testified that she actually never read any of the back-up documents supporting the licensing recommendation. Further, Ms. Hansen testified that she also did not read any of the back-up documentation and merely signed the document recommending licensure because Ms. Smith had instructed her to do so.

According to the testimony of Mr. Pugh, the licensing for Holland House came to his attention on June 8, 1982 when Ms. Yvonne Walker informed him that she had received a monthly report from Ms. Smith which indicated, among other things, that SERO was in the process of finalizing the license. According to Mr. Pugh, because he wished to be involved in the licensing of any new facilities, he met on the afternoon of June 8th with Yvonne Walker, Pat Monroe, Alinlo Lobo and Connie Hansen to discuss licensing of Holland House. Also according to Mr. Pugh, the licensing file and proposal of Mr. Holland were brought to him prior to that meeting at his request. (There appears to be some confusion as to when Mr. Holland's file actually was brought to Central Office for Ms. Hansen testified the file was brought to Central Office on June 9th.) On that same day, at Mr. Pugh's request, Ms. Monroe and Ms. Walker searched for and located the license which was about to be issued for Holland House, and that license was thereafter held in abeyance pending a complete review of the licensing file by Central Office.

At the June 8th meeting it was discovered that the file did not contain a completed standard by standard evaluation. Mr. Pugh therefore asked Ms. Monroe to review the file and determine whether the facility complied with

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the new regulations for residential child care facilities which became effective on May 20, 1982. Ms. Monroe completed her review and reported back to Mr. Pugh on June 9th. Her conclusion, concurred in by Mr. Pugh, was that the proposed facility was not in compliance with the new regulations and that the license should not be issued until the facility was brought into compliance.

Mr. Holland was called into the Central Office for a meeting on the morning of June 10th, at which time Mr. Pugh and Ms. Monroe informed Mr. Holland that they could not issue a license for Holland House at that point because it was not in compliance with the new regulations. That same day Ms. Monroe informed him that she would be willing to work with him and assist in bringing his facility and application into compliance with the regulations. After a meeting with Ms. Monroe at which she began to explain what Mr. Holland would have to do before DHSS could issue Holland House a license, Mr. Holland indicated he would have to think about it. A few days later he called Ms. Monroe and requested that DHSS grant or deny his application. Central Office complied with that request and the license application for Holland House was denied. By letter of June 15, 1982, Mr. Holland was informed of the denial and presented with a statement of issues setting forth the reasons for the denial.

At some time after Alinio Lobo's return to Juneau on June 14, 1982, there appeared a completed standard by standard evaluation for the Holland House facility. Testimony as to when this document had been completed was contradictory. It was the testimony of Ms. Monroe and Mr. Pugh that the document was not in the file as of June 9, 1982 and that the only standard by standard evaluation in the file at that time was far from complete. They also testified that Mr. Lobo had stated on June 8th that he was still working on the standard by standard evaluation. Mr. Lobo, however, testified that he had completed the standard by standard evaluation and placed it in the file on or before June 8, 1982.

In August of 1982, Mr. Holland and Mr. Botelho met with me to discuss procedures to be followed in bringing this case to a hearing. At that time

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Mr. Botelho indicated that it was the position of DHSS that no complete standard by standard evaluation assessing the facility's compliance with the new residential child care facility regulations had been done for the facility, and that that in itself was sufficient to justify denial of the license application. It having been my view that it made little sense to go through a long and costly hearing in this case only to reach the conclusion that the license could be denied because a standard by standard evaluation had not been done, I recommended to Mr. Holland that he allow DHSS to conduct a new standard by standard evaluation of his facility. Mr. Holland agreed. At Mr. Holland's request, Ms. Laurie Vaughn of the Fairbanks Regional Office of DHSS performed the standard by standard evaluation. Her conclusion was that the facility was not in compliance with the May 20, 1982 residential child care facility regulations and that the license should not be issued. Document 183.

At some time in August, the "proposal" submitted to SERO by Mr. Holland on January 12, 1982, which, inexplicably, had not found its way to Mr. Holland's licensing file, was brought to the attention of DHSS. According to the testimony of Ms. Hansen, she had seen the document sometime prior to May of 1982, but for some unknown reason, had not considered it part of Mr. Holland's application. She became aware sometime during the summer of 1982 that the document was not in Mr. Holland's licensing file, and she ultimately obtained a copy of it by driving out to Mr. Lobo's home. Evidently, the copy so obtained was an extra copy Mr. Lobo had for his personal use for he testified that there were two other copies which he had placed in Mr. Holland's licensing file. Mr. Lobo was certain that he had placed those two copies in the file, clipping one of them into the file and placing the other one loosely in the file. According to the testimony, a couple of days after obtaining the document from Mr. Lobo at his home, another copy was found in the back of a drawer in Ms. Hansen's desk at SERO. The explanation given by Ms. Smith for this occurrence was that Ms. Hansen has a very messy desk and that the document had plastic covers and must have slipped out of the file and into the back of Ms.

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Hansen's desk drawer. According to Ms. Hansen, she had discussed this document with Ms. Smith sometime prior to May of 1982.

Upon discovery of the group home proposal of January 12, 1982, a copy of the document was sent to Ms. Vaughn for her assessment to determine whether the document changed the conclusion she had reached in her standard by standard evaluation. She then assessed the Holland House application in view of the new document. Her conclusion, however, remained that the Holland House did not satisfactorily meet the new residential child care facility regulations and that the license should be denied.

CONCLUSIONS OF LAW

Each of the parties argues that the other bears the burden of proof in this proceeding. Mr. Holland has cited no support for his assertion. The State has cited Fields v. Kodiak City Counsel, 628 P.2d 927 (Alaska 1981); Thornton v. Commissioner of Department of Labor and Industry, 621 P.2d 062 (Montana 1980), and Country Club Home, Inc. v. Harder, 620 P.2d 1140 (Kansas 1980). None of these cases is instructive on the point. In Fields, the court applied the standard rule that one seeking a variance to zoning requirements has the burden of proof, and the ordinance at issue specifically set forth what one seeking a variance was required to show to be successful. In Thornton and Country Club Home, Inc., the courts were reviewing a final order emanating from an administrative hearing, and in each case the court concluded that the order was presumed to be correct and the burden was on the one challenging the order. In the case at bar, we are not dealing with a final order of an agency following a hearing. Instead, we are trying to derive that order.

A case which Mr. Holland might have cited in support of his position is that of Alaska Alcoholic Beverage Control Board v. Malcolm, Inc., 391 P.2nd 441 (Alaska 1964). There, the court concluded that since under the Administrative Procedure Act the party filing a statement of issues is the moving party and the party seeking the issuance or re-newal of a license is the respondent, the party filing the statement of issues bears the burden of

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proof on the issues raised therein.

In my view, none of the above authorities are very helpful. It is my conclusion that in this case, DHSS has the burden of presenting a prima facie case in support of the claims set forth in the statement of issues. Once it has done so, the burden of proof falls upon Mr. Holland to prove by a proponderance of the evidence that the requested license should be issued. See Mezines, Stein & Gruff, 4 Administrative Law, § 24.02 (1982). This approach seems to me to give proper recognition to both the fact that DHSS cannot arbitrarily refuse to issue a license on the one hand, while on the other hand, given the importance of DHSS' licensing function in protecting society, a presumption of some magnitude in favor of the State's licensing decision should apply.

The arguments of Mr. Holland in support of his case appeared to be as follows. First, because of an incident at his home and his subsequent complaint to the Ombudsman, as well as a number of rumors at the SERO Office concerning occurences at Mr. Holland's facility, DHSS intended to deny Mr. Holland's application regardless of whether his proposed facility complied with applicable regulations. In support of this part of his argument, Ms. Borkowski testified that Ms. Smith had stated, upon reviewing the January 12, 1982 proposal, that Mr. Holland would be licensed over her dead body. Furthermore, Ms. Borkowski testified that Ms. Smith had indicated that she was dissatisfied because of Mr. Holland's complaint to the Ombudsman and that he was essentially a troublemaker.

With the foregoing premise established, Mr. Holland proceeded to argue that someone in DHSS had removed the completed standard by standard evaluation performed by Mr. Lobo and the January 12, 1982 Group Home Proposal from his licensing file for the purpose of assuring that the application would be denied. In response to the fact that DHSS' denial of the license was maintained even after review of those two documents, Mr. Holland argued that the deficiencies which remained in his application were rather minor, DHSS had the authority to waive adherence to those provisions with which Mr. Holland had not complied, and DHSS had exercised that

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discretion in approving the applications of certain other facilities. In Mr. Holland's view, DHSS should have issued him a provisional license for his new facility allowing him a reasonable amount of time within which to bring his facility into compliance with those portions of the new residential child care facility regulations with which he had not yet complied.

The position of DHSS was that, notwithstanding all that occurred prior to August of 1982, once all of the proper documents were in Mr. Holland's file and a standard by standard evaluation was performed, his facility was found not to be in compliance with the new residential child care facility regulations, and therefore the denial of the license application was proper. While provisional licenses have been issued in the past, DHSS' position is that given recent amendments to AS 47.35.055, a provisional license is only appropriate for on-going facilities, not for new facilities, the difference being that denial of a license to an existing facility would cause great hardship for the residents of that facility because it would require closing the facility, while any delay in starting a new facility would not have such an affect. According to DHSS, a waiver of regulation requirements could only be given in certain cases, and then only if an applicant applied in writing for a waiver. In those cases in which field workers addressing other facilities exercised discretion and did not require that certain documents called for in the regulations be submitted with a facility's application the field workers were not complying with the policies of DHSS. I find the argument of DHSS to be persuasive.

