ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

2937 HSA HB 34 - HB 62

2937

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LEGISLATIVE FINANCE

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. House Bill No. 34
Title "An Act regulating succession to the Office of Lt. Governor"
Requested by State Affairs and Judiciary Date 1-17-83

II. FISCAL DETAIL
Agency Affected Office of the Governor
Program Category Affected Executive Operations
BRU, Program, Or Subprogram(s) Affected Executive Office
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	0	0	0			

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No fiscal impact is anticipated.

IV. DATE 1-20-83 PREPARED BY Laurie Herman
AGENCY Office of the Governor
PHONE 465-3500

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)
OMB Reviewed by: Glen Price

HB

49

STATE AFFAIRS COMMITTEE SIGN-IN SHEET DATE OF HEARING: 2/25/83

HB 20, HB 49, HB 6

NAME (PRINTED)	ADDRESS	REPRESENTING	PHONE	TESTIFYING? YES/NO WHICH BILL
Michael P. McMullen	Pouch C	Division of Personnel	x4430	Yes HB 49
Terry Cramer	Pouch YG	Blue Ribbon Com'n	4442	Yes HB49 If Needed

HSA FORM #002

Sec. 39.10.010. Nepotism prohibited. It is unlawful for a person who is the spouse of or is related by blood within and including the second degree of kindred to the executive head of a principal state department or agency to be employed in that department or agency. (§ 1 ch 98 SLA 1959)

Am. Jur. 2d reference. — 63 Am. Jur. 2d, Public Officers and Employees, § 97.

Chapter 15. Official Bonds.

Section
10. Form, amount, and conditions
20. Obligation and effect
30. Action on bond
40. Recovery on defective bond
50. Procedure when bond becomes insufficient

Section
60. Number of sureties
70. Justification of sureties
80. Release of sureties
90. Proceedings for release of sureties
100. Failure to file new bond

Sec. 39.15.010. Form, amount, and conditions. The official bond of an officer or employee of the state required by statute, or rule or regulation under authority of law shall be in a form joint and several, and made payable to the state in the penal sum and with the conditions required by law. (§ 11-2-1 ACLA 1949)

Cross reference. — As to surety bonds furnished by the principal executive officer of each department and subordinate officials, see AS 39.05.050.

Am. Jur. 2d references. — 12 Am. Jur. 2d, Bonds, § 1 et seq.; 63 Am. Jur. 2d, Public Officers and Employees, §§ 122, 414-482.

Sec. 39.15.020. Obligation and effect. Bonds of state officers and employees are in force and obligatory upon the principal and sureties for breach of the condition of the bond committed during the time the officer or employee discharges the duties of or holds the office or appointment. Each bond is considered in force and obligatory upon the principal and sureties for the faithful discharge of all duties required of the officer or employee by any law enacted after the execution of the bond and this condition shall be set out in the bond. (§ 11-2-2 ACLA 1949)

Sec. 39.15.030. Action on bond. An official bond executed by a state officer or employee is in force and obligatory upon the principal and sureties to and for the state, and for the use and benefit of all persons injured or aggrieved by the wrongful act or default of the officer or employee in his official capacity or employment. A person injured or aggrieved may bring suit on the bond in his name. (§ 11-2-3 ACLA 1949)

Article 1. Administration.

Section
10. Purpose of chapter
20. Appointing authority
30. Division of personnel and board
40. Director of personnel
50. Powers and duties
60. Personnel board
70. Powers and duties of personnel board
80. Public records

Sec. 39.25.010. Purpose of chapter. (a) It is the purpose of this chapter to establish a system of personnel administration based upon the merit principle and adapted to the requirements of the state to the end that persons best qualified to perform the functions of the state will be employed, and that an effective career service will be encouraged, developed and maintained.

(b) The merit principle of employment includes the following:

(1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;

(2) regular integrated salary programs based on the nature of the work performed;

(3) retention of employees with permanent status on the basis of the adequacy of their performance, reasonable efforts of temporary duration for correction in inadequate performance, and separation for cause;

(4) equal treatment of applicants and employees with regard only to consideration within the merit principles of employment; and

(5) selection and retention of an employee's position secure from political influences. (§ 1 ch 144 SLA 1960; am § 1 ch 46 SLA 1980)

Effect of amendment. — The 1980 amendment added subsection (b).

Legislative history report. — For report on original bill, see 1960 House Journal, p. 209.

Quoted in Mueller v. Alaska State Bd. of Personnel, Sup. Ct. Op. No. 396 (File No. 738), 425 P.2d 145 (1967).

Am. Jur. 2d references. — 15A Am. Jur. 2d, Civil Service, § 1 et seq.; 1 Am. Jur. 2d, Administrative Law, § 1 et seq.

Sec. 39.25.020. Appointing authority. The authority to appoint to positions in the state service is as follows:

(1) The legislature is the appointing authority for all officers and employees of the legislature and the legislative agencies, but the authority to make appointments may be delegated.

(2) The governor is the appointing authority for all officers and employees of the executive branch, but the authority to make appointments may be delegated.

(3) The chief justice of the supreme court is the appointing authority for all administrative and clerical personnel of the state judicial system, but the authority to make appointments may be delegated.

(4) The board of regents is the appointing authority for all employees of the University of Alaska, but the authority to make appointments may be delegated. (§ 8 ch 144 SLA 1960)

Stated in State v. Bogenrife, Sup. Ct. Op. No. 918 (File No. 1665), 513 P.2d 13 (1973).

Cited in Wolfe v. O'Neill, 336 F. Supp. 1255 (D. Alas. 1972).

Sec. 39.25.030. Division of personnel and board. There is established within the Department of Administration a division of personnel. There is established within the division of personnel a personnel board. (§ 9 ch 144 SLA 1960)

Sec. 39.25.040. Director of personnel. The head of the division of personnel is the director of personnel appointed by the commissioner of administration and responsible to the commissioner of administration for the execution of the duties and responsibilities imposed by this chapter and the rules adopted under this chapter. The director of personnel must have at least three years of practical working experience in the field of personnel administration. (§ 10 ch 144 SLA 1960; am § 3 ch 82 SLA 1975)

Sec. 39.25.050. Powers and duties. The director of personnel shall direct and supervise the administrative and technical activities of the division of personnel. In addition to the other duties imposed on him, he shall

(1) administer this chapter and the personnel rules;

(2) encourage and exercise leadership in the development of effective personnel administration in the state government;

(3) develop, in cooperation with appointing authorities and others, programs for the improvement of employee effectiveness and morale;

(4) attend meetings of the personnel board and serve as secretary for the board;

(5) establish and maintain a roster of employees subject to this chapter;

(6) prepare the rules, not inconsistent with this chapter, which are required to implement and administer this chapter;

(7) perform other lawful acts which he considers necessary or desirable to carry out the purposes of this chapter. (§ 14 ch 144 SLA 1960)

The scope of rules prepared pursuant to this section is limited severely in AS 39.25.150, leaving the director of personnel very little discretion and virtually no policymaking power. Kelly v. Zamarello, Sup. Ct. Op. No. 705 (File Nos. 1255, 1256), 486 P.2d 906 (1971).

Quoted in Whaley v. State, Sup. Ct. Op. No. 465 (File No. 833), 438 P.2d 718 (1968).

Cited in State v. Bogenrife, Sup. Ct. Op. No. 918 (File No. 1665), 513 P.2d 13 (1973).

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

DIVISION OF PERSONNEL

BILL SHEFFIELD, GOVERNOR

POUCH C-0201
JUNEAU, ALASKA 99811-0201
(907) 465-4430

February 2, 1983

Honorable Mitch Abood
Chairman
House State Affairs Committee
Alaska State Legislature

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Dear Mr. Chairman:

This is a follow up to my testimony given before the House State Affairs Committee on January 26, 1983. At your request I am reducing to writing some of my concerns about House Bill 49.

At the outset I wish to express my support for a nepotism bill for the Executive Branch of Government. At the present time AS 39.10.010 only prohibits spouses and close relatives of "... the executive head of a principal state department or agency..." from being employed. Therefore the need for additional prohibitions is obvious.

There are, however, some potential problems with House Bill 49 which I would like to point out:

1. Concepts of Nepotism - There are two concepts of nepotism, one of which should be decided on:

    a. The Narrow Concept - Nepotism is the prohibition of a high official from using his or her influence to hire a spouse or other close relative.

    b. The Broader Concept - Nepotism is the prohibition of spouses or close relatives working together.

Under the first concept, it would be permissible for two people to continue to work together provided they were married after being employed. Under the second broader concept, when two employees got married, one of them would have to quit because of apparent conflict of interest.

I recommend the narrower concept to allow people who meet on the job and decide to live together to have the choice of marriage.

It is my understanding that the phrase "A person may not be appointed..." incorporates the narrower concept only. I support this interpretation. However, I feel it is arguable. There-

fore, I recommend that the intent of the legislation be clear in the bill so that it will not be administered on the basis of an Attorney General's Opinion.

2. Possible conflict with Title 18 - Alaska law prohibits discrimination on the basis of marital status or change in marital status. To prohibit one from working with a spouse could be argued to be discrimination. The counter argument is that the discrimination is based on who a person is married to (that is a state employee) not on marital status per se (that is if a person is married or single). Again, I believe the argument should be settled prior to the adoption of the legislation.

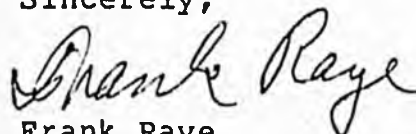
3. Approval by the Director of Personnel - Paragraph C of House Bill 49 prohibits a person from being appointed to any executive branch, department or agency if they are the spouse or close relative to any other employee in that department or agency "...unless the director of personnel and the appointing authority approve the appointment in writing."

I recommend that language be changed to permit the executive head of a department or agency to give written approval. I see no need to have the Director of Personnel give approval. Furthermore, you may wish to state in the bill conditions under which commissioners and agency heads may give their approval. For example, it may be desirable to prohibit one spouse from supervising another.

4. Definition - I also suggest the bill provide a definition of "second degree of kindred". This is a term which, as I understand it, comes from probate law and which does in fact have a legal definition. However, that definition is not commonly understood nor readily available.

Thank you for the opportunity to give testimony before your committee and for considering these points. I will be glad to appear before you again to answer any questions or discuss any of these issues further.

Sincerely,



Frank Raye
Director

FR/sjh

c.c. Teresa B. Cramer
Blue Ribbon Commission

Commissioner Lisa Rudd
Department of Administration

Members of Blue Ribbon Commission

THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 49

Title An Act relating [illegible] in State employment

Requested by House State [illegible] Date January 24, 1983

II. FISCAL DETAIL

Agency Affected Administration

Program Category Affected Central Administrative Services

BRU, Program, or Subprogram(s) Affected Personnel

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

		FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100	PERSONAL SERVICES						
200	TRAVEL						
300	CONTRACTUAL						
400	COMMODITIES						
500	EQUIPMENT						
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL	0					

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND	0					
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

No fiscal impact presuming the Executive Branch will not be expected to monitor or enforce this Act in the Legislative or Judicial Branch.

IV. DATE January 24, 1983 PREPARED BY Frank Raye [signature]

AGENCY Administration Personnel

PHONE 465-4430

Original: Legislative Finance OMB Reviewed By: Liz Blecker

cc: Budget and Management

Prime Sponsor (First Legislator Named)

47D7/0121-7

Bill/Resolution No. HB 49
Title An Act relating to nepotism in State employment
Requested by Abood Date 1-25-83

II. FISCAL DETAIL
Agency Affected Administration
Program Category Affected Centralized Administrative Services
BRU, Program, or Subprogram(s) Affected Labor Relations
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, [illegible]						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-					
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME	-0-					
PART TIME	-0-					
TEMPORARY	-0-					

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

No fiscal impact.

Guy E. Stringham

IV. DATE 1-25-83 PREPARED BY [illegible] P. [illegible]
AGENCY Division of Labor Relations
PHONE 465-4404
OMB Reviewed By: Liz Blecker

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

5/0128-10/LR1
FORMS/1203-3

JUNEAU, ALASKA

Alaska State Legislature

BLUE RIBBON COMMISSION ON THE
STATE PERSONNEL ACT

Senator Bill Ray, Chairman

Pouch YG
Mail Stop 3123
Juneau, Alaska 99811
(907) 465-4442

M E M O R A N D U M

January 20, 1983

TO: House State Affairs Committee

FROM: Teresa B. Cramer
Administrative Assistant

SUBJECT: House Bill 49, Relating to Nepotism in State Employment

The existing statute prohibiting nepotism in state employment forbids only the employment of anyone related to the executive head of a department or agency. AS 39.10.010. The Personnel Rule is more extensive, prohibiting the employment of relatives of the head of a division or subdivision within that division or subdivision. In addition, the Rule prohibits the employment of two related persons in the same agency unless express approval is given by both the appointing authority and the Director of Personnel.

The scope of the Personnel Rule is broader than the statutory authority granted in AS 39.10.010. In addition, the rule-making authority given to the Personnel Board by the State Personnel Act may not extend to nepotism, since the nepotism statute is placed outside the Act. The Attorney General has advised the Division of Personnel that the nepotism rule may exceed the scope of statutory authority. A lawsuit has been filed challenging the Department of Transportation's implementation of nepotism prohibitions.

The Blue Ribbon Commission recommends that legislation prohibiting nepotism in state employment be adopted to provide statutory authority for the Personnel Rule. The prohibition against employing relatives does limit the opportunities for some Alaskans to find state jobs. The disadvantage to those people should be weighed against the appearance of impropriety and favoritism which is created by people working for a close relative. Problems can also arise if relatives are working in the same office so it is appropriate that the hiring decision be scrutinized with the potential for personnel problems in mind.

Bill Analysis

Page 1 Line 9 The first section of the proposed legislation codifies the Personnel Rule. The first paragraph retains the existing nepotism prohibition and extends it to include relatives of

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deputy or assistant commissioners. The prohibition against employing a person related to the executive head of an agency applies to all legislative, judicial and executive branch agencies.

Line 17 The second paragraph adds new langage based on the Personnel Rule to prohibit appointment of a relative of the head of a division within that division. It applies to positions in the legislative, judicial or executive branch.

Line 22 The third paragraph prohibits employment of two relatives within the same executive branch department or agency unless the appointing authority and the Director of Personnel approve the second appointment in writing.

In each of the paragraphs, relatives include spouses and persons within the "second degree of kindred", which the Personnel Rules define as:

> father, mother, son, daughter, brother, sister, husband, wife, grandfather, grandmother, grandson, granddaughter, uncle and aunt including those involving half or step relationships.

Line 29 The second section of the proposed legislation provides for an immediate effective date.

Will TESTIFY

FRANK RAYE PERSONNEL DIRECTOR

under any provision of these Personnel Rules or in any manner commit any fraud preventing the impartial execution of these Personnel Rules.

13 08.0 Rights of Others

No State employee or other person may defeat, deceive, or obstruct any person in his right to examination, eligibility, certification, appointment, or promotion under these Rules.

13 09.0 Nepotism

13 09.1 No person may be employed in a position in any agency who is the spouse of or is related by blood or marriage within and including the second degree of kindred to the appointing authority of the agency.

13 09.2 No person may be employed in a position in any division or subdivision of any agency who is the spouse of or is related by blood or marriage within and including the second degree of kindred to the head of the division or subdivision of the agency.

13 09.3 No person may be employed in a position in any agency who is the spouse of or is related by blood or marriage within and including the second degree of kindred to any other employee in the agency without the expressed approval of the appointing authority and the Director.

13 10.0 Information from Applicant

No State agency or agency supported in whole or in part by State funds may request or suggest that an applicant for employment provide information concerning the applicant's religious opinions, or his membership in fraternal organizations or of an applicant for a classified position as to his political convictions.

13 11.0 Outside Employment

13 11.1 No employee or official of the state shall engage in or accept private employment, or render services for private interest when such employment or service is incompatible with the proper discharge of his official duties.

13 11.2 No employee or official of the State may solicit, negotiate for, or promise to accept employment by or anything of substantial value from any person, firm or company with which he or his agency is engaged in the transaction of business on behalf of the state, or which may be affected by his official action.

I. REQUEST
Bill/Resolution No. HB 49
Title An Act relating to nepotism in State employment
Requested by Abood Date 1-25-83

II. FISCAL DETAIL
Agency Affected Administration
Program Category Affected Centralized Administrative Services
BRU, Program, or Subprogram(s) Affected Labor Relations
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-					
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME	-0-					
PART TIME	-0-					
TEMPORARY	-0-					

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

No fiscal impact.

Guy E. Strington

IV. DATE 1-25-83 PREPARED BY [illegible]
AGENCY Division of Labor Relations
PHONE 465-4404
OMB Reviewed By: Liz Blecker

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

5/0125-10/LR1
FORM 5/1203-3

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 49, SB 56
Title An Act relating to nepotism in State employment
Requested by House State Affairs   Date January 24, 1983

II. FISCAL DETAIL
Agency Affected Administration
Program Category Affected Central Administrative Services .
BRU, Program, or Subprogram(s) Affected Personnel
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0					

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND	0					
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

No fiscal impact presuming the Executive Branch will not be expected to monitor or enforce this Act in the Legislative or Judicial Branch.

IV. DATE January 24, 1983   PREPARED BY Frank Raye *Frank Raye*
AGENCY Administrator Personnel
PHONE 465-4430

Original: Legislative Finance   OMB Reviewed By: Liz Blecker
cc: Budget and Management
Prime Sponsor (First Legislator Named)

47D7/0121-7

COPY

STATE OF ALASKA
THE LEGISLATURE

RECEIVED
FEB 24 1983

COPY

POUCH [illegible] STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M　　　February 24, 1983

SUBJECT: Nepotism
(HB 49)

TO: Representative Mitchell E. Abood, Jr.
Chairman, House State Affairs Committee

FROM: Linn H. Asper
Legislative Counsel

You have asked whether the relationships included in the "second degree of kindred" as that term is defined in the proposed committee substitute for HB 49 are the same relationships that are traditionally associated with that phrase. The term "degree of kindred" is not defined in the Alaska Statutes. In other jurisdictions the "degree of kindred" between one person and another is normally determined as follows: Take the closest common ancestor of the two persons and count the generations back to that ancestor from each; each generation represents a degree of kindred. Thus, the first degree of kindred to a person includes the parents and children of that person, the second degree includes brothers and sisters, grandparents, and grandchildren, and the third degree includes nephews and nieces and aunts and uncles. In proposed CSHB 49 aunts and uncles are included within the definition of "second degree of kindred" although they would normally be considered to be in the "third degree of kindred". In other respects the statutory and common law definitions are the same.

It should be pointed out that since the definition of "second degree of kindred" in the proposed CSHB 49 only applies to the section in which it appears, the term can include any relationships that the legislature sees fit to include. You can also use a different term, such as "close relationship" if you feel that use of the traditional "degree of kindred" terminology will cause confusion.

LHA:ljb

Enclosure

HB

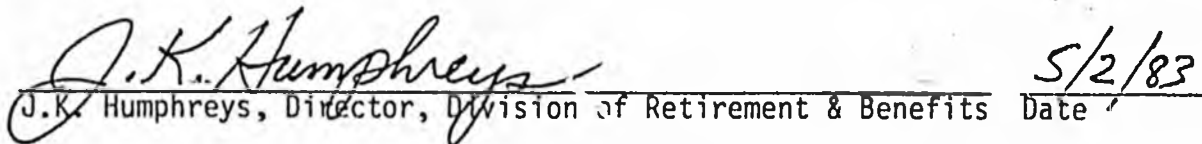
51

Position Paper

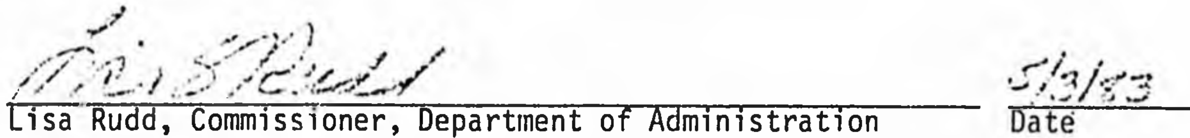
HB 51

Both the Public Employees' and Teachers' Retirement Board unanimously passed resolutions at their March meetings opposing passage of HB 51. The Department of Administration agrees that the existing mechanisms for granting waivers of adjustments (AS 39.35.522 and AS 14.25.175) are equitable and allow the boards to decide these cases on their own merits.

We are concerned that this bill would arbitrarily limit recovery of overpayments even in cases where the person receiving the overpayment knew or had reasonable grounds to know an error had been made. In addition, the bill makes no provision for oversight by the boards where adjustments are prohibited. Again, we are opposed to changing the existing law; however, the two specific objections mentioned above were addressed in the Senate State Affairs Committee substitute for SB 57.



J.K. Humphreys, Director, Division of Retirement & Benefits — Date: 5/2/83



Lisa Rudd, Commissioner, Department of Administration — Date: 5/3/83

Introduced: 1/18/83
Referred: Labor & Commerce,
State Affairs and Finance

CS SB 57

BY THE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE COUNCIL (for the Blue Ribbon Commission on the State Personnel Act)

1 IN THE HOUSE

2 HOUSE BILL NO. 51

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act limiting the adjustment of retirement bene-
7 fits; and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 14.25.173 is amended by adding a new subsection to
10 read:

11 (b) An adjustment that requires repayment of benefits may not be
12 made under this section if

13 (1) the incorrect benefit was first paid two years or more
14 before the member or teacher or beneficiary was notified of the change
15 or error; ~~and~~ or

16 (2) the change or error was not caused by the member or
17 teacher or beneficiary.