No person may operate a residential facility without first obtaining a license to do so from DHSS. AS 47.35.020; 7 AAC 50.003. To obtain a license for a new residential child care facility, an applicant must satisfy the requirements of 7 AAC 50.001 - 7 AAC 50.073. AS 47.35.040. A facility in operation at the time new regulations are passed may continue in operation despite not being in compliance with some of the new regulations if it submits an acceptable plan of correction for those items of the regulations with which it is not in compliance. A new facility may not begin operation until it has satisfied all of the applicable regulations. 7 AAC 50.05(a)(2).

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DHSS is required to issue a provisional license to a new facility "if the facility submits to the Department an acceptable plan for operation that is in conformity with" applicable statutes and regulations. AS 47.35.055(a); 7 AAC 50.013. Under that statute and regulation, a new facility which does not meet all of the regulatory requirements is not entitled to a provisional license. While under 7 AAC 50.023 DHSS possesses the authority to waive certain of the regulatory requirements under certain conditions, an applicant desiring a waiver must make application therefor to DHSS in writing.

The facility for which Mr. Holland is seeking a license is a new facility, and he is therefore required to satisfy all of the regulations applicable to residential child care facilities. He is not entitled to a provisional license while he is bringing his facility into compliance with the regulations. He is also not entitled to a waiver of any of the regulations for he did not apply to DHSS in writing for any such waivers.

A number of witnessess testified that one reason for denying Mr. Holland's license application was that DHSS did not recognize a category of provider called a foster family group home. This reason for denial, however, was not included in the amended statement of issues in support of denial of the license. Furthermore, it appears that DHSS construed the application of Mr. Holland to be for a residential child care facility and evaluated the facility using residential child care facility regulations. For these reasons, this recommended decision will not address the question of whether the absence of a category of care provider specifically matching the title set forth in Mr. Holland's application would, in itself, justify denial of his application.

Turning to the reasons for denial set forth in the first amended statement of issues, DHSS has met its burden of making a prima facie showing that the inadequacies set forth therein did in fact exist. Mr. Holland put on no evidence to the contrary. He also failed to present evidence showing that a provisional license had been provided for any other new residential child care facility in Alaska which had failed to satisfy those regulations set forth in the first amended statement of issues. Furthermore,

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he failed to put on any evidence tending to show that any other new residential child care facility in Alaska had obtained a waiver of any regulatory requirements without submitting a written waiver request. Consequently, Mr. Holland failed to prove that the denial of his license was arbitrary or capricious, or that he was treated differently than other applicants in a similar situation.

While Mr. Holland may consider some or all of the deficiencies in his application identified by DHSS to be of minor significance, I do not intend to pass judgment on either the wisdom or importance of the regulations he failed to satisfy. DHSS is clearly authorized by law to set forth by regulation standards with which care providers in this state must comply and Mr. Holland has not challenged that authority. Mr. Holland having failed to satisfy those standards, I recommend that the denial of his application be upheld. DHSS, at least as of June 10, 1982, appeared willing to assist Mr. Holland in bringing his facility into compliance with the regulations. Mr. Holland chose not to follow this route, and instead demanded that DHSS take action on his license, notwithstanding that it certainly should have been clear to Mr. Holland that the only action DHSS could take at the time was to deny his license.

Though I recommend that the license denial be upheld, something must be said of DHSS' very poor handling of Mr. Holland's application. Were the results not so costly to the State in time and money, and to Mr. Holland both in time and emotional distress, one could refer to the handling of his application as a comedy of errors. The application was submitted by Mr. Holland in September of 1981 and yet no decision was made on the license until June of 1982. Furthermore, the amended version of his group home proposal which SERO had specifically requested in November of 1981, upon receipt by SERO, was not even recognized as being related to his application, notwithstanding the fact that the document bore the exact same title and appearance as did the plan attached to his original application. SERO then evidently lost the document. When SERO finally got around to considering Mr. Holland's application, the Regional Director recommended

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that it be approved, without even reviewing any of the documentation in support of the license. The Acting Regional Director then signed the approval recommendation, also without reviewing any back-up documentation. As it turns out, the kind of facility for which Mr. Holland was applying, and for which SERO recommended licensure, did not even exist in DHSS regulations.

Mr. Holland assigns sinister purposes to all of these events and interprets them in some manner to be a conspiracy against issuance of his license. I do not agree with that conclusion. While Mr. Holland argued that SERO was dead set against issuing him a license, it was in fact SERO which recommended issuance of the license. It appears that all of the events to which Mr. Holland pointed as evidence of a sinister conspiracy were evidence of nothing more than a very poor performance by the employees at SERO. Had the license application been properly handled, it is doubtful this matter would have ever gone to a hearing, and a care provider who has provided high quality services for the State in the past would not be so disillusioned with continuing to serve the State in the future. It would seem to be most beneficial for the State to make every reasonable effort to assist quality care providers in continuing to provide services on behalf of the State. Sadly, no such effort appears to have been made in this case until it was too late.

DATED this 3rd day of December, 1982.

Richard M. Burnham
Hearing Officer

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HB

593

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 593
Title: Fines imposed in Criminal Cases
Sponsor: Liska, Barnes, Bussell
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Alaska Court System
Program Category Affected: Administration of Justice
BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard Barrier
Phone: 264-0545
Division: Alaska Court System
Date: 2/21/84

Approved by Commissioner:
Date: 2/21/84
Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

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Vice Chairman — Judiciary
Vice Chairman — Legislative Regulations Review
Resources
Finance Sub Committee on Labor

Alaska State Legislature

House of Representatives

John J. Liska

While in Session
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Home - District 15
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February 22, 1984

M E M O R A N D U M

TO: Judiciary Committee

FROM: Representative John J. Liska

REFERENCE: HB 593, "An Act relating to fines imposed in criminal cases"

A. Copy of HB 593

B. Reference Section 2 of HB 593.
We felt it essential to the bill to include this section. President has been set in many places in Alaska Statutes where there are direction or instructions as to the use of funds, even though we can not designate what the funds shall be used for. Reference is made to Sec. 16.05.130 attached.

C. Program Review of other States.
Showing -

1. Funding Source
2. Total Revenues
3. Specific Provisions
4. Experienced insufficient funds
5. Changes in Costs and Funding

D. Letter of support from Violent Crimes Compensation Board.

JJL/tm

Sec. 16.05.120. Disbursement of funds. Upon authorization of the commissioner, disbursements from the fish and game fund shall be paid by the proper state officer on presentation of vouchers signed by the commissioner or an authorized representative, and approved by the proper state officer. (§ 17 art I ch 94 SLA 1959)

Sec. 16.05.130. Diversion of funds prohibited. Funds accruing to the state from sport fishing, hunting, and trapping licenses or permit fees may not be diverted to a purpose other than the protection, propagation, investigation, and restoration of sport fish and game resources and the expenses of administering of the sport fish and game divisions of the department. (§ 18 art I ch 94 SLA 1959; am § 2 ch 41 SLA 1979)

Effect of amendments. — The 1979 amendment substituted "sport fishing, hunting, and trapping licenses" for "sport fishing and hunting licenses."

Opinions of attorney general. — The primary, if not the sole, purpose of this section is to make possible the procurement of federal matching money. A provision for nondiversion of funds is a condition precedent to obtaining federal assistance under 16 U.S.C. §§ 669, 777. 1959 Op. Att'y Gen., No. 10.

A temporary use of money in the fish and game fund under particular circumstances, wherein repayment is to be made pursuant to a contract with the federal government, is not a diversion within the meaning of this section. 1959 Op. Att'y Gen., No. 10.

Sec. 16.05.140. Assent to provisions of federal aid acts. The state assents to the Federal Aid to Wildlife Restoration Act of September 2, 1937 (16 USC, 669-669j), to the Federal Aid in Fish Restoration Act of August 9, 1950 (16 USC, 777-777k), to any amendment, revision or modification of either act, and to any other federal aid act which may be enacted to benefit the state. It is desired that the department participate in the federal aid programs on the same basis as other states. (§ 20 art I ch 94 SLA 1959)

Sec. 16.05.150. Enforcement authority. The following persons are peace officers of the state and they shall enforce this chapter:

(1) an employee of the department authorized by the commissioner;

(2) a police officer in the state;

(3) any other person authorized by the commissioner. (§ 21 art I ch 94 SLA 1959)

Opinions of attorney general. — Where the military does not assign sufficient personnel to enforce fish and game laws on military reservations, state game officials as well might enforce them, possibly by deputizing state game officials as federal marshals, since 10 U.S.C. 2671(c) makes violation of state fish and game laws a federal offense. 1964 Op. Att'y Gen., No. 2.

Since state fish and game laws operate on a federal military reservation, not only as federal law but also as state law, both the federal and state officers may enforce these laws. 1964 Op. Att'y Gen., No. 2.

State officers should have full access to military reservations in Alaska, subject to safety and military security requirements, to enforce laws and manage and harvest fish and game resources. 1964 Op. Att'y Gen., No. 2.