18 * Sec. 2. AS 39.35.520 is amended by adding a new subsection to read:

19 (b) An adjustment that requires repayment of benefits may not be
20 made under this section if

21 (1) the incorrect benefit was first paid two years or more
22 before the employee or beneficiary was notified of the change or
23 error;

24 (2) the change or error was not caused by the employee or
25 beneficiary; and

26 (3) the change or error relates to the employee's credited
27 service with the state and does not relate to credited service with
28 another participating employer.

29 * Sec. 3. This Act is retroactive to July 1, 1979.

1 * Sec. 4. This Act takes effect immediately in accordance with AS 01.-
2 10.070(c).

Bill No: House Bill 51 Date on Bill: 1-18-83
Title: An Act Limiting the Adjustment of Retirement Benefits
Sponsor: Rules Committee
Requestor:

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
Capital								
Operating								
Total			-0-	-0-	-0-	-0-		

b. Revenues:

Revenue								

2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

Undoubtedly there will be some costs to the reitrement systems, but they cannot be measured. In most instances the individual adjustment would be small.

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor.

Prepared By: J.K. Humphreys, Director Phone: 465-4460
Division: Retirement & Benefits Date: 2-23-83

Approved by Commissioner: [signature] Date: 2/24/83
Department: [illegible]

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor
Copy to Requestor

2/8/83

MEMORANDUM

To: John
From: Brent

April 29, 1983

Re: HB 51 Limiting the Adjustment of Retirement Benefits

John, this bill was heard in Labor and Commerce on February 14. You voted a "do pass" along with Furnace, Uehling and Ringstad.

I talked with Ken Humphreys, the Director of Retirement this morning about this bill.

The devision of Retirement is not in favor of this bill, because it feels the existing mechinism in place is adequate. (see his letter, Feb 14, to the L&C Committee)

Under HB 51, the board of Retirement would have no way of making sure that corruption of the system might happen.

QUESTION: Under HB 51, What checks would the board have to insure that nobody is corrupting the system? Is there any reporting to the board the cases of incorrect benefit?

Here is what would happen under HB 51.
Say a person received $1000 benefit and shouldhave received really only $500. They are overpayed $500 each month so overpayed $6000 every year. If this goes unnoticed for two years, the beneficiary does not have to repay the overpayed amount.

Under current law, if the board discovers an overpayment, they can require the benficiary to take a decrease in their monthly retirement check till the correct amount is balanced.
If you look at Humphrey's letter of Feb. 14, you will see that the Devision of Retirement usually waives this pay back requirement. You will also notice that there really are so few people concerned or effected by this legislation

1 yr

1. adequate measures in place
2.

JUNEAU, ALASKA

Alaska State Legislature

BLUE RIBBON COMMISSION ON THE
STATE PERSONNEL ACT

Senator Bill Ray, Chairman

Pouch YG
Mail Stop 3123
Juneau, Alaska 99811
(907) 465-4442

MEMORANDUM April 14, 1983

TO: House State Affairs Committee

FROM: Teresa B. Cramer *Teresa B. Cramer*
Administrative Assistant

SUBJECT: House Bill 51 - Limiting the Adjustment of Retirement Benefits

Retired state employees may have substantial difficulties if they are required to repay retirement benefits improperly received because of errors made by the Division of Retirement and Benefits or because of a change in law. The commission is proposing legislation to limit the authority of the division to collect amounts paid improperly through no fault of the beneficiary or retired person if the error is not corrected within two years.

One woman testified to the commission that before she retired she asked the division to verify her years of credited service. Several years later a court-ordered change in retirement regulations reduced the number of years for which she received credit. Her employment with the University of Alaska could no longer be counted as credited service in PERS. As a result she had received more than $5000 in benefits to which she was not entitled. The division reduced her benefit to the correct amount and began withholding an additional $100 per month to be applied to the overpayment. She appealed to the Public Employees Retirement Board asking that collection of the overpayment be waived. The Board agreed.

Both the Public Employees' Retirement Board and the Teachers' Retirement Board have authority to waive collection of overpayments, but the uncertainty of an appeal can cause considerable stress to people on fixed incomes. Both boards are required to determine whether there would be undue hardship imposed by requiring repayment. AS 14.25.175 and AS 39.35.522. In establishing whether there is financial hardship, the entire family financial situation is considered, not just the resources of the petitioner.

The commission recommends that a two-year statute of limitations be placed on the collection of overpayments which resulted from errors which were not caused by the retired state employee. Two years provides ample opportunity for the division to audit its records and correct any errors. After that period, a retired person should not be required to repay benefits erroneously received if he or she did not cause the error. The division would still correct the amount of future benefits paid to the retired person.

<u>Bill Analysis</u>

Page 1 Line 9	The first section of the proposed legislation adds the two-year statute of limitations to the Teachers' Retirement System.
Line 18	The second section adds the same provision to the Public Employees' Retirement System. The amendment to PERS is applied only to state employees because the Blue Ribbon Commission considered that requiring other participating employers to pay for errors made by the state was inappropriate.
Line 29	The third section makes the bill effective retroactively to July 1, 1979, in order to apply to those individuals whose situations came to the commission's attention.
Page 2 Line 2	The fourth section of the bill contains an immediate effective date clause.

HB

53

Introduced: 1/18/83
Referred: Labor & Commerce, State
Affairs and Finance

BY THE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE COUNCIL (for the Blue Ribbon Commission on the State Personnel Act)

1 IN THE HOUSE

2 HOUSE BILL NO. 53

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act prohibiting duplicate teachers' retirement
7 benefits for Alaska BIA service."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 14.25.107 is amended to read:

10 Sec. 14.25.107. CREDIT FOR ALASKA BIA SERVICE. A member who
11 joins the system on or after July 1, 1978, who has Alaska BIA service
12 may claim all of that service as credited service. [A RETIREMENT
13 BENEFIT PAYABLE UNDER THIS CHAPTER FOR ALASKA BIA SERVICE SHALL BE
14 REDUCED BY AN AMOUNT EQUAL TO THE RETIREMENT BENEFITS PAID TO THE
15 MEMBER BY THE UNITED STATES GOVERNMENT FOR THE SAME SERVICE.]

16 * Sec. 2. AS 14.25.169 is amended to read:

17 Sec. 14.25.169. DUPLICATE BENEFITS. <u>(a)</u> If payments from this
18 retirement system are due to a teacher or to the teacher's spouse
19 under more than one provision of this plan, the teacher or spouse
20 shall elect under which provision and which benefit the teacher or
21 spouse wishes to receive and no payments may be made under any other
22 provision. However, benefits under AS 14.25.155, 14.25.157, 14.25.-
23 160, 14.25.162, 14.25.164, and 14.25.167 shall be paid in addition to
24 those benefits or that service credit a person is entitled to receive
25 because of the person's own membership in the retirement system.

26 <u>(b)</u> A teacher may not receive

27 (1) duplicate credit under this system for the same period
28 of service,

29 (2) more than one year of service credit in the course of a

1 school year, or

2 (3) a benefit while accruing service credit under this

3 system, except as provided in this section.

4 (c) A retirement benefit payable under this chapter for Alaska

5 BIA service [claimed under AS 14.25.107] shall be reduced by an amount equal to the retirement

6 benefits paid to the member by the United States government for the

7 same service. Before appointment to retirement under this chapter,

8 and once each year thereafter, the administrator may require a member

9 who has received credit for Alaska BIA service under AS 14.25.107 to

10 produce verification of the benefit amount the member is receiving

11 from the United States government for that same service or verifica-

12 tion that the member is not entitled to receive a benefit from the

13 United States government for that same service.

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M May 11, 1983

SUBJECT: Duplicate teachers' retirement benefits for Alaska BIA service (HB 5[illegible]

TO: Representative Mitchell E. Abood, Jr.
Chairman, House State Affairs Committee

FROM: James H. Lear
Legislative Counsel JHL

You have asked our office to provide, if appropriate, a committee substitute for House Bill 53 (An Act prohibiting duplicate teachers' retirement benefits for Alaska BIA service) that would modify page 2, line 5, by inserting "under AS 14.25.107" after the word "service". In the opinion of this office that change would be unnecessary and also misleading.

The word "service" on that line is used to describe the basis for "A retirement benefit payable under this chapter". AS 14.25.107 merely addresses the fact that credit for Alaska BIA service may be claimed. By inserting the qualifying phrase "under AS 14.25.107", you would mislead the reader by having the reader expect to find under AS 14.-25.107 detailed provisions at to what constitutes Alaska BIA service.

It is helpful to note that the sentence in which the suggested modification would appear is being transferred from AS 14.25.107 because the section pertains to credit for service while the transferred sentence pertains to duplicate benefits. As the sentence appears in AS 14.25.107 there is no equivalent language such as "under this section" following the word "service" as one might expect to find if it were necessary and appropriate to make the suggested modification.

If you have any questions, do not hesitate to contact our office.

JHL:ljb

INTERIM OFFICE:
1024 WEST SIXTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 274-2843

IN SESSION:
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4963

Alaska State Legislature

Representative Mitch Abood
CHAIRMAN

House Comm- -tee on State Affairs

AGENDA

DATE: 4/29/83

TIME: 1:00 P.M., ROOM 102

I. CALL THE MEETING TO ORDER

A. NOTE THE COMMITTEE MEMBERS PRESENT AND WELCOME THOSE OBSERVING THE MEETING.

B. REMIND THOSE WHO HAVE NOT SIGNED-IN TO DO WHO WISH TO TESTIFY. AND REMIND THOSE GIVING TESTIMONY TO SPEAK UP AND STATE THEIR NAME, ADDRESS AND PHONE NUMBER BEFORE TALKING.

II. ANNOUNCE LEGISLATION UNDER CONSIDERATION:

hb 53 - an act prohibiting duplicate teacher's retirement benefits for alaska BIA services

hb 369 - an act relatin to credited service under the public emp. retirement system

HB 51 - an act limited the adjustment of retirement benefits.

OTHER NOTES OR REMINDERS:

____

____

____

____

JUNEAU, ALASKA

Alaska State Legislature

BLUE RIBBON COMMISSION ON THE
STATE PERSONNEL ACT

Senator Bill Ray, Chairman

Pouch YG
Mail Stop 3123
Juneau, Alaska 99811
(907) 465-4442

MEMORANDUM

April 25, 1983

TO: House State Affairs Committee

FROM: Teresa B. Cramer
Administrative Assistant

SUBJECT: House Bill 53 - Prohibiting Duplicate Teachers' Retirement Benefits for Alaska BIA Service

The Blue Ribbon Commission heard testimony from the Division of Retirement and Benefits that a loophole exists in the Teachers' Retirement System statutes which permit receiving TRS credited service for federal employment in Alaska BIA schools. Teachers who qualified for federal retirement from a BIA school and who then worked for the state in a position covered by the Teachers' Retirement System could receive benefits for the same years of service from each system.

Under TRS, teachers may receive credit for Alaska BIA service by contributing 7% of their entry TRS salary for each year of BIA service to be credited. The law provides that state retirement benefits for Alaska BIA service will be reduced by the amount received from the federal government for the same service. However, this is verified only at the time of applying for retirement.

Credit from both retirement systems is possible if the teacher who has worked for both employers buys TRS credited service for BIA employment and takes a lump sum payment of his or her federal retirement contributions before retiring from the state. At the time of state retirement, the teacher reports being eligible to receive no federal retirement benefits for Alaska BIA service. After establishing state benefits, the teacher could repay the lump sum to the federal government and claim a federal retirement. The teacher would then be drawing from two retirement systems for the same period of service.

The commission recommends that language be added to the TRS statutes to permit the Division of Retirement to require retired members to verify annually any federal benefits received for Alaska BIA service.

Bill Analysis

Page 1 Line 9	The first section of the bill deletes material concerning treatment of duplicate benefits from the current authorization for claiming BIA service.

Page 2 Line 4	The language deleted in section 1 is moved to AS 14.25.169 by the second section of the bill.
Line 7	Section 2 also provides authorization for the Division of Retirement and Benefits to request annual verification of the amount of any federal retirement benefits for Alaska BIA service for which state benefits are also received.

Title: An Act Prohibiting Duplicate Teachers' Retirement Benefits for Alaska BIA Service
Requested by ______________________ Date __________

II. FISCAL DETAIL
Agency Affected: Administration - Division of Retirement & Benefits
Program Category Affected: Labor Services and Elementary & Secondary Education
BRU, Program, Or Subprogram(s) Affected: TRS
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-			

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

There will be no costs or savings as a result of this bill as it contains a change in language of the statute which is procedural and the effect is the same; that is a benefit payable for Alaska BIA service must be offset by any benefits paid by the federal government for the same service.

IV. DATE 1/31/83 PREPARED BY J.K. Humphreys, Director
J.K. Humphreys

AGENCY Division of Retirement & Benefits
PHONE 465-4460

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named) Rules Committee

33-001 (Rev. 12/82)

HB

54

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

RECEIVED
MAR 2 1983

Bill No: HB 54 Date on Bill: 1/18/83
Title: Relating to regulations adopted under the Administrative Procedure Act (AS 44.62) and providing for an effective date
Sponsor:
Requestor:

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
Capital								
Operating			0	0	0	0		
Total								

b. Revenues:

Revenue								

2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor.

Prepared By: [signature] Phone: 465-2200
Division: Deputy Commissioner of Administrative Management Date: March 2, 1983

Approved by Commissioner: [signature] for Date: March 2, 1983
Department: Department of Administration

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor
Copy to Requestor

2/8/83

Alaska State Legislature

House of Representatives

Committee on State Affairs

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

AGENDA

DATE: 3/2/83

TIME: 1:00 p.m.

I. Call meeting to Order

A. Note the committee members present.

B. Welcome those observing the meeting.

C. Remind those who have not signed in to do so. And remind those giving testimony to speak up and state their name before talking.

II. Announce legislation under consideration:

HCR 18 - Relating to displaying the flags of the US of America and the State of AK

HB 54 - An act relating to regulations adopted under the administrative procedures Act AS 44.62.

HB 106 - An act relating to bidder preference.

Mitch: Rep. Ward needs to testify first (HB 106) in order to return to the Finance Committee meeting.

Other notes or reminders:

Susitna hearings will continue tomorrow in State Affairs

HSA Form #004

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

March 2, 1983

Honorable Mitchell E. Abood, Jr.
Chairman, House State Affairs Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: HB 54 (regulations adopted under the Administrative Procedure Act)

Dear Mr. Abood:

In line with the first section of this bill, the Department of Law wholeheartedly supports the idea "that regulations adopted, revised or amended under the Administrative Procedure Act (AS 44.62) be simple, clear, understandable, and easily readable." However, we oppose this bill.

The heart of this bill is, of course, in its section 4, which would require the application of the Flesch "reading ease test" to administrative regulations adopted under the Alaska Administrative Procedure Act. That test is derived from a part of the "readability formula" developed by Dr. Rudolph Flesch in the 1940's. See his The Art of Plain Talk (Harper & Row, Publishers, 1946) and The Art of Readable Writing (Harper & Row, Publishers, 1949). In his preface to the second book, Dr. Flesch states

> . . . I can only repeat what I said in the preface to The Art of Plain Talk: "Some readers, I am afraid, will expect a magic formula for good writing and will be disappointed with my simple yardstick. Others, with a passion for accuracy, will wallow in the little rules and computations but lose sight of the principles of plain English. What I hope for are readers who won't take the formula too seriously and won't expect from it more than a rough estimate." [Emphasis added.]

Dr. Flesch himself recognized that, while such a formula can be useful in helping sensitize a writer to certain elements of his writing, it should not be rigidly applied or overemphasized. This bill does just that. Under section 2 of the bill, an administrative regulation, no matter how essential to the wellbeing of the state and no matter how easily understood by the portion of the public governed by that regulation, would be invalid if it does not achieve a certain score on the Flesch reading ease test. Conversely, a regulation could satisfy the requirements of the proposed statute, by containing simple

sentences and words of few syllables, and still be pure gibberish.

The proposed AS 44.62.055(a)(4) requires counting words and syllables only for a regulation containing 10,000 words or less. That would be virtually every regulation. That means that someone in the Department of Law serve as a word and syllable counter, since it is this department that is responsible for assuring the legality of administrative regulations (AS 44.62.060). That does not seem to be a productive use of staff time. A regulation drafter, whether or not an attorney, should be aware of such things as sentence and word length as well as the many other things discussed so well by Professor Reed Dickerson in his <u>The Fundamentals of Legal Drafting</u> (Little, Brown & Co., 1965).

Professor Dickerson's book has served as the basic reference work for both legislative and regulation drafting in Alaska for many years. In a 1980 article, Professor Dickerson points out, with regard to sentence length, that "the psycholinguists recently confirmed the fact that because the structure of an unavoidably complicated idea is normally hierarchical, it is better grasped if framed in sentences long enough to accommodate appropriate clauses and subclauses than if chopped up into short sentences whose interrelationships are accordingly obscured." <u>Plain English in a Complex Society</u> (The Poynter Center, Indiana University, April 1980). That, itself, is a rather long sentence, but its meaning seems quite clear and the professor's point is certainly valid.

It is a coincidence that section 3 of this bill, requiring the Drafting Manual for Administrative Regulations to consider the requirements of the proposed Flesch-test section, appears at this time. The Department of Law is currently in the final stages of preparing the 8th edition of the Drafting Manual for Administrative Regulations, and a new Chapter 20 mentions Dr. Flesch and his readability formula. A copy of that Chapter 20 taken from the final (but not yet proof-read) draft of the 8th edition is attached, for your convenience.

Two other points: (1) it is not clear why only medical terminology has been singled out (page 3, line 16) as a particular kind of technical terminology to be excepted from the definition of "text." (2) Proposed AS 44.62.055(c) and (d) (page 3, lines 21 -- 27) assign duties to the commissioner of administration. Currently, that commissioner has no role under the Administrative Procedure Act, and it would be more appropriate to assign the two functions mentioned there either to the Department of Law or the Lieutenant Governor's Office.

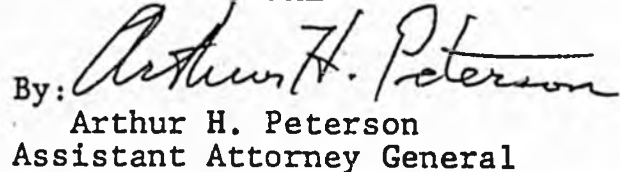
The bill's concern with clear writing of administrative regulations is commendable. However, it does not appear that a

rigid use of the Flesch test (or some other such approach) will assure clear writing, and this bill appears likely to cause more problems than it will solve.

Thank you for this opportunity to comment.

Yours truly,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: 
Arthur H. Peterson
Assistant Attorney General

AHP:md

cc: Hon. Walt Furnace
House of Representatives
Alaska State Legislature

Emil Notti, Legislative Assistant
Office of the Governor

From final draft of Department of Law's 8th edition of its Drafting Manual for Administrative Regulations (12/82).

CHAPTER 20. PLAIN ENGLISH.

In writing regulations, use "plain English." Legislation has been introduced in Alaska and has been enacted in some states (e.g., Connecticut, Massachusetts, New York) requiring certain legal material to be written in plain English. President Carter's Executive Order No. 12044 (March 23, 1978) included a provision requiring officials to determine that their regulations are "written in plain English and . . . understandable to those who must comply with [them]."

Obviously, people will disagree as to what that means. Much has been written on the subject. For the purposes of this manual, the admonition to use plain English should be taken in much the same vein as Edwin Newman's advice to use a "civil tongue."

> A civil tongue . . . means to me a language that is not bogged down in jargon, not puffed up with false dignity, not studded with trick phrases that have lost their meaning. It is not falsely exciting, is not patronizing, does not conceal the smallness and triteness of ideas by clothing them in language ever more grandiose, does not seek out increasingly complicated constructions, does not weigh us down with the gelatinous verbiage of Washington and the social sciences. It treats errors in spelling and usage with a decent tolerance but does not take them lightly. It does not consider "We're there because that's where it's at" the height of cleverness. It is not merely a stream of sound that disk jockeys produce, in which what is said does not matter so long as it is said without pause. It is direct, specific, concrete, vigorous, colorful, subtle, and imaginative when it should be, and as lucid and eloquent as we are able to make it. It is something to revel in and enjoy.
>
> From A CIVIL TONGUE, copyright ©1975, 1976 by Edwin H. Newman, used with permission of the publisher, The Bobbs-Merrill Company, Inc.

While administrative regulations are rarely "colorful," Mr. Newman's point is well taken. They should be direct, specific, concrete, etc. It is necessary to think about each word that is written. For regulations as for statutes, the potential for administrative difficulties, public confusion, and litigation --

all stemming from careless drafting -- must be borne in mind. This is a matter of what may be called "substantive clarity" -- the logical organization and accuracy of the writer's thought and of the expression of that thought.

In addition, it is necessary to consider how clearly or easily that thought is likely to be understood by a particular reader or class of readers. Regulations should be written for two audiences: (1) that portion of the public who will be governed by the regulations, and (2) the general public. As part of the law of the state, regulations should be written in a style that can be readily understood by people of fairly widely varying educational backgrounds. They should not be written as part of an esoteric realm accessible only to some highly educated or governmental elite. However, this does not mean that a set of commercial banking regulations, for example, should be written at an eighth-grade level. The primary focus should be on the persons governed by the regulation. The standard is flexible. Balance and good judgment are required.