There is no provision in the Alaska Statutes or the Alaska Constitution which would operate to deprive the commissioner

PROGRAM REVIEWS

Funding Source	Total Revenues	Specific Provisions	Experienced Insufficient Funds	Changes in Costs & Funding
ALASKA				
•General Revenues	$ 339,300[1]	None	Yes	•Because of increasing medical costs, inflation and more claims, benefits are increasing but admin. costs are remaining stable.
CALIFORNIA				
•Penalty Assessment	17,075,379	•All felonies and most misdemeanors are assessed a $4 penalty for every $10 fine; 24.38% of these monies go to the victim compensation; the balance goes to victim witness and rape crisis centers	Yes	•This is the first year that the program received no general fund support and was funded solely from fines & penalties. •$2,620,860 worth of claims were carried over from previous year, leaving $10,149,281 for payment of claims in '81-82. Additional spending authority granted to cover $2.5 million shortfall this year.
CONNECTICUT				
•Fines	1,100,000	Fines are assessed as follows: •$15 on all motor vehicle and DUI offenses & misdemeanors •$10 on all felony convictions	No	•Bill pending to allow program to invest funds in short term interest-bearing accounts (presently remains in general fund with interest reverting to that fund).
DELAWARE				
•Fines & penalties •Forfeitures •Restitution	343,317[2]	[redacted] (including traffic violations)	Yes	•Surcharge increased from 10% in 1982.
FLORIDA				
•Fines & penalties	2,200,000[3]	$10 additional court cost and surcharge on all criminal penalties	No	•Court costs & surcharges now will be assessed on criminal traffic offenses. Program estimates that this will provide 50% more revenue.
HAWAII				
•General Revenues	598,000	None	No	•Asked legislature for a $300,000 revolving fund in 1981 but it did not pass.
ILLINOIS				
•General Revenues •Supplemental Approp.	2,300,000	None	Yes	None

These are 1981 figures or rather Program reviews —

PROGRAM REVIEWS

Funding Source	Total Revenues	Specific Provisions	Experienced Insufficient Funds	Changes in Costs & Funding	
•General Revenues •Fines & penalties	$0,000 (Administration) 900,000 (Benefits)	•$15 on class A misdemeanors & all felonies (no traffic violations) •10% of salaries of prisoners on work release	No	•Indiana has had a rollercoaster history of funding: 1978 Appropriation - $200,000 1979 " $1 1980 " $0 1981 - Changed affiliation $1 •Under new legislation, effective July 1982, the program will be self-supporting without any general appropriation. •Also under the new law, interest on the victim compensation fund will revert to that fund rather than to the general fund as in the past.	INDIANA
•General Revenues	259,452	None	No	•Bill pending to assess a penalty fee of $25 on all felonies & $10 on all misdemeanors to augment revenues from the general fund. The state made a projection as to the amount that would be collected & subtracted that much from the general appropriation so that funding remains stable.	KANSAS
•General Revenues •Fines & penalties	366,000	$10 for all offenses for which imprisonment may be imposed	Yes	Legislation establishing fines effective July 15, 1982.	KENTUCKY
•General Revenues •Court Costs	$2,004,763 (only $318,230 was collected thru court cost)	$10 on all conviction	Yes	None	MARYLAND
•General Revenues	903,987	None	Yes	•Legislation pending to allow for payment of some or all of any fine imposed on a convicted offender to the victim of that crime. •Bill also pending to allow for monies collected under Son of Sam provision to revert to the victim compensation fund if no civil action is brought by victim.	MASSACHUSETTS
•General Revenues •Supplemental Approp.	1,900,800	None	Yes	None	MICHIGAN

PROGRAM REVIEWS

Funding Source	Total Revenues	Specific Provisions	Experienced Insufficient Funds	Changes in Costs & Funding	
•General Revenues •Restitution •Refunds •Fines & Penalties	573,089	See "changes"	Yes	•Anticipate that funding will decrease due to state government cutbacks. •Legislature passed surcharge provision stipulating that 10% of a fine (or $40, whichever is greater) on every misdemeanor, gross misdemeanor & felony conviction should be collected & divided up among victim services. An additional $5 is assessed for traffic violations. These funds will, however, be used to reimburse the general fund & thus only those monies in excess of the appropriation will go directly to victim compensation. •Program would like to mandate minimum monetary penalties on offenders. •Would also like to see a % of wages earned by prisoners go to victim compensation.	MINNESOTA
•Fines & Penalties •Restitution	$ 370,814	[illegible]-of fines & bail forfeitures assessed by highway patrol on all motor vehicle violations	No	Established new penalty assessment procedure in 1981 - Prior to that date the victim comp. fund received 6% of all fines for moving traffic violations (local cities & towns).	MONTANA
•General Revenues •Supplemental Approp.	115,000	None	Yes	•Program was set up in 1979 with a 3-year test period established before appropriation would be raised, but there has been no problem in getting supplemental appropriations as needed. •However, because of state fiscal crunch governor requested 3% decrease in victim compensation budget last year and will probably affect similar decreases in the future.	NEBRASKA
•Bond Forfeitures •"Son-of-Sam" monies	70,000	•Bond forfeitures on all felony cases •Half the earnings from "Son-of-Sam" provisions	—	None	NEVADA

PROGRAM REVIEWS

Funding Source	Total Revenues	Specific Provisions	Experienced Insufficient Funds	Changes in Costs & Funding
NEW JERSEY				
•General Revenues •Fines & Penalties	$2,300,000 Approx.	•Court costs of $25 assessed on any simple assault or any crime; in cases of injury or death to a victim the judge can impose any fine up to a max. of $10,000. Money comes directly to victim comp. office & is deposited in treasury account.	Yes	•Court costs imposed effective Feb 6, 1980 but because of problems in collecting fines they did not begin to come in until 1981. Program has hired a court monitor to oversee collection of the penalties; so far in 1982, $600,000 has accumulated. •Proposal pending also to assess a fine of $10 on juvenile convictions, as well as $25 on all convictions for disorderly conduct. •Budget increased by $1 million in 1979 (appropriation).
NEW MEXICO				
•General Revenues	$1,800,000	None	—	None
NEW YORK				
•General Revenues	6,800,000[9]	None	—	•Legislation was proposed in 1982 to allow for the proceeds of sale of abandoned property held by law enforcement to be paid into victim compensation fund. •Also proposed in 1982 a more rigorous restitution statute. •Have also proposed minimum mandatory monetary penalties on persons convicted of crimes. •Also proposing that 1/2 of all monies earned by convicted arsoners be used for victim compensation.
NORTH DAKOTA				
•General Revenues	$311,068[10]	None	No	None
OHIO				
•Fines & Penalties •Supplemental Approp.[11]	5,310,189	•Additional court costs of $3 (see "Changes") are assessed on any person who is convicted of or pleads guilty to any offense other than a non-moving traffic violation.	Yes	•Legislation eff. Nov. 15, 1981 provided that court cost be raised to $10 until June 30,1983 at which time it will revert back to $3 unless action is taken to keep it at higher rate. •In 1980 the legislature specified that court costs apply also to juveniles & that defendant out on bail is required to pay.

PROGRAM REVIEWS

Funding Source	Total Revenues	Specific Provisions	Experienced Insufficient Funds	Changes in Costs & Funding	
•General Revenues (Almin) for period 10/14/81 to 6/82 •Fines & Penalties (Collected thru 2/82) •Restitution Fund	$ 50,000 44,022	•Fines & Penalties are to be assessed on pleas & convictions as follows: $5 - misdemeanors (excluding traffic) $25-non-violent felonies $25-$10,000 (judicial discretion) on violent felonies Project that these assessments will bring in $250,000/year •Restitution fund-statute provides that any monies left in the fund over 3 years will revert to victim compensation fund; expecting to receive $30,000 to $35,000/year	—	None	OKLAHOMA
•General revenues •Restitution	1,761,000 ...	•$1,480,000 benefits, 281,000 admin. •Program is running on $45,000/month less than appropriated •Unique restitution statute allows program to recoup costs from third parties, such as drinking establishments, who may be held responsible for the criminal acts of its patrons & must carry liability insurance	—	None	OREGON
Fines & penalties	$1,861,397 (collected) $1,311,000 (budget)	• $10 fine is assessed on any Title 18 criminal conviction. While this $ goes into the general fund from which the victim compensation receives an appropriation the program is really self-supporting through deposition of court costs.	No	• Anticipate that their revenues will increase because the crime rate is going up.	PENNSYLVANIA

PROGRAM REVIEWS

Funding Source	Total Revenues	Specific Provisions	Experienced Insufficient Funds	Changes in Costs & Funding	
Fines & penalties	$970,723	• Court costs are imposed on criminal convictions as follows: 1. $10 on misdemeanors with penalty of less than 1 year incarceration; 2. $30 on felonies w/ penalty up to 5 years; 3. $50 on felonies w/penalty of more than 5 years	No	None	RHODE ISLAND
Fines & penalties	$1,141,631	• Offenders on parole pay $5/month • Court costs: (1) $21 in Circuit Court; (2) $10 Sessions Court	Yes	• 1980 legislature included convictions in Sessions Court (less severe crimes) in court costs levies. • Taxing provision used to be "crimes against person or property"; now reads any criminal conviction except $500 fine and no incarceration (eff. 1981).	TENNESSEE
Fines & penalties	$1,129,520	• Court costs are assessed as follows: 1. $15 on all felony convictions & 2. $10 on all Class A & B misdemeanors (penalties of more than $200 fine or incarceration)	Yes	• Legislature does not meet again until 1983--at that time they will probably pass bill including Class C misdemeanors in levying fines.	TEXAS
General revenues	$125,000	• Benefits only	Yes	• Considering possibility of setting up special rates; no formal action yet.	VIRGIN ISLANDS
Fines & penalties	$450,673[16]	• $15 court cost assessed on individuals convicted of any felony or Class 1 & 2 misdemeanor (not including drunken driving, disorderly conduct, or traffic offenses)	Yes	• Fee raised to $15 from $10 in 1981. • Have go-ahead from legislature to propose that interest from victim comp. fund revert to that special fund rather than general fund.	VIRGINIA

PROGRAM REVIEWS

Funding Source	Total Revenues	Specific Provisions	Experienced Insufficient Funds	Changes in Costs & Funding
• General revenues • Fines & penalties	$2,500,000	• $50 felony or gross misdemeanor convictions • $25 misdemeanor • Includes juveniles • Need not be convicted of victim-involved crime	Yes	• Old legislation provided for $25 fine or 10% of other fine (whichever is greater) to be assessed on victim-involved felony or gross misdemeanor. • New legislation contains monitoring & enforcement provisions. • New legislation is predicated on proposition that program will be self-supporting.
Fines & penalties	$318,000	• $3 court cost imposed on any felony or misdemeanor conviction, including moving traffic violations. • Anticipate that they will be collecting between $30,000 & $40,000/ month.	—	None
General revenues	$1,788,000	• $1,583,000--benefits $205,000--admin.	No	• 1980 passed victim/witness bill of rights adding separate additional appropriation of $572,000 in '81 for v/w services to be administered by victim comp. program.