Legal writing will sometimes deal with complicated concepts. Nevertheless, the drafter's words and writing style should be geared toward expressing those concepts as simply, clearly, and accurately as possible. Typically, the substance of a regulation is the source of much dispute. A jargon-laden, "governmental" writing style can cause confusion and resentment; it should be avoided.

A widely used State of Alaska form, revised in 1980, retained the following language (immediately after providing a blank for a land description):

> Together with, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, . . .

Not even in legal writing is there any longer a justification for that sort of archaic, redundant jargon. While its origins may be described, whatever value it may once have had is overwhelmed by the problems it creates in current writing. Whoever approved that form in 1980 simply did not think about all of the words he or she was using. Equally importantly, that language does not show any concern about the comprehension level of the people using that form.

In 1946, Rudolf Flesch wrote The Art of Plain Talk (Harper and Row, Publishers), in which he developed a statistical formula for measuring "readability." By finding average sentence length and

proceeding through some additional steps, use of Dr. Flesch's formula tells a writer where the writing stands on a scale ranging through seven steps from "very easy" (e.g., comic books) to "very difficult" (e.g., scientific journals). Dr. Flesch's The Art of Readable Writing (Harper and Row, Publishers, 1949) offered a revised version of his readability formula, and he cautioned readers of his books not to expect more from the formula than a rough estimate. It is simply an attempt to provide some sort of objective measurement of readability.

More recently, computers have been used to assist in that kind of statistical or objective approach. An oversimplified statement of its basic premise might be "The longer the sentences, and the longer the words, the harder it will be to understand the writing." A writer's use of the Flesch formula or of a computer or of some other readability analysis certainly does not guarantee good writing. It does not even guarantee easily understood writing. But one who is aware of the factors discussed by Dr. Flesch has some guidance in producing writing that ought to be understood by the appropriate reading audience.

As indicated in the long quotation at the beginning of this chapter, it is also necessary to think about the precision of each word itself. Four relatively recent and popular books that emphasize the precision that is available in the English language are: Edwin Newman's Strictly Speaking (Warner Books, 1975) and A Civil Tongue (Warner Books, 1977); William Safire's On Language (Avon, 1981); and John Simon's Paradigms Lost (Clarkson N. Potter, Inc./Publishers, 1980). With varying degrees of dogmatism and humor, these books help sensitize one to the appropriate uses of words and phrases.

Those authors criticize errors in punctuation and word usage that they have observed in the press, in television commercials, in everyday social exchanges, and in a variety of other sources. This criticism emphasizes the need to adhere to standards of "correctness" while not freezing the development of the language. And it emphasizes the obvious need to avoid the thoughtless use of a language that, if used with care, can provide very accurate communication.

This manual will not attempt to offer a bibliography of books and articles on legal drafting or other kinds of writing. However, two classic reference works must be mentioned: H. W. Fowler's A Dictionary of Modern English Usage (Oxford University Press, 2d ed., 1965); and William Strunk, Jr., and E. B. White's The Elements of Style (Macmillan Publishing Co., Inc., 3d ed., 1979). In addition, Margaret Nicholson's A Dictionary of American English Usage (Signet, 1958) can be useful (although it is now out of print). The Fowler book and the Nicholson book (based on

the first edition of Fowler) provide dictionary entries, often extending to brief essays, on such things as split infinitives and the distinction between the proper uses of "which" and "that." A basic characteristic of Fowler is mentioned by the editor in the preface to the second edition:

> [H]e never forgot what he calls "that pestilent fellow the critical reader" who is "not satisfied with catching the general drift and obvious intention of a sentence" but insists that "the words used must . . . actually yield on scrutiny the desired sense." [Footnote omitted.]

The Strunk and White book sets out rules, examples, and discussion, in a very few pages. It provides what White calls (in his introduction to the third edition) a "summation of the case for cleanliness, accuracy, and brevity in the use of English."

A discussion of legal writing has to include mention of Reed Dickerson's The Fundamentals of Legal Drafting (Little, Brown and Co., 1965), referred to at several places in this manual. Through logic, humor, and a very "readable" writing style, Professor Dickerson provides guidance and insight. One can use his book for its "do" and "don't" rules (such as some of those in Chapter 15 of this manual) as well as for its solution of various kinds of language puzzles that appear in legal drafting (such as semantic and syntactic ambiguities, logical fallacies, and distinguishing the appropriate use of vagueness). His explanations and advice help one's thinking and one's writing.

The purpose of this little chapter is to stress the importance of the writing of regulations and to suggest just a few basic books that will help in the effort. Most of the rest of this manual deals with substantive issues and procedural requirements. However, if the language used is not carefully selected to help assure clear thinking and to help assure that the concept in the writer's mind is likely to be the same concept that the reader derives from the writing, the attention devoted to those issues and requirements may well have been wasted. Not only that, the administrative problems, public confusion, and litigation that might result could be very expensive. A regulations drafter is writing law. That is not something that can be done with abandon.

CHAPTER 21. SECRETARIES' SUMMARY.

A. Introduction

HB 54

Page 1 line 15 What are words of art?

Refer to the fiscal note from the Dept. of Law:

The department of law recommends that the power to authorize a lower Flesch score when such a lower score is necessary to prevent substantive misinterpretation of a statute be vested in either the Attorney General or the Lt. Governor and <u>NOT</u> the Commissioner of Administration.

Wouldn't the Attorney General's office be the most reasonable place to guard against any substantive misinterpretation of a statute?

Please disregard

~~Also, please note the appearance of several typo's on:~~

~~page 3 lines 21;22;24;25 the words "commissioner" and "administration."~~
~~My office has notified the Chief Clerk of the engrossing errors and they will be corrected in the next printing.~~

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

[illegible] No: HB 54 Date on Bill: 2/9/83
[illegible]le: "An Act relating to regulations adopted under the Administrative Procedure Act (AS 44.62):
[illegible]onsor: House State Affairs Committee
[illegible]questor: House State Affairs Committee
and providing for an effective date."

[illegible]. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
[illegible]apital								
[illegible]perating			7.3	50.6	53.6			
[illegible]otal			7.3	50.6	53.6			

b. Revenues:

[illegible]evenue								

[illegible]. Source of funds to offset fiscal impact of bill:

No information provided.

[illegible]. Assumptions:

Each year the Department of Law reviews and assists in the preparation of approximately 150 separate sets of regulations adopted under the Administrative Procedure Act. The department agrees fully with the purpose and intent of the bill, which is that the state's regulations be simple, clear, understandable, and easily read. The department's drafting manual for administrative regulations and its civil division law office manual both stress the importance of simplifying legal writing, through example and instruction. Due to the large number of regulations being reviewed by the department, and their varied

[illegible]. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It doe[s] not represent the policy of the Sheffield Administration or the final estimate of fisc[al] impact.

[illegible]epared By: Richard I. Pegues, Director Phone: 465-3672
[illegible]vision: Administrative Services Date: 2/10/83

[illegible]proved by Commissioner: Norman C. Gorsuch, Attorney General Date: 2/10/83
[illegible]epartment: Department of Law

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2/8/83

scope and nature, it will be necessary to add a new and ongoing level of examination during the review process. Consequently, resources made available to the department must be increased to add attorney supervised staff who will be responsible for insuring that regulations comply with a "Flesch reading ease" type test.

The department notes that proposed Sec. 44.62.055(d) would empower the Commissioner of Administration to authorize a lower score when such a lower score is necessary to prevent substantive misinterpretation of a statute. The department recommends that this power be vested in either the Attorney General or the Lieutenant Governor rather than the Commissioner of Administration. Adding a new player to an already complicated game, one that we are all trying to simplify, will probably complicate the process further.

7AAC 35.090 (c)

Words	Text	Syllables
9	(c) It shall be the duty and responsibility of all	14
7	physicians licensed to practice medicine in the	13
9	State of Alaska who are in attendance or any	13
8	physician who by virtue of his appointment as	13
7	medical examiner or local health officer shall	15
8	have knowledge or suspect that a person has	11
7	died of a communicable disease which may	12
8	reasonably constitute a threat to the health of	15
6	morticians and their staffs, village officials,	11
7	clergymen, and all others involved in the	11
8	handling and preparation of a dead human body,	12
7	to inform and counsel such individuals promptly	13
9	of this hazard or potential threat to their health	13
5	and safety. Appropriate precautionary measures	13
7	to prevent the spread of communicable diseases	13
7	from deceased human bodies to employees of	12
5	mortuary establishments, persons contracted to	13
7	provide services involved in the preparation and	14
8	handling of dead human bodies, and to the	11
8	general public, shall be undertaken at all times	14
8	and shall be the responsibility of the funeral	13
8	director, or in his absence, the senior village	13
2	official present.	5
Total 166		287 Total

Sentences = 2

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

January 31, 1983

MEMORANDUM

TO: Representative Walt Furnace
Attention: Jeff Barry

FROM: Christine Johnson, Research Staff

RE: Readability Formulas
Research Request No. 83-1

Jeff Barry of your staff has asked for a description of the formulas which are used to test the "readability" of written material. There are many readability formulas, although six are most commonly used. A brief description of these six tests is attached. We have also enclosed some material prepared by the National Conference of State Legislatures (NCSL) regarding "plain language laws" in other states. States which require that contracts, insurance policies, etc., be subjected to a readability test generally specify the Flesch readability formula.

All readability tests determine the reading level of a document based on (a) the difficulty of the vocabulary and (b) the complexity of the sentence structure. They generally judge the complexity of vocabulary by the number of syllables per word. Several formulas also have their own vocabulary lists of "familiar" words. Written material which has a large percentage of words not on these lists is considered more difficult to read. The formulas determine the complexity of sentences based on the average number of words per sentence.

Readability formulas differ in the types of material they are designed to evaluate and in the ease with which they are applied. The table on the following page shows the grade levels for which each test is suited. The American public reads at roughly a junior high school level; newspapers are written at a sixth to seventh grade reading level.

As you can tell from the information we have attached, it does not require any specialized training to use the readability formulas. It can, however, be time consuming to count the number of words in sentences, the number of syllables per word, etc. The Spache and the Dall-Chall formulas are the most complicated and time consuming to use as each word in a document must be looked up on the word list. Readability formulas which can instantly test the reading level of a document are available on the softwear for many brands of word processors. The more sophisticated programs will automatically display

alternatives to words in the document which are above the desired reading level. We have enclosed a description of the readability formulas available for Wang word processors for your information.

We hope this information is of use to you. If you would like any additional information on this topic, please don't hesitate to contact us.

Six Most Common Readability Formulas

Grade Level for which Test is Suited

Formula	1	2	3	4	5	6	7	8	9	10	11	12	College	Professional
Spache	1--------			4										
Dale-Chall					5-------------------------								College	
Fry	1-------------------------------------												College	
Raygor				4-------------------------------------										Professional
Flesch								8----------------					College	
Gunning-Fog								8----------------					College	

Source: Alaska Department of Education, Office of Educational Technology and Telecommunications.