WASHINGTON

WEST VIRGINIA

WISCONSIN

DEPARTMENT OF PUBLIC SAFETY

VIOLENT CRIMES COMPENSATION BOARD

POSITION PAPER - HB 593

SUPPORT

February 17, 1984

This bill would impose a 20% penalty on any court fine a defendant is sentenced to pay. An amount equivalent to the 20% penalty collected would be appropriated annually to the crime victim compensation fund.

The Violent Crimes Compensation Board supports this bill. This is similar to legislation passed in other states and in effect makes offenders pay for compensation to innocent victims.

Nola Capp

(Mrs.) Nola K. Capp
Administrator

HB

595

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M

February 1, 1984

SUBJECT: Retirement benefits for administrative director of courts (Work Order No. 13-1894)

TO: Representative Charlie Bussell

FROM: LHA Linn H. Asper
Legislative Counsel

I have redrafted the above-referenced work order to delete section 3 of the original draft, as you have requested. That section made the Act apply only to an administrative director employed after the effective date of the Act. I included the section for informational purposes because the result indicated in the section is the result that is dictated by the case of Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska, 1981). In that case it was held that an employee's retirement benefits are guaranteed as a matter of contract and constitutional right and that the employee's retirement plan may not be changed in a way that disadvantages the employee without providing offsetting additional advantages. Thus, under the law, the benefits due an incumbent administrator of courts or an administrator who takes office before the Act becomes effective may not be changed in the way that this bill indicates, whether or not the bill contains a section similar to the one that you have requested be removed.

LHA:ojb
J3/038

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

MEMORANDUM February 1, 1984

SUBJECT: Retirement benefits for administrative director of courts (Work Order No. 13-1894)

TO: Representative Charlie Bussell

FROM: LHA Linn H. Asper
Legislative Counsel

I have redrafted the above-referenced work order to delete section 3 of the original draft, as you have requested. That section made the Act apply only to an administrative director employed after the effective date of the Act. I included the section for informational purposes because the result indicated in the section is the result that is dictated by the case of Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska, 1981). In that case it was held that an employee's retirement benefits are guaranteed as a matter of contract and constitutional right and that the employee's retirement plan may not be changed in a way that disadvantages the employee without providing offsetting additional advantages. Thus, under the law, the benefits due an incumbent administrator of courts or an administrator who takes office before the Act becomes effective may not be changed in the way that this bill indicates, whether or not the bill contains a section similar to the one that you have requested be removed.

LHA:ojb
J3/038

Sec. 22.25.012. Retirement benefits of administrative director. (a) An administrative director of the Alaska court system appointed under art. IV, sec. 16 of the state constitution is entitled to retirement benefits under this chapter on the terms and conditions applicable to a superior court judge appointed after July 1, 1978, except that an administrative director may receive retirement benefits only with service as administrative director for 10 or more years.

(b) An administrative director who vacates the office of administrative director for any reason and who has not at that time accrued 10 years of credited service under this chapter is entitled to a refund of contributions to the judicial retirement system together with interest.

(c) An administrative director who withdraws from the judicial retirement system under (b) of this section is eligible for membership in the public employees' retirement system (AS 39.35) and shall receive credited service in that system for service rendered as administrative director. To be eligible for membership in the public employees' retirement system under this subsection, the administrative director must contribute to the public employees' retirement system

(1) the amount that would have been contributed if the administrative director had been a member during the period of the membership in the judicial retirement system; and

(2) any contributions for service as administrative director refunded from the public employees' retirement system at the time the administrative director became a member of the judicial retirement system. (§ 7 ch 146 SLA 1980)

Editor's notes. — This section was redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

Section 50, ch. 146, SLA 1980 provides: "A person who is serving as administrative director of the Alaska court system on the effective date of AS 22.25.012 as enacted in sec. 7 of this Act [July 1, 1980] may receive prior service credit under AS 22.25 for service rendered as administrative director of the Alaska court system before the effective date of AS 22.25.012 if he withdraws from the public employees' retirement system (AS 39.35), receives a refund of his contributions made under AS 39.35, elects to receive service credit under AS 22.25 for prior service as administrative director and makes retroactive contributions for prior service as administrative director including service before July 1, 1978. Retroactive contributions made under this section are calculated at seven percent of the base annual salary of a superior court judge in effect during the period for which contributions are made."

Sec. 22.25.020. Retirement pay. A retired justice or judge eligible for retirement pay shall receive from the date of eligibility until death monthly compensation equal to five percent per year of service, to a maximum of 75 percent, of the monthly salary authorized for justices and judges, respectively, at the time each retirement payment is made. (§ 1 ch 102 SLA 1963; am § 11 ch 83 SLA 1967)

Editor's note. — The obsolete section was derived from § 4, ch. 52, SLA 1979.

Sec. 39.35.158. Administrative director of courts. An administrative director of the Alaska court system who withdraws from the judicial retirement system under AS 22.25.012 is eligible for membership in the system and shall receive credited service in the system for service rendered as administrative director. To be eligible for membership in the system under this subsection, the administrative director must contribute to the system

(1) the amount he would have contributed if he had been a member during the period of his membership in the judicial retirement system; and

(2) any contributions for services as administrative director refunded to him by the system at the time he became a member of the judicial retirement system. (§ 30 ch 146 SLA 1980)

Article 3. Contributions by Employees.

Section
160. Amount of employee contributions
170. Employment contributions mandatory
180. Voluntary contributions by employee
190. [Repealed]
200. Refund upon termination of employment for reason other than death
210. [Repealed]
220. [Repealed]
230. Refund upon death of retired employee
240. Withdrawal of voluntary contributions

Sec. 39.35.160. Amount of employee contributions. (a) While participating in the system each peace officer and each fireman shall contribute five per cent and every other employee shall contribute four and one-quarter per cent of his compensation to the public employees' retirement system.

(b) Repealed by § 6 ch 135 SLA 1980 and § 39 ch 146 SLA 1980. (§ 8a ch 143 SLA 1960; am § 2 ch 235 SLA 1968; am § 3 ch 35 SLA 1969; am § 5 ch 109 SLA 1970; am § 5 ch 159 SLA 1972; am § 2 ch 58 SLA 1979; § 6 ch 135 SLA 1980; § 39 ch 146 SLA 1980)

Effect of amendments. — The 1979 amendment substituted the language beginning "be considered to have agreed" for "pay the appropriate social security contribution" in subsection (b).

The first and second 1980 amendments, retroactive to January 1, 1980, repealed subsection (b).

Editor's note. — Section 2, ch. 123, SLA 1976, purported to amend subsection (a) of this section. Section 25, ch. 123, SLA 1976, provided: "Sections 2 and 3 of this Act become effective on July 1, 1976 if approved by a majority of the votes cast in a special election conducted by the Public Employees Retirement Board to be held among active members of the retirement system. During the conduct of this election, the division shall remain impartial and take no position on the question." The amendment was rejected by the public employees.

Section 1, ch. 58, SLA 1979, purported to amend subsection (a) of this section. Section 9 of ch. 58 provided that the amendment take effect on January 1, 1980, if approved by a majority of the votes cast in a special election conducted before

Sec. 39.35.680. Definitions. In this chapter, unless the context otherwise requires,

(1) "active member" means an employee who is employed by an employer, is receiving compensation for seasonal, permanent full-time, or permanent part-time services, and is making contributions to the system;

(2) "actuarial adjustment" means equality in value of the aggregate expected payments under two different forms of pension payments, considering expected mortality and interest earnings on the basis of tables adopted from time to time by the board;

(3) "administrator" means the person appointed by the commissioner of administration under AS 39.35.050;

(4) "average monthly compensation" means the result obtained by dividing the compensation earned by an employee during a considered period by the number of months, including fractional months, for which compensation was earned; the considered period consists of the three consecutive calendar years during the period of credited service which yields the highest average, or if the employee does not have three consecutive calendar years, his period of credited service; an employee must have at least 115 days of credited service in the last calendar year in order to be used as part of the three consecutive calendar years;

(5) "beneficiary" means a person designated by an employee to receive benefits that may be due from the system upon the employee's death;

(6) "board" means the Public Employees Retirement Board;

(7) "calendar year" means the period beginning on January 1 and ending on December 31;

(8) "compensation" means the total remuneration earned by an employee for personal services rendered, including cost-of-living differentials, but does not include retirement benefits, welfare benefits, per diem, expense allowances, or medical leave or annual leave not used by the employee;

(9) "credited service" means the number of years, including fractional years, recognized for computing benefits that may be due from the system;

(10) "deferred vested member" means an inactive member who meets the five-year credited service requirement to qualify for a retirement benefit;

(11) "dependent child" means an unmarried child of an employee, including one adopted, who is dependent upon the employee for support and who is either (A) under 19 years old or (B) under 23 years old and registered at and attending on a full-time basis an accredited educational or technical institution recognized by the Department of Education; age restrictions set out in this paragraph do not apply to a chil

(13) "early retirement" means retirement for a member who is at least 50 years old and has a minimum of five years credited service;

(14) [Effective until January 1, 1981] "elected official" means a member whose compensation results from personal services rendered as an elected representative and who elects coverage under AS 39.35.125;

[Effective January 1, 1981] "elected official" means a person whose compensation results from personal services rendered to an employer as an elected representative;

(15) "employee contribution account" means the account maintained by the system to record the mandatory contributions of each employee, including interest and adjustments to the account in accordance with AS 39.35.100;

(16) "employee savings account" means the account maintained by the system to record the voluntary contributions of each employee, including interest and adjustments to the account in accordance with AS 39.35.100;

(17) "employer" means the State of Alaska or a political subdivision or public organization of the state which participates in the system;

(18) "fiscal year" means the period beginning on July 1 and ending on June 30 of the following calendar year;

(19) "former member" means an employee who is terminated and who has received a total refund of the balance of his employee contribution account, or who has requested in writing a refund of the balance in his employee contribution account, or who is eligible for a refund under AS 39.35.200(b);

(20) "inactive member" means an employee who is terminated and who has not received a refund from the system or an employee on leave-without-pay status or layoff status;

(21) "member" or "employee"

(A) means a person eligible to participate in the system and who is covered by the system;

(B) includes

(i) active member;

(ii) inactive member;

(iii) vested member;

(iv) deferred vested member;

(v) non-vested member;

(vi) disabled member;

(vii) retired member;

(C) does not include

(i) former members;

(ii) persons compensated on a contractual or fee basis;

(iii) casual or emergency workers or nonpermanent employees as defined in AS 39.25.200;

(iv) persons covered by the Alaska Teachers' Retirement System;

(v) employees of the division of marine transportation engaged in operating the state ferry system who are covered by a union or group retirement system to which the state makes contributions; and

(vi) justices of the supreme court or judges of the court of appeals or of the superior or district courts of Alaska;

(vii) the administrative director of courts appointed under art. IV, sec. 16 of the state constitution unless he becomes a member under AS 39.35.158;

(D) may include employees of the division of marine transportation excluded under (C)(v) of this paragraph provided that

(i) the State of Alaska formally agrees to their inclusion through the process of collective bargaining; and

(ii) no collective bargaining agreement has the effect of obligating contributions made by the state under AS 39.30.150 in the event the state resumes participation in the federal social security system;"

(22) "military service" means active duty service in the armed forces of the United States;

(23) "nonoccupational disability" means a physical or mental condition which, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing his usual duties for his employer or the duties of another position or job which his employer makes available and for which the employee is qualified by training or education, not including a condition resulting from a cause which the board, in its regulations has excluded;

(24) "non-vested member" means an active or inactive member who does not meet the five-year credited service requirement to qualify for a retirement benefit;

(25) "normal retirement" means retirement for a member who is at least 55 years old and has a minimum of five years credited service, or who is any age and has 30 years or more of credited service, or a peace officer or fireman who is any age and has 20 years or more of credited service;

(26) "occupational disability" means a physical or mental condition which, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing his usual duties for his employer; however, the proximate cause of the condition must be a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties and not the proximate result of the wilful negligence of the employee;

(27) "peace officer" [illegible]

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 595
Title: "An Act relating to JRS"

Sponsor: Bussell
Requestor:
Date of Request:

FISCAL DETAIL
Agency Affected: Ak. Court System
Program Category Affected: JRS & PERS

BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

Operating	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
100 Personal Svcs						
100 Rtmnt & Bnfts	-0-	-0-	-0-	-0-	-0-	(111.5)
200 Travel						
300 Contractual						
400 Supplies						
500 Equipment						
600 Land & Struct						
700 Grants, Claims						
700 TRS Match						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	(111.5)
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Fund	-0-	-0-	-0-	-0-	-0-	(111.5)
Federal Funds						
Other						
Total						

POSITIONS:

Full-Time						
Part-Time						
Temporary						

SOURCE OF FUNDS TO OFFSET IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: J.K. Humphreys J.K. Humphreys Phone 465-4460
Division: Retirement & Benefits Date: 2-22-84

Approved by Commissioner: Lisa Rudd Date: 2/22/84
Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

House Bill 595
Fiscal Note Analysis
Prepared by Division of Retirement & Benefits
Department of Administration

February 22, 1984

IV Analysis: This bill will replace the administrative director of the Alaska Court System in retirement coverage under the Public Employees' Retirement System (PERS). Even though the bill will take effect immediately, the incumbent would be entitled to continued coverage under the Judicial Retirement System (JRS).

We have assumed that the incumbent would remain in his position until June 30, 1988 when he would have approximately 15 years of JRS service. We have assumed that the present annual salary of $79,600 will increase at a rate of 8% per year and that the contribution rates for the PERS and the JRS will remain constant through 1989 at the FY 85 level (13.80% PERS and 109.14% JRS).

The savings shown represent the savings to the State under the JRS less the cost to the State under the PERS.

Position Paper

HB 595

The Department of Administration supports passage of this legislation which would remove the position of Administrative Director of the Alaska Court System from the Judicial Retirement System and replace it in the Public Employees' Retirement System.

Even though it would not affect the status of the incumbent, the bill would ensure that, in future, only judges would enjoy the superior benefits of the judicial system.

J.K. Humphreys, Director, Division of Retirement & Benefits — Date 2/22/84

Lisa Rudd, Commissioner, Department of Administration — Date 2/22/84

HB 619

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3820

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 16, 1984

SUBJECT: Sectional Analysis of HB 619
Office of Litigation Counsel

TO: Representative Mitch Abood
Chariman, House State Affairs Committee

FROM: Billy G. Berrier
Director
Division of Legal Services

You have requested a sectional analysis of House Bill 619 establishing an office of Litigation Counsel in each house of the legislature.

Sec. 24.20.580 establishes two offices of litigation counsel, one in each houses as permanent staff agency of the legislature. Each is headed by a director appointed by the Legislative Council.

Sec. 24.20.590 provides the directors are appointed for a four year term and may be removed only for cause. It specifies the vote in the legislative council required for removal. It establishes qualification required of each director consisting of five years admission to practice of law in Alaska and admission to the United States District Court for Alaska.

Sec. 24.20.600 prescribes the duties of each office. Each shall represent the house, its members staff and agencies before courts or other tribunals as directed by the presiding officer of the house. They shall jointly represent central agencies and staff as directed by the legislative council.

Sec. 24.20.610 provides the legislative council shall establish the compensation of each director who employs and establishes the compensation of other staff of the office within limits of the budget. It also prohibits partisan political activities of the director and other staff. It

expressly provides that this prohibition does not include expressing private opinions or voting.

Sec. 24.20.620 provides that each director shall make a formal request for funds to the legislative council and the council shall include the amount it decides is needed in the budget it submits to each finance committee under AS 24.20.130.

Sec. 24.20.630 defines the term "council" as used in the bill to mean the Alaska Legislative Council.

*Sec. 2 provides for immediate effective date.

BGB:ojb
J3/108

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 619
Title: An Act establishing an Office of Litigation Counsel for each house of the legislature, e.d.
Sponsor: Rep. Mitch Abood
Requestor: House State Affairs
Date of Request: 3/8/84

FISCAL DETAIL
Agency Affected: Legislative Affairs Agency
Program Category Affected: Legislature
BRU, Program or Subprogram(s) Affected: Legal Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES		211.0	223.7	237.1	251.3	266.4
200 TRAVEL		40.0	42.4	44.9	47.6	50.5
300 CONTRACTUAL		33.8	35.8	37.9	40.2	42.6
400 SUPPLIES		3.0	3.2	3.4	3.6	3.8
500 EQUIPMENT		12.2				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		300.0	305.1	323.3	342.7	363.3
CAPITAL		-				
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		300.0	305.1	323.3	342.7	363.3
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		4	4	4	4	4
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Lauren Smith, Manager L Smith Phone: 465-3850
Division: Division of Administrative Services Date: 3/9/84

Approved by Exec. Director: M. R. Charney Date: 3/9/84
Agency: Legislative Affairs Agency

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

HB 619: An Act establishing an Office of Litigation Counsel in each house of the legislature; and providing for an effective date

ANALYSIS:

Personal Services:	
2 attorneys - permanent full-time - Range 24	
Salary ---------- $107,136	
Benefits ---------- $ 27,806	
Subtotal ---------- $134,942	$134,942
2 legal secretaries - permanent full-time Range 15	
Salary ---------- $ 57,840	
Benefits ---------- $ 18,228	
Subtotal ---------- $ 76,068	$ 76,068
TOTAL PERSONAL SERVICES	$211,010
Travel:	
Travel between Juneau and place of filing; i.e., Anchorage and Fairbanks depending on caseload	$ 40,000
Contractual:	
Includes telephone, postage, equipment maintenance and rental, and space rental	$ 33,800
Commodities:	
Miscellaneous specialized legal supplies	$ 3,000
Equipment:	
One-time charge to set up offices with the following:	
2 secretarial desks and chairs -- $ 1,900	
2 professional desks and chairs - $ 2,100	
2 lateral file cabinets --------- $ 650	
4 guest chairs ---------- $ 1,200	
2 typewriters, calculators ------ $ 2,000	
2 phone systems ---------- $ 3,400	
2 sets statutes ---------- $ 900	
TOTAL FURNITURE & EQUIPMENT $12,150	$ 12,150
TOTAL COST FY85	$299,960