Descriptions of the Six Most Common Readability Formulas

1. The Spache Formula
2. The Dale-Chall Formula
3. The Fry Formula
4. The Raygor Formula
5. The Flesch Formula
6. The Gunning-Fog Formula

SPACHE READABILITY FORMULA

The Spache Formula was developed to determine the readability of written materials for grades 1 - 4. The steps used in evaluating selections are presented below.

1. Count the number of words

2. Count the number of sentences

3. Count the number of words not on the Spache Word List

4. Find the average sentence length by dividing number 2 by number 1.

5. Divide number 3 by number 1 and multiply by 100.

6. Multiply number 4 by .121

7. Multiply number 5 by .082

8. Add number 6 and number 7 plus a constant .659 to obtain the grade level.

This outline of the Spache test is given so the reader will know how the formula is calculated. It is not intended to be complete. For the word list, and further details, see Appendix C, Reference 8.

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DALE-CHALL FORMULA

One of the most commonly known and widely used formulas for determing the reading level of printed materials is the "Dale-Chall Formula". This formula is based on two counts: average sentence length and percentage of unfamiliar words. This formula is used extensively in the elementary field to evaluate vocabulary in textbooks. However, the range and vocabulary in senior high school books makes this formula somewhat impractical for that level. The steps used in evaluating written selections are presented below:

1. Count the number of words in the sample;
2. Count the number of sentences in the sample;
3. Count the number of words not included in Dale's list of 3000 words;
4. Divide the number of words by number of sentences to obtain the average sentence length;
5. Divide the number of words not on Dale's list of 3000 words by the total number of words in the sample;
6. Multiply the average sentence length by .04696;
7. Multiply the Dale score by .1579;
8. Add the results from steps 6 and 7 to a constant (3.6365) to obtain the formula raw score;
9. Convert to a readability score by the use of the following conversion table:

FORMULA SCORE	CORRECT GRADE LEVELS
4.9 and below	Grades 4 and below
5.0 to 5.9	Grades 5 and 6
6.0 to 6.9	Grades 7 and 8
7.0 to 7.9	Grades 9 and 10
8.0 to 8.9	Grades 11 and 12
9.0 to 9.9	Grades 13 - 15 (College)
10.0 and above	Grades 16 - above (College Grad)

This description of the Dale-Chall test is given so the reader will know how the formula is calculated. It is not intended to be complete. For the word list, and further details, see Appendix C, Reference 1.

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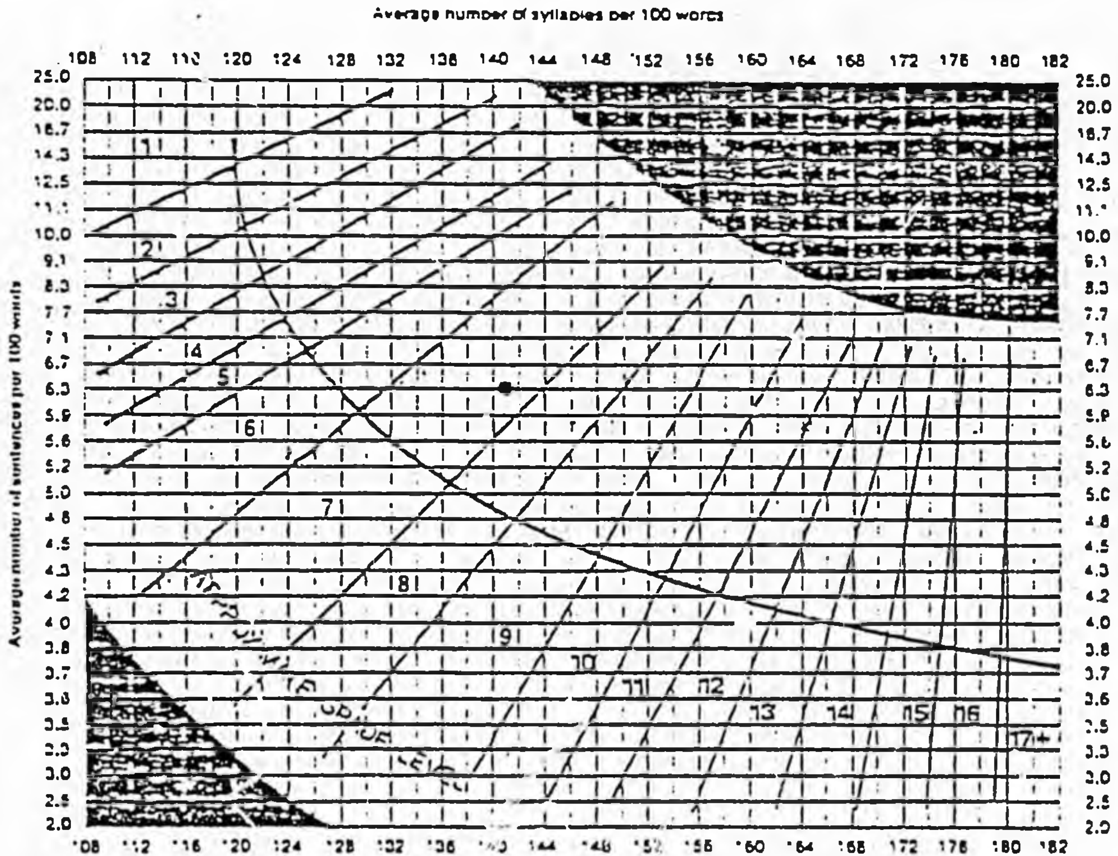
FRY READABILITY ESTIMATE

by Edward Fry, Rutgers University Reading Center, New Brunswick, N.J. 08904



Directions:

Randomly select three one hundred word passages from a book or an article. Plot average number of syllables and average number of sentences per 100 words on graph to determine the grade level of the material. Choose more passages per book if great variability is observed and conclude that the book has uneven readability. Few books will fall in the gray area but when they do, grade level scores are invalid.

Count proper nouns, numerals and intializations as words. Count a syllable for each symbol. For example, "1945" is 1 word and 4 syllables and "IRA" is 1 word and 3 syllables.

Example:

	SYLLABLES	SENTENCES
1st Hundred Words	124	6.6
2nd Hundred Words	141	5.5
3rd Hundred Words	158	3.8
AVERAGE	141	6.3

READABILITY 7th GRADE (see dot plotted on graph)

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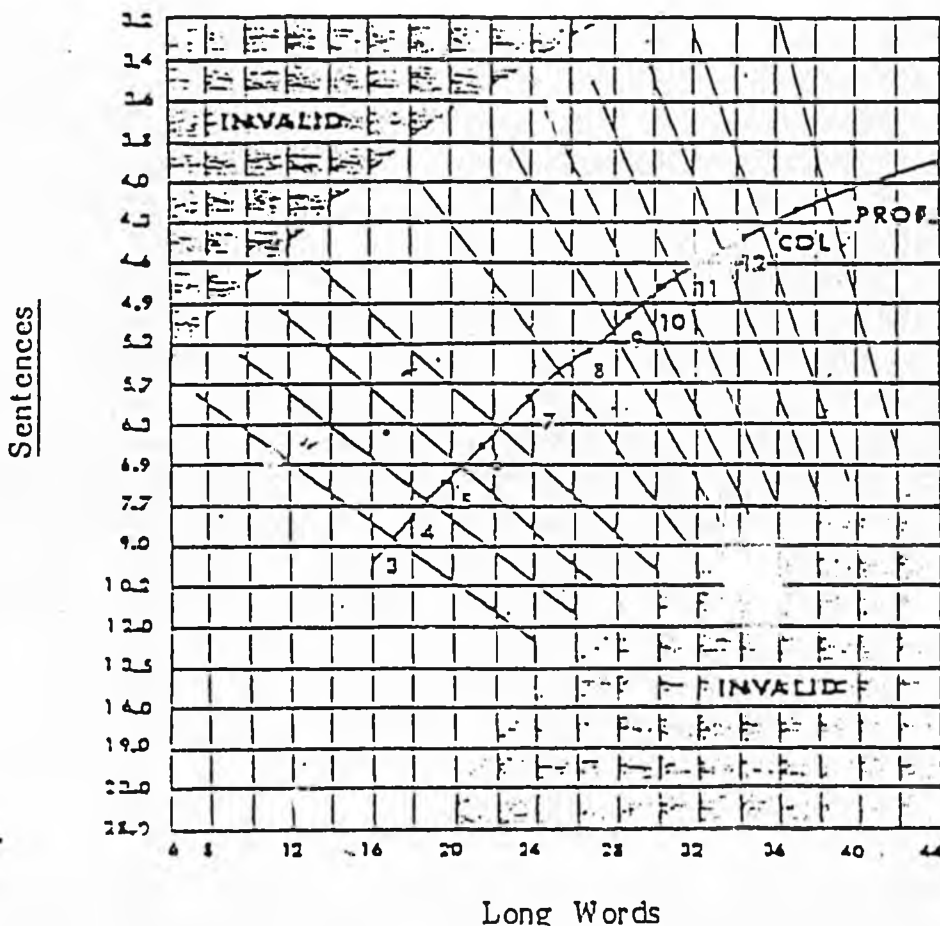
THE RAYGOR READABILITY ESTIMATE

ALTON L. RAYGOR - UNIVERSITY OF MINNESOTA



Directions:

Count out three 100-word passages near the beginning, middle, and end of a selection or book. Count proper nouns, but not numerals.

1. Count words with six or more letters (long words).
2. Count sentences in each passage, estimating to nearest tenth (sentences).
3. Average the sentence length and word length over the three samples and plot the average on the graph.

Example:

	Long Words	Sentences
A	15	6.0
B	19	6.8
C	17	6.4
Total	51	19.2
Average	17	6.4

Note mark on graph. Grade level is about 5.

FLESCH FORMULA

The Flesch formula is based to compute scores for "reading ease" and "human interest". Although this method has been criticized, no better system seems to have been developed to this time for quick evaluation of adult reading materials. Flesch has a chart inside the cover of his book, The Art of Readable Writing, which is a short-cut to determining readability and will eliminate the need to compute the formula. This chart can be used in place of steps 6 and 7 in the procedure outlined below. For those who do not have access to his book, the procedure he follows to determine readability is:

1. Count the words in the article (mark each 50th word).
2. Count the sentences.
3. Count the syllables in the article.
4. Divide the number of words by the number of sentences to obtain the average sentence length.
5. Divide the number of syllables by the number of words and multiply by 100 to obtain the average number of syllables per 100 words.
6. Multiply the average sentence length in words by 1.015.
7. Multiply the average number of syllables per 100 words by .846, then add the totals of steps 6 and 7, then subtract the total from 206.835 to obtain the readability score for the article.
8. Convert the readability score to reading ability level given below to determine usability.