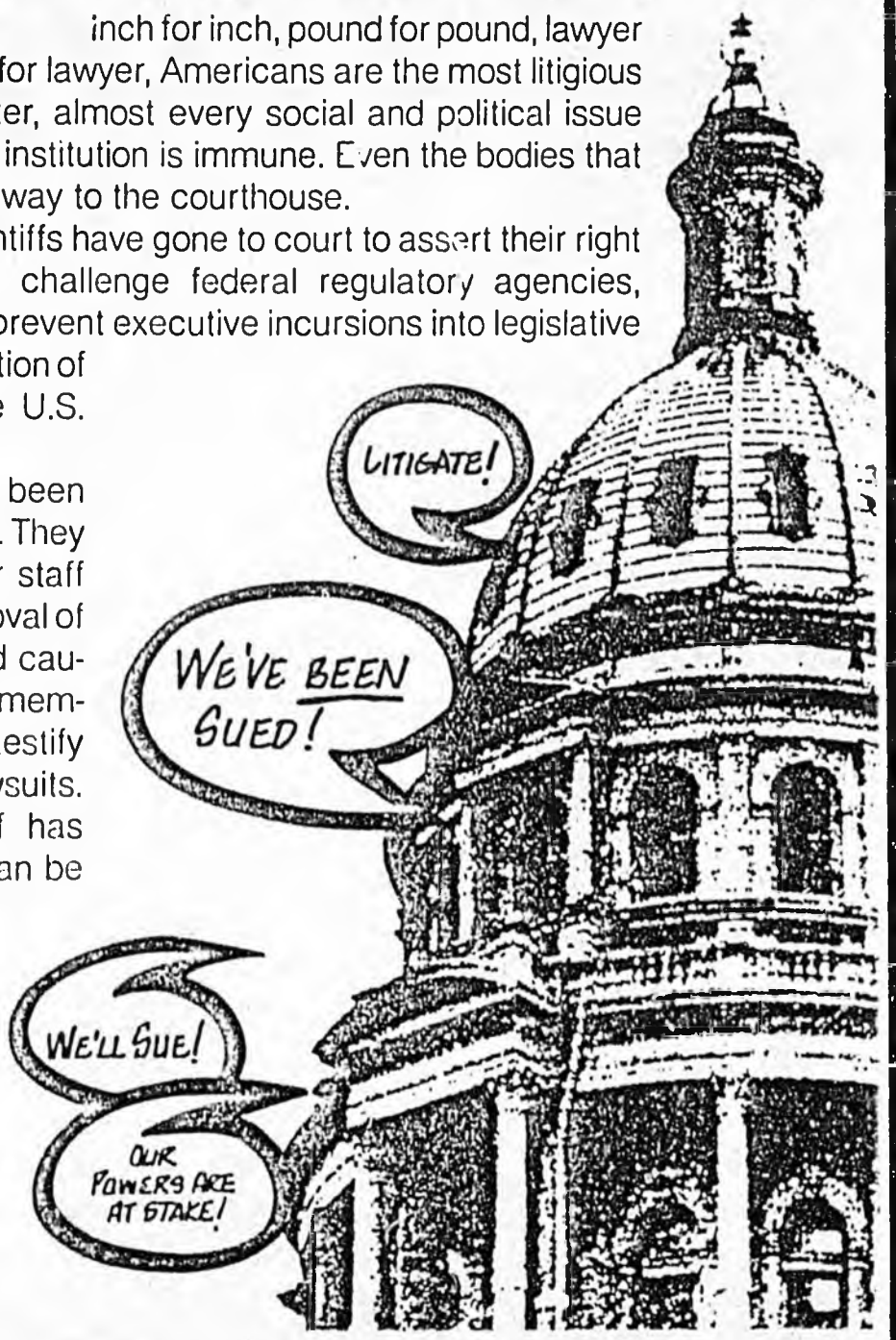
Litigation has become a part of legislative life. In the past, legislatures have relied exclusively on the state attorney general to represent them—as the law often says they must. Now, some of them are hiring their own legislative counsels. That trend is likely to grow.

The State Legislature in Court

inch for inch, pound for pound, lawyer for lawyer, Americans are the most litigious people on earth. Sooner or later, almost every social and political issue ends up in court. No person or institution is immune. Even the bodies that write the laws are finding their way to the courthouse.

State legislatures as plaintiffs have gone to court to assert their right to appropriate federal funds, challenge federal regulatory agencies, regulate the initiative process, prevent executive incursions into legislative prerogatives, and seek clarification of the process for amending the U.S. Constitution.

Legislatures have also been hauled into court as defendants. They have been told to explain their staff hiring practices and justify removal of legislators from committee and caucus positions. Legislative staff members have been subpoenaed to testify before grand juries and in lawsuits. The legislative process itself has been assaulted. No tradition can be taken for granted.



Lanny Proffer

The State Legislature

Legislators have always believed that what was said or done in the legislature could not be questioned elsewhere, and their view was supported by a tradition of immunity that can be traced back to the 17th century. Yet in 1980 the U.S. Supreme Court held that immunity did not apply when the federal government was investigating a state legislator (*U.S.* v. *Gillock* 445 U.S. 360 [1980]). Legislators also believed that their power to raise and appropriate money was absolute. Today, federal judges instruct legislatures under threat of contempt to appropriate whatever sums are necessary to implement judicial decrees.

It is clear from a reading of the state statutes governing the operation of the legislatures and the attorneys general of the states that legislatures were not considered potential litigants. This seems incongruous, since American political theory relies so heavily on the notion of carefully calculated checks and balances. From a contemporary perspective, it seems inevitable that arguments between branches of government occasionally ripen into lawsuits.

Many states have absolute prohibitions against any state agency, institution or individual representing the state or its officials. Arizona statutes designate the attorney general as the only legal counsel for the state. Outside counsel can be retained only with the attorney general's consent. The Connecticut attorney general is specifically directed to defend members of the legislature if any of their official acts are challenged.

In 1966, the Utah Legislature passed a bill that authorized the legislature to retain its own counsel. The attorney general challenged the statute, and it was declared unconstitutional by the state supreme court. Not until 1972, when the legislative article of the state constitution was amended, could the Utah Legislature hire its own attorney.

Six state legislatures have statutory authority to litigate issues of concern to them: California, Georgia, Kansas, Nevada, Oregon and Utah.

Exclusion of the legislatures as litigants may have been based on the assumption that disputes between branches of government should be resolved by the political process rather than the courts. It may also have seemed that any sort of enforcement role, even if only to enforce a legislative prerogative, was inconsistent with the legislative function. Whatever the reason, the courts still have difficulty with legislatures as litigants.

Robert Coldsnow, legislative counsel for the Kansas Legislature, argues that without its consent the legislature has no existence for purposes of litigation. Individual members may sue or be sued; the legislature may not. Certain entities within the legislature have a legal existence; the legislature does not.

This lack of a clear party in interest causes confusion in the courts. When the Colorado General Assembly entered a suit against the Environmental Protection Agency, the U.S. Court of Appeals for the Tenth Circuit ruled that the named members of the legislature could not speak for the state and they lacked the requisite interest or "standing" in the case to be heard as individuals (*Mountain States Legal Foundation* v. *Costle* 630 f. 2d 754 [1980]). To quote the court: "Even if state law permitted the petitioner legislators to press the state's constitutional claims . . . this court should not allow the legislators standing to raise claims that the state itself declines to raise and in fact opposes."

In that case, the legislature and the governor took contradictory positions. Governor Richard D. Lamm instructed Attorney General John D. MacFarlane to enter the case as his advocate. The court ruled that "the attorney general has the exclusive right to represent the state in actions to enforce its interest." It held that the legislators could not represent the interests of the state because to do so would be to pre-empt the power of the attorney general and the governor.

The court either did not understand or chose to ignore the claim that uniquely *legislative* powers were being threatened. Legislatures may not have standing to compel enforcement of the statutes they pass, but they definitely have the requisite interest in preserving legislative authority. Issues that fall into this category include confirmation of certain state officials, ratification of constitutional amendments, and the legislature's investigatory and information-gathering functions.

In *Coleman* v. *Miller* (307 U.S. 433 [1939]), the U.S. Supreme Court made it clear that state legislators challenging the procedure for ratification of constitutional amendments had sufficient interest in the outcome of the case to have their claim resolved. Similarly, U.S. Senator Edward Kennedy (D-Mass.) successfully argued before the

U.S. Court of Appeals for the District of Columbia that an allegedly improper Presidential veto sufficiently infringed the power of the Senate, and his rights as a senator, to establish his standing to sue.

Aside from its opinion in *Coleman* v. *Miller*, the Supreme Court has not ruled on the question of legislator standing. And although the *Coleman* ruling has been cited repeatedly, it has limited value as precedent, since the standing of the legislature was not directly at issue when the Supreme Court decided the case. Their comments on the legislators' right to sue were superfluous to the decision.

Traditionally, legislatures have relied on the state attorney general for legal assistance. There are only a handful of states where the attorney general is not specifically directed to give legal opinions to the legislature when asked to do so. In some states, such as Oklahoma and South Carolina, the attorney general is available as a bill drafter for the legislature. In New Hampshire, the attorney general can be asked for legal advice in addition to drafting assistance.

In some cases, however, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest. In the Colorado case cited above, where members of the legislature challenged the Environmental Protection Agency, and in Pennsylvania, where the legislature challenged the power of the governor to spend federal funds without a legislative appropriation (*Shapp* v. *Sloan* 391 A.2d 602), the attorney general opposed the legislature. In both cases, the legislature retained outside counsel and was ably represented. Nevertheless, these examples show that legislatures cannot rely on the state attorney general to represent their interests in all cases.

Congress has encountered similar problems in disputes with the executive branch. A case now on appeal to the Supreme Court (*Chada* v. *Immigration and Naturalization Service* [No.-1932]) tests the validity of the legislative veto. The U.S. Department of Justice, on behalf of President Reagan, argues that the legislative veto is an unlawful intrusion by Congress into an executive function. The recently established Office of Legal Counsel in the Senate is arguing the Senate position.

From time to time, every legislature faces an issue that requires it to assert its position in court. If these occasional lawsuits were the only basis for legislative counsel, it might be economic to retain outside counsel on a case-by-case basis. But many legislatures have found that legal questions now arise almost daily.

Legislatures have become big enterprises with large budgets, broad powers and extensive responsibilities. They operate in a highly charged, contentious atmosphere. One would have to search to find any official legislative action that did not raise one or more legal questions. In similar circumstances, a private concern would have a battalion of lawyers. To be effective, the legislature must not only defend its prerogatives from all sides, but also exercise them to the fullest extent. A power not asserted is abdicated.

The legislative power to investigate, which lies at the heart of the lawmaking function, has been the subject of entire texts and innumerable court cases. The legislatures of Kentucky, Montana, Nebraska, and other states without statutory authority to litigate, *do* have express authority to go to court to enforce their subpoena power.

Not all threats to the legal authority of a legislature necessarily arise in the state or federal courts of the home state. Federal precedent applies in all cases under the federal system. A decision in a distant federal court may have profound effects beyond the parties to the litigation.

As mentioned earlier, the power of the Congress to veto certain administrative rules of federal agencies is before the U.S. Supreme Court. The same concerns that prompted Congress to provide for review of agency rules and regulations have been apparent in state legislatures, some of which have established procedures to review the administrative rules of state agencies. If the Supreme Court curtails congressional power in this area, attacks on similar state statutes are inevitable. Thus it will be important for the legislature to be heard even when it is not a party to the litigation.

The law recognizes the importance of such third parties and provides for their participation as *amicus curiae* or

In some cases, relying on the attorney general to advocate and defend legislative priorities is unwise. Worse still, the attorney general may be confronted with a conflict of interest.

"friend of the court." An institution, group or person with an interest in the outcome of a case may file a brief with the court, explaining its point of view and bringing to the court's attention the potential effects of the decision.

State attorneys general regularly join their colleagues in other states as *amici* in lawsuits when the outcomes might affect them. A recent Supreme Court case raised the question whether a local government might be subjected to punitive damages under a U.S. civil rights law (*City of Newport* v. *Fact Concerts, Inc.* 49 USLW4860 [1981]). Many states intervened in the case as *amicus curiae* and the Court ruled that punitive damages could not be imposed upon the city. Because few legislatures have offices set up to handle such tasks, their participation in such cases is limited.

In states where the legislature has no legal counsel of its own, the main difficulty is that an outside counsel, who has been retained for a limited time and purpose, may not understand the nuances of the legislative process. Legislatures with legal counsels are able to accumulate legislative

States with In-House Legislative Counsels

State	Statutory Authority	Agency Approving Litigation	Scope of Litigating Authority	Other Duties	Authority to Retain Outside Counsel
California	Annotated California Code 10200 et. seq.	Joint Rules Committee or legislature by resolution.	No specific limitation other than authorization by Joint Rules Committee.	Bill drafting; and advice and counsel to legislature, drafting and advice for governor and state judges, code revision, preparation of initiative measures; statutory indexing and codification.	Yes
Georgia	Georgia Code Annotated 46-1203	Legislative Services Committee.	"Represent the interests of the Legislative branch in matters involving litigation."	Bill drafting; assist committees, advisory opinions; statutory and code revision; research.	Yes
Kansas	Kansas Statutes Annotated 46-1224	Legislative Coordinating Council when legislature is out of session. Either house by resolution when legislature is in session.	May represent legislature in "any cause or matter." Legislative Council has same mandamus and quo warranto powers and standing as attorney general.	Advisory opinions, counsel to special committees of legislature; provide investigative assistance upon request of committee chairpersons.	Legislative Coordinating Council may provide legal, investigative and clerical assistance to legal counsel as needed.
Nevada	Nevada Revised Statutes 218.690 et. seq.	Legislative Commission.	"To protect the official interests of the legislature or one or more legislative committees."	Bill drafting; advisory opinions; code revision; digest and annotate Supreme Court opinions; service on Commission on Uniform State Laws.	May contract for necessary services.
Oregon	Oregon Revised Statutes 173.111 et. seq.	Legislative Counsel Committee.	"To protect the official interests of the legislative Assembly, one or more committees, or one or more members."	Bill drafting, research; assist in preparation of initiative measures; code revision.	Yes
Utah	Utah Revised Statutes 36-12-14	Legislative Management Committee.	"Represent the legislature, any of its committees or subcommittees, or the professional legislative staff in cases or controversies before courts, administrative agencies and tribunals.	Bill drafting; advice and counsel to legislature; code revision; bill status.	No statutory authority.

experience and knowledge to complement legal experience. This experience and knowledge can be brought to bear in litigation even if outside counsel is retained for the actual trial.

Six state legislatures have statutory authority to litigate issues of concern to them: California, Georgia, Kansas, Nevada, Oregon and Utah. In each case, the selection of the legal counsel is nonpartisan and professional. The Kansas statute describes the qualifications and the selection process in detail. The Nevada statute requires membership in the state bar and expertise in "political science, parliamentary practice, legislative procedure, and the methods of research, statute revision and bill drafting."

Before the counsel in any state can initiate an action or enter his appearance in a lawsuit, the legislature must consent. In most states, the legislative counsel is a part of the legislative service agency and the supervising committee of legislators must give its consent before any action can be brought.

The legislatures have given their counsels broad power to litigate. The Oregon statute is typical: Legal action may be brought "when deemed necessary or advisable to protect the official interests of the legislative assembly, one or more legislative committees, or one or more members of the legislative assembly." The authorizing legislation for the Georgia counsel is broad and succinct: "to represent the interests of the legislative branch in matters involving litigation." Georgia and Oregon specifically provide for outside counsel as necessary; presumably the other states would permit such counsel as well if the particular litigation called for it.

Legislatures with offices of legal counsel have managed to get a lot of mileage out of them. Their duties, as spelled out in each state's enabling legislation, include far more than litigation. All are asked to provide legal counseling to legislators and legislative committees. Most are involved with bill drafting and service to investigative committees. The Nevada legislative counsel works with the National Commission on Uniform State Laws. In Oregon and California, the counsels are involved in the initiative processes. California, Utah and Nevada specifically assign code revision duties, including the development of recommendations for improvement and reform. Other states, such as Georgia and Nevada, assign "such other authority and duties as the committee may provide."

The office of legal counsel in the legislature is essentially analogous to that of the general counsel in a large corporation. Although there may be lawyers in many divisions, the ultimate responsibility in legal matters resides in the office of the general counsel. All litigation is channeled through that office.

Some states have stopped short of creating an official legislative counsel but have assured that they have other knowledgeable counsel on legislative issues. New Jersey is an example. The New Jersey Senate and General Assembly retain majority and minority counsel who spend a substantial portion of their time representing the respective legislative bodies. During the remainder of their time they carry on the private practice of law. Their legislative responsibilities keep them current on legislative issues and the private practice gives them regular and continuous courtroom experience. These counsels do not, however, handle bill drafting and other legislative chores assigned to in-house counsels.

This kind of legal representation provides more flexibility for the leadership, according to Robert Smartt, deputy director of the New Jersey General Assembly. "Issues sometimes arise where only the majority has a substantial interest at stake," he said. "In those instances, counsel to the majority can respond quickly and effectively." Lawrence Marinari, majority counsel to the General Assembly, sees litigation as a growth industry in the state. "The more modernized and co-equal the legislature becomes," Marinari said, "the more often it is likely to be drawn into lawsuits. Representing the legislature could become a full-time job."

Perhaps the most important function of the legal counsel in a legislature is also the most subtle. Creation of the office signals to the other branches of state government and to the public at large that the legislature is prepared to defend its prerogatives and assert its powers to the fullest extent possible.

The legislature must be prepared to defend itself as an institution when it is challenged in a court of law. As a co-equal branch of government, the legislature must be prepared to use the courts as a sword as well as a shield. When necessary, legislatures must bring actions as well as defend them. They must also extend their vision beyond their own states to federal courts throughout the nation, and, as issues warrant, to let those courts know how their rulings might affect the states.

If there was ever a time when the legislature was a cloistered institution, that time has passed. In tomorrow's state legislatures, there may be fewer cries of "there oughta be a law"—and more of "I'll see you in court."

Lanny Proffer is counsel to NCSL.

A SURVEY OF STATES
LITIGATION TECHNIQUES SUMMARY

OREGON

Legislative litigation is handled by The Legislative Counsel Committee composed of 12 attorneys. None are specifically or exclusively assigned to this function or to particular factions in the legislature. The committee spends the majority of its time drafting legislation (80%) and writing advisory opinions. The committee budget for 1983-85 is $2,229,711.00 which covers all functions of the office. Only twice in the past ten years has there been occasion to act in a litigious capacity; however, in both cases the committee only did the research and outside counsel was retained to argue the case in court at a cost of $5,000.00.

UTAH

The Office of Legislative Research and General Counsel is a professional staff office that provides support to the legislative committees and individual legislators on a non-partisan basis. The staff is composed of a diversified group of both attorneys and non-attorneys including an economist, a statistician, etc. The 11 full-time attorneys in the force have as their primary purpose drafting legislation. At the time of writing the office had very infrequently been involved in actual litigation on behalf of the legislature, as there had been no demand. Outside counsel has been retained in all instances of major litigation (at a cost of $20,000.00 for the last one), despite statutory authority for the Counsel. The operating budget for the office is around $1.3 million.