READABILITY	READING ABILITY LEVEL
80 - 70	7th and 8th grades
70 - 60	9th and 10th grades
60 - 50	11th and 12th grades
50 - 40	College Freshman to Juniors
40 - 30	College Seniors
30 - 20	College Graduates

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GUNNING-FOG FORMULA

The Gunning-Fog Formula was developed to determine the readability of magazine articles. The steps used in evaluating articles are presented below:

1. Count the number of words
2. Count the number of sentences
3. Count the number of hard words
4. Find the average sentence length by dividing number 2 by number 1.
5. Multiply the percent of hard words (number 3) by number 1 times 100.

<u>Fog Index</u>

Total (4+5) x .4

This outline of the Gunning-Fog formula is given so the reader will know how the formula is calculated. It is not intended to be complete. For further details, see Appendix C, Reference 4.

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Why Results Of Tests May Vary

Grade levels predicted for a book based upon a large number of 100 word samples was found to have a normal distribution. Several passages from a book may differ by several grade levels because, individually, the passages are not representative of the whole book. It is important, therefore, to use an average of three or more passages to obtain an accurate estimate of reading level.

Results obtained by the various tests applied to a given book or passage may differ because of the measures used as predictors and the criteria by which the methods were validated.

All methods in School Utilities Volume 2 are based upon a measure of vocabulary difficulty and a method of sentence structure complexity as predictors. However, the various methods arrive at these measures in different ways.

Sentence length is the predictor of sentence structure complexity for all the methods in School Utilities Volume 2, but the weight given to this predictor varies from one method to the next.

Several measures are used to predict vocabulary difficulty which accounts for most of the variance between the grade level results in the various methods. For example, there are quite a number of words with three or more syllables that appear on the Dale list of "familiar" words. These familiar words are counted as difficult by methods which employ syllable counts. The word list methods of Dale-Chall and Spache have proven to be more accurate.

Another cause of differences in results is the criterion used to validate each of the methods. The Spache method was validated against the grade level of basal reader series. Most other measures predict the grade level required to score 50 percent correct on the multiple choice comprehension tests used by McCall and Crabbs in their Standard Test Lessons in Reading.

It is important to keep in mind that readability formulas only predict the probable grade level. However, as Edward Fry has said, "high motivation can overcome high readability level, but low motivation demands a low readability level." ("Fry's Readability Graph", Journal of Reading, 21, December 1977, pp. 242-251.)

...imous Declaration of the thirteen united States of America

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, ... the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires ... self-evident, that all men are created equal, that they are endowed by ...

STATE LEGISLATIVE REPORT

An Information Service of the National Conference of State Legislatures — Earl S. Mackey, Executive Director

Vol. 4, No. 3 July 15, 1979

LEGISLATION REQUIRING PLAIN LANGUAGE

ISSUE DEFINITION

Many legal documents, especially contracts and insurance policies, awkwardly like this first sentence often read. As part of a general dislike for cumbersome language and as part of renewed interest in consumer protection, several states have passed legislation requiring use of "plain language" in consumer agreements. The purpose behind these "plain language laws" is to make legal documents simpler and understandable to the average person -- a good few would dispute. The laws themselves, however, have been subject to a continuing controversy in the state legislatures because of their vagueness, the influential interests that often oppose them, and the effects of such legislation on the body of contract law.

BACKGROUND

In the late 1960s and 1970s members of the consumer movement expanded their attack on what they saw as attempts by business interests to bilk consumers through the design of unreadable contracts for goods and services. The image was one of the business representative who presented the consumer with a multi-page contract, written in small print and a strange hand. Even if the consumer were not intimidated by the mere appearance of the document, the contorted language would prevent this average person from understanding the terms of the agreement.

To remedy the situation, consumer advocates (and others who were interested simply in the preservation of the English language) created a drive to have certain consumer contracts written in plain, easy-to-understand language. The purpose behind this effort was succinctly stated in the Maine bill (Legislative Document 1634) which stated that the "purpose of this chapter is to enable the average consumer, who makes a reasonable effort under ordinary circumstances, to read and understand the terms of loan documents without having to obtain the assistance of a professional".

When the Citibank of New York simplified its consumer loan forms, it gave credence to the argument that such simplification was practical. Moreover, various political candidates

and officeholders moved in the mid-seventies to make government documents more readable. Chief among these disciples of readability was President Jimmy Carter who issued an Executive Order in 1977 insisting on understandable language in federal regulations.

At about the same time, the New York legislature passed an amendment to that state's general obligations law. This "Sullivan Law" (named after its sponsor, Assemblyman Peter M. Sullivan), as amended in 1978, became the model for a groundswell of legislative concern and action in the area of consumer contract and insurance policy readability.

The plain-language laws usually require consumer contracts, loan agreements, and insurance policies to contain simplified language that the "average person" can understand. In many instances the laws pertain only to contracts involving no more than $50,000, and they frequently set penalties in the range of $50 for violation of the plain language requirements. The aggregate liability of a person who originates a document in violation of a plain language law -- in the event he or she is sued in a class action--is usually set at $10,000. Plain-language laws rarely render the document void simply because it does not meet the plain-language requirements; they simply penalize the originator of the document.

The laws are usually met with a swirl of controversy. Proponents of plain-language laws frequently cite the following arguments in their support.

1. The average consumer cannot understand most contracts and insurance policies without assistance from legal counsel. Since few consumers are willing to take every insurance policy, loan agreement, and lease to an attorney because of the time and expense involved, they often enter binding arrangements without understanding the full implications of their signatures. Plain-language requirements for these documents would protect the consumers and make it possible for them to read and evaluate their own business transactions.

2. Some academicians and journalists complain that the English language is often mutilated in contracts, insurance policies, and other documents covering the exchange of goods and services. Plain-language laws are one method by which public officials can be restrained from inflicting further damage on the language.

3. Anything that can be written in complicated, difficult, and generally tortuous English can be written in plain English. Simply by taking the time and effort to guarantee understandable language in public records and private contracts, government and business can become more democratic, open, and understandable to the general public.

Opponents of the plain-language movement usually grant the good intentions of the movement's members, but argue that problems surround the execution of these laws.

1. No one knows what language is sufficiently "plain". What might be plain language to one person, might be confusing, vague, or misleading to another.

2. The enforcement costs will be high. They will involve not only the expense to private firms of designing and printing new forms, but also administrative and investigative costs for government.

3. The government will also incur substantial costs in prosecuting violators. Current contracts and policies have been developed through thousands of court cases. Introduction of an entirely new language structure will require much of that litigation to commence again as new, precise meanings are given to the altered vocabulary in contracts and insurance policies. The only people likely to benefit from this need for litigation will be the attorneys involved in the suits.

4. The requirements for plain language in contracts and insurance policies will create the potential for a tremendous number of interstate conflicts and state-federal conflicts, as each state develops different document forms based on different models of plain-language law. It is even possible that some stringent state plain-language laws might be questioned as unlawful restrictions on interstate commerce if they severely hamper the ability of a firm in one state to conduct business in another state.

Even as the pros and cons of plain language requirements for consumer agreements grow and intensify, however, the drive for plain language has spread to areas other than consumer protection. Just as President Carter has asked federal bureaucrats to write rules and regulations in understandable terms, state legislatures have considered bills and memorials to require the same standards in their own halls and in the state bureaucracies.

<u>STATE LEGISLATION</u>

Since the enactment of the Sullivan law in New York, the idea of plain language requirements has become popular in state legislatures. A 50-state survey by NCSL in June of this year indicated that over half the states had passed plain-language laws or had them introduced in the past two years. Below is a list of states that reported recent activity in this area:

Arkansas	Iowa	Minnesota	North Carolina
Arizona	Illinois	Mississippi	North Dakota
California	Kentucky	Nebraska	Ohio
Colorado	Kansas	Nevada	Oregon
Connecticut	Maine	New Jersey	Rhode Island
Delaware	Maryland	New Mexico	South Carolina
Hawaii	Michigan	New York	Vermont
			Washington
			Wisconsin

Many of this year's plain-language bills have died in committee, but some have already been passed by the legislatures and signed into law.

The approaches taken by these plain-language laws vary widely. In Rhode Island, a 1979 bill (H5820) passed containing the following language:

> SIMPLIFIED COMPREHENSIVE POLICIES OF INSURANCE -- Simplified policies of insurance providing broad coverage of all or various combinations of risks may be approved by the director of business regulation and issued by insurers notwithstanding any provision of this chapter, and notwithstanding those provisions of any other law which specify the contents of insurance policies, provided that such policies contain provisions assuring to policyholders and claimants protection not less favorable that they would be entitled to under Section 27-5-3 of this chapter or a substantially similar policy which is not subject to this section.

Still another approach has been taken by the Illinois legislature in which HB305 requires:

> Every written agreement entered into after June 1, 1979, for the lease of space to be occupied for residential purposes, or to which a consumer is a party wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes must be:
>
> 1. Written in a clear and coherent manner using words with common and every day meanings;
>
> 2. Appropriately divided and captioned by its various sections.

By far the most stringent requirement on language is set forth in states that subject insurance policies and other forms of consumer contracts to the "Flesch readability formula". At least eight states have this formula written into pending or enacted legislation. A section from the North Carolina House Bill 707, which was enacted into law, describes how this formula is applied to consumer contracts.

> (a) A Flesch scale analysis readability score will be measured as provided in this section.
>
> (b) For policies containing 10,000 words or less of text, the entire policy must be analyzed. For policies containing more than 10,000 words, the readability of two 200-word samples per page may be analyzed in lieu of the entire policy. The samples must be separated by at least 20 printed lines. For the purposes of this subsection a word will be counted as five printed characters or spaces between characters.
>
> (c) The number of words and sentences in the text must be counted and the total number of words divided by the total number of sentences. The figure obtained must be multiplied by a factor of 1.015. The total number of syllables must be counted and divided by the total number of words. The figure obtained must be multiplied by a factor of 84.6. The sum of the figures computed under this subsection subtracted from 206.835 equals the Flesch scale analysis readability score for the policy.

Most states using the Flesch readability score require a score of 40 for a document to be designated as readable.

Many of the state laws have additional requirements for the format and design of insurance policies and other contracts. Ohio's H.B. 119 carried in it the requirement that:

> The agreement shall be divided in a logical manner into sections organized for orderly and understandable reading of the entire agreement. Each section shall contain an underlined, boldface, or otherwise conspicuous title or caption at the beginning that indicates the nature of the subject matter included in or covered by the section.

Oregon Senate Bill 730 contained several requirements of this type:

> (6) Have the text of the contract or policy printed in Roman type at least as

large as 10-point modern type, two points leaded;

(7) Have margins that are adequate for purposes of readability, and have a line length of the text not exceeding four inches for a column;

(8) Have contract section headings printed in contrasting color, typeface or size; and

(9) Be printed so that the contrast and legibility of the ink and paper used is substantially the equivalent of black ink on white paper.