GEORGIA

The Office of Legislative Counsel was created under the jurisdiction of the Legislative Services Committee in 1959 to take the place of the old bill-drafting unit of the Attorney General's office. The office is duty-bound by statute to provide bill-drafting and to advise and counsel all members of the legislative body on legislative matters with no regard to party ties. Furthermore, it is authorized to provide for Code revision, to perform research, and to provide legal services for the legislative branch and represent the interests of that branch in matters involving litigation. The provision for legislative litigation has only been exercised twice since its creation, it having been put in more as a safe-guard than anything else. Therefore, the majority of its work does not involve litigation.

SEE APPENDIX I.

KANSAS

The Legislative Counsel is composed of one attorney who performs litigation services and others duties as directed by the Legislative Coordinating Council (a bi-partisan council of the legislative leadership--President of the Senate, Speaker of the House, and Majority and Minority leaders of both Houses). The LCC supervises the Counsel in representing all factions of the legislature. When political conflicts arise, as they sometimes do, the office of Legislative Counsel is not involved. Most of the cases, however, involve the Legislature as an institution and its prerogatives as the legislative branch of the state government. (Many of the matters arise out of the legislative-executive conflicts which have occurred in great frequency in the past few years.) The annual budget is $65,000.00 and one secretary is employed on a full-time basis. No outside counsel is ever retained. Just the existence of the office has resulted in a more professional and cooperative attitude of the Office of the Attorney General. By having its own counsel, the Legislature has independence from the AG's office, thus avoiding possible adverse consequences from almost inherent conflicts.

SEE APPENDIX II.

NEVADA

The State of Nevada Legislative Counsel Bureau consists of 12 attorneys and 24 staff people. Although the bureau does work on litigation cases, only four of the present staff is experienced in the practice. None of the attorneys are specifically designated to legislative litigation cases, and never has outside counsel been retained for this purpose. At the most only the equivalent of eight days per year has been spent in dealing with the practice in question. Much more time is spent counseling legislators and committees and drafting legislation. Although the bureau works with all factions in the legislature and is required to keep inviolate the secrets of all these opposing factions, no problem has yet developed involving conflict of interest. Whether the bureau takes part in litigation is determined by the Legislative Commission, an agency composed of equal representation from both Houses, as well as almost equal representation from both parties. The recorded expenditures of the bureau from 1981-1983 is $29,316.50. No preceding period of that measure has exceeded that figure.

A SURVEY OF STATES
LITIGATION TECHNIQUES

	OREGON	UTAH	GEORGIA	KANSAS	NEVADA
1.) How many attorneys does your legislature have on staff to represent the particular legislative body in instances of litigation?	12*	11*	0	1	12*
	* denotes not exclusive to function.				
2.) How often do the attorneys go to court or specifically work with the legislators on possible litigious situations?	Twice in 10 years	None yet	Rarely	3 or 4 times yearly	2 or 3 times yearly
3.) Does the legislature retain on staff attorneys who represent the whole legislature or specific ones for each political faction? Ever conflict?	N/P	N/P	N/P	N/P	N/P
	No	Not as of yet	Ø	Yes	No
	N/P denotes Non-Partisanship.				
4.) How much back-up staff is retained for the attorneys who appear in court to represent the legislature?	None	10	None	1	24*
	* denotes not exclusive to function.				
5.) What is the approximate budget for litigation only?	0	0	0	65K	7.5K

6.) What $ volume is spent in hiring private attorneys for legislative litigation?	5K	20K	0	0	0
7.) What process does the legislature use to choose its attorneys and how successful has it been in the past?	No pattern	ß	Never been utilized	ß	Chosen by Leg. Counsel
8.) How much time is spent by the attorney's working with legislators or legislative committees on non-litigious matters?	Maj.	Maj.	Maj.	50%	Maj.

Maj. denotes Majority.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

February 27, 1984

MEMORANDUM

TO: Representative Mitch Abood

FROM: Deb Pomeroy, Administrative Assistant

RE: Lawsuits Involving the Alaska Legislature
Research Request 84-042

Anne Williams of your staff requested information regarding the number of lawsuits the Alaska Legislature has been involved in since 1981. Specifically, she requested information on:

- the nature of the lawsuit;
- the attorneys involved;
- the current status; and
- the cost of the lawsuit.

I contacted Tamara Brandt Cook with Legislative Affairs Division of Legal Services, and Ron Lorenson, Deputy Attorney General, who provided a listing of the lawsuits of which they were aware. It is difficult to ascertain whether or not this is a complete listing. Legal Services keeps a file of the main cases involving the legislature; however, there are a variety of additional cases in which the legislature is an "amicus curiae"[1] or that involve minor housekeeping issues.[2] Ron Lorenson stated that the Attorney General's office keeps a file of only those cases in which the Department of Law has represented the State Legislature.

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[1]Amicus curiae translates literally to "friend of the court." In these cases, the legislature is not directly named in the lawsuit, but since they are indirectly involved, may suggest or state some matter of law for the assistance of the court.

[2]For example, the legislature recently ordered some computer equipment from a firm on the East coast. This firm went bankrupt before completing delivery. As a result, a claim was filed in bankruptcy court to recover payment.

The Legislature, or some part of it, has been named in eleven civil lawsuits filed from 1981 to date and has been an amicus curiae in two cases. In three of the cases, the legislature, or a portion of it, has sued the Executive Branch; six cases have involved an outside party suing the legislature, or the Legislative Council; and two cases have involved members of the legislature suing other members, or the Legislative Council. Of these eleven lawsuits, six are pending in Superior Court or are under appeal. The remaining five have either been resolved or the legislature was dropped from the case. In addition to these eleven lawsuits, there are a number of cases filed in previous years which are still pending (e.g. Sharmon Haley vs. State of Alaska). In addition, two legislators have been named in criminal proceedings in the past four years (State of Alaska vs. Hohman, and State of Alaska vs. Dankworth).

I have attached for your information a summary of the lawsuits in which the legislature has been involved. This summary includes a brief description of the case, the attorneys involved, the status of the case, and, where possible, the costs. In addition to the above cases, I have included three of the major lawsuits which were filed in 1980.

We were not able to get total costs for any of the cases. In some cases the Department of Law represents the legislature. The department does not bill the legislature for this representation. The only way to estimate the possible costs would be to request each attorney to provide an estimate of hours he spent on each case and apply a standard hourly fee. The Department of Law does not keep records of the amount of time spent.[3] Lauren Smith, Manager of the Division of Administrative Services with the Legislative Affairs Agency provided a listing of payments which have been made by the legislature to private law firms who represented the legislature. I have included this data on the attached pages. In some cases, I was not able to identify all of the attorneys involved. Where possible, the names and addresses of the attorneys are listed.

I hope this information is useful to you. If you have any questions, or would like additional information, please call us.

DP

Attachments

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[3]These costs are considered "sunk costs" as the attorneys are paid a salary and receive that salary whether they are involved in representation or not.

Alaskans for Nuclear Arms Control Political Action Committee, a nonprofit corporation

vs.

1JU-84-14 Civil

Myrton R. Charney, Executive Director of the Legislative Affairs Agency, et. al.

Year Filed: 1984

Description:

The Nuclear Arms Control Political Action Committee signed up to use the legislative teleconference network. In the application, the purpose of the meeting was described as "campaign planning." The Legislative Affairs Agency denied use of the network saying that a political action committee could not use a State system for this purpose. The committee replied that they were no longer a political action committee and that they wanted to use the network for a board meeting. This request was also denied.

This suit is over the right of the committee to use the State teleconference network.

Status

The case is currently pending in Superior Court.

Attorneys

Plaintiff -- Joseph A. Guthrie
725 Fifth Street
Juneau, Alaska 99801

Defendant -- Virginia Ragle
Department of Law

Cost: not available

Mitchell E. Abood, Jr., et. al.

vs. 3AN-83-5980 Civil

Norman C. Gorsuch, et. al.

Year Filed: 1983

Description

This suit states that the joint session of the House and Senate called for the purpose of confirming executive appointments had not been legally convened and that, therefore, the confirmations are invalid.

Status

The case is currently pending in Superior Court.

Attorneys

Plaintiff--Robinson and Devine
821 N Street, Suite 212
Anchorage, Alaska 99501

Defendant--Jim Baldwin
Department of Law

Cost*

Robinson & Devine = $169,147.67

*These costs were paid by the Legislative Affairs Agency Accounting Division and do not necessarily represent the total cost of the case.

Joe Hayes, et. al.

vs. 1JU-83-46 Civil

M.R. Charney, et. al.

Year Filed: 1983

Description

Plaintiffs asked for action to enjoin performance of a contract to televise the first session of the Thirteenth Legislature. They also requested the court to declare AS 24.20.140 (allowing Legislative Council to direct the Executive Director to transfer amounts from one appropriation to another if considered necessary to accomplish the work of the Council) unconstitutional as an improper delegation of legislative authority. They also questioned whether or not the Legislative Council had conformed to the public meeting law.

Status

The court declared the case to be non-judicable (it was not a matter appropriate for court action).

The case is currently under appeal.

Attorneys

Plaintiff --Robinson & Devine
James T. Robinson
821 N Street, Suite 212
Anchorage, Alaska 99501

State of Alaska--Jon Rubini
Department of Law

Legislative Council--Robertson, Monagle, Eastaugh & Bradley
210 Ferry Way, Second Floor
Juneau, Alaska 99801

Cost*

Robertson & Monagle	=	$ 44,816.99
Robinson & Devine	=	$ 96,772.84
		$141,589.83

*These costs were paid by the Legislative Affairs Accounting Office and do not necessarily represent the total cost of the case.