Several states' bills contained a combination of these requirements.

Legislation in Hawaii is mindful of the possibility that "plain language" and "plain English" laws are not necessarily synonymous in the United States. S.B. 48 in that state dealt with plain language in acts of the legislature, rules, and public records. A sentence from Section 3 of the bill states, "A Hawaiian word which is commonly understood may be used as a technical term in any public record". So in that state, words other than English-language words are specifically considered in one form of plain-language legislation.

As mentioned in the previous section, requirements for plain language have not remained confined to the realm of consumer protection or commercial law. States have started to consider the possibility that plain language requirements can have applications in other areas. In Wisconsin, Senate Bill 6 requires that:

> The state or county, municipality, school district or other unit of government within this state may furnish a document used in a transaction between it and a consumer only if the document is coherent, written in commonly understood language, legible, appropriately divided and captioned and presented in meaningful sequence.

The bill also applies similar requirements to "every tax form, set of directions and instruction booklets relating to the imposition of personal income tax issued by the department of revenue".

Some bill drafting manuals now devote as much space to grammatical instruction as to legal requirements for bills. The Montana manual states the point behind these requirements simply and forcefully:

> Bills should be written in simple, clear, and direct style, phrased for the common reader as well as for the political or legal expert...A poorly drafted, ambiguous bill will waste the time of citizens affected, confuse those charged with its administration, lead to litigation, and likely fail to accomplish the purpose of the author.

The high level of activity in the area of plain-language legislation in the past year does not necessarily mean that defeated bills from this session will be re-drafted and re-introduced next year. Nor is it certain that additional states will join the list of states active in this area. However, we are witnessing a strong current level of interest in the basic concept which underlies plain-language legislation -- that citizens should be able to read and understand the laws which govern them and the contracts which commit them to action.

REPORTS AND PUBLICATIONS

Goldbaum, D. "Insurance Policy Readibility Laws," Ohio Legislative Service Commission, Service Commission, May 8, 1979. (Available through NCSL's Legislative Information System. Document RCH7903353.)

Givens, R.A. "Practice Commentary," in New York's General Obligations Law 5-702, p. 15.

Havemann, J. "The Headache of Writing Regulations in a New Language," National Journal, November 12, 1977, pp. 1769-1771.

"Plain English Laws in Banking," The American Banker, June 29, 1978.

"Flaws are Seen in Simple English Legislation," La Crosse (WI) Tribune, February 2, 1979.

"Cutting Through the Thicket of Legal Lingo," Milwaukee Journal, February 9, 1979.

"Plain Language Law in Connecticut," New York Times, July 8, 1979.

"Plain Language Law in New York," New York Times. May 2, 1978.

The Alliance of American Insurers Public Relations Committee presents its Fifth Annual Conference on Company Communications in New York, September 23-25, 1979. At that meeting, Alan Siegel of Siegel & Gale, Inc., will discuss the status of simplified language and plain-language policies.

NCSL maintains a file of state activity on plain language legislation and requests that state legislators and legislative staff send bill copies, updated information, and relevant reports and articles on this topic to our Denver offices, c/o Glenn Newkirk.

OIS READABILITY INDEX USER MANUAL

OFFICE INFORMATION SYSTEMS

CHAPTER 1
INTRODUCTION

1.1 WHAT IS READABILITY?

Some documents are easier to understand than others. We read some letters and memos once and immediately know what the writer means, while we must reread others over and over before we can understand them. What is the factor that makes the difference? The answer is "readability." Readability is the element in written material that makes it easy or difficult to read.

Since the 1920s, researchers have been developing ways to measure readability. They have devised various systems, including the Flesch Index, and the Kincaid Index (MIL-M-38784A). These indices are computed by the Readability Index on the Wang Office Information System (OIS), Models 140 and 145.

Readability is important because, in today's business world, productivity and communication are major concerns. The time spent trying to read difficult writing decreases productivity. The less time spent reading, the more productive a person can be.

1.2 THE PLAIN ENGLISH MOVEMENT

Federal and state laws and forms have traditionally been difficult to read. Anyone who has filled out a tax return knows that. Yet tax forms are only a small part of the problem. Every business must comply with a host of federal regulations, many of which carry stiff penalties if they are not adhered to. Business and government spend much time and money each year interpreting these rules.

As a result, the "plain English movement" originated. A pension reform act was passed in 1974, requiring information sent out by companies describing their pension plans and benefits be clearly understood by their employees. A year later, the Moss-Magnuson Warranty Act was passed. This law applied similar readability standards to warranties for consumer goods.

CHAPTER 2
ABOUT THE PROGRAM

2.1 HOW THE READABILITY PROGRAM WORKS

The Readability Index reads a word processing document and analyzes it for reading difficulty. It analyzes documents that are not damaged, in use, or in a print queue.

The program creates a new document containing readability statistics and a list of all polysyllabic words (three or more syllables) used in the text. If specified by the user, the text of the input document is also output. The statistics indicate how easy or difficult the text is to understand.

The Readability Index gathers the following statistics and indices for each paragraph.

- Number of words
- Number of sentences
- Number of syllables
- Number of polysyllabic words
- Average number of syllables per word
- Average number of words per sentence
- Kincaid Index (MIL-M-38784A)
- Flesch Index score
- Grade level (a Flesch Index derivative)

After each line of paragraph statistics, the Readability Index lists all polysyllabic words in the order in which they occur in the text.

At the end of each page, the program accumulates the items and prints the page totals. At the end of the document, the program accumulates all the statistics and prints the document totals.

2.2 COUNTING SYLLABLES, WORDS, SENTENCES, AND PARAGRAPHS

To efficiently use the Readability Index, the user should understand how the program counts syllables, words, sentences, and paragraphs. Readability tests are based on the assumption that only the "running" text, i.e., the actual text contained within paragraphs, need be tested. This program, however, tests all text including titles, headings, section and paragraph numbers, date lines, salutations, and signature lines. The decision about what constitutes running text is left to the user. By using exclusion symbols, the user can exclude any part of the text from the analysis process.

2.2.3 Sentences

The Readability Index uses common typing rules to determine its sentence and paragraph designations. A sentence is defined as any word or group of words ending with a period, question mark, exclamation point, colon, or semicolon.

To indicate a sentence, a period must be followed by at least two spaces (or at least one return character). If there is only one space after a period, the Readability Index does not count it as a sentence (for example, Mrs. Smith). Only one space must follow other end-of-sentence punctuation marks to indicate a sentence. The end of a paragraph indicates the end of a sentence.

A word followed by any end-of-sentence punctuation (other than a period) and a single or double quotation mark is not the end of a sentence unless the quotation mark is followed by at least two spaces or by at least one return character. Also, a word followed by a single return and no end-of-sentence punctuation does not denote an end of sentence.

If the program encounters an ellipsis (a sequence of three dots indicating missing text, i.e., "...") or more than one exclamation point or question mark in a row, the system does not count them as multiple sentences. For example, the sentence "What on earth do you mean???" is counted as one sentence.

2.2.4 Paragraphs

The Readability Index recognizes a paragraph when it finds one or more words followed by two or more return characters regardless of end-of-sentence punctuation (period, question mark, exclamation point, colon, or semicolon). A paragraph end is implied if a sentence ends at the end of a page, even if there are no return characters.

A word at the end of a page that is not followed by any end-of-sentence punctuation or a return character indicates that the sentence, and the rest of the paragraph, continue on the next page.

If the last word on the page is part of a sentence that continues on the next page, the program does not consider that page an end of paragraph. If a sentence carries over to the next page, the Readability Index includes the sentence's statistics on the page on which it ends. Syllable, word, and sentence counts for all complete sentences in the partial paragraph are included in the page totals for the page on which the paragraph began. The totals for the entire paragraph appear when the end of the paragraph is reached.

Thus, if there are split paragraphs in a document, the totals for the entire document will not equal the sum of the various page totals because the document totals represent the sums of all the complete paragraph statistics. Thus, accuracy is maintained at the paragraph and document level.

	[------ NUMBER OF		------]		[- AVERAGE -]		[-KINCAID-]	[- FLESCH -]	
Sect.	Words	Sent	Syl	Poly-syl	Syls/ Word	Words/ Sent	MIL-M-38784A	Raw Score	Grade Level

(TO: John Clark

FROM: Martha Johnson

SUBJECT: Office Information Systems Readability Index

DATE: September 30, 1981)

Enclosed is a demonstration of the Office Information Systems Readability Index. This demonstration should be able to be performed easily, as a result of the advanced human interface design aspects of the package.

Pr 1	33	2	62	6	1.88	16.50	13.0	31.14	16.3

POLYSYLLABIC WORDS: demonstration Information Readability demonstration easily interface

The necessity of the following software package demonstration becomes readily understandable when one investigates the series of events which have led to the development and implementation of the Pension Reform Act of 1974, the Moss-Magnuson Warranty Act of 1975, and the Presidential Executive Order 12044 in 1978. This legislation requires increased levels of readability for documentation in the insurance industry, the public sector, and the federal government.

Pr 2	67	2	134	19	2.00	33.50	21.1	3.63	20.5

POLYSYLLABIC WORDS: necessity following demonstration readily understandable investigates development implementation Moss-Magnuson Warranty Presidential Executive legislation readability documentation insurance industry federal government

PG 1	100	4	196	25	1.96	25.00	17.3	15.64	18.7
TOTAL:	100	4	196	25	1.96	25.00	17.3	15.64	18.7

	[----- NUMBER OF			-----]	[- AVERAGE	-]	[-KINCAID-]	[- FLESCH	-]
Sect.	Words	Sent	Syl	Poly-syl	Syls/ Word	Words/ Sent	MIL-M-38784A	Raw Score	Grade Level

(TO: John Clark

FROM: Martha Johnson

SUBJECT: Office Information Systems Readability Index

DATE: September 30, 1981)

Enclosed is a demo for the OIS Readability Index. This demo should be easy to run because of the human design aspects of the package.

Pr 1	25	2	39	1	1.56	12.50	7.7	62.17	9.6

POLYSYLLABIC WORDS: Readability

The need for this software package becomes clear when one learns of the events which led to the creation of the 1974 Pension Reform Act, the 1975 Moss-Magnuson Warranty Act, and the 1978 Presidential Executive Order 12044. These laws call for easy-to-read texts in the insurance industry, the public sector, and government.

Pr 2	52	2	83	9	1.60	26.00	13.4	45.41	14.2

POLYSYLLABIC WORDS: creation Moss-Magnuson Warranty Presidential Executive easy-to-read insurance industry government

PG 1	77	4	122	10	1.58	19.25	10.6	53.25	11.9
TOTAL:	77	4	122	10	1.58	19.25	10.6	53.25	11.9

HB
59

Alaska State Legislature

Representative John Lindauer
District 10-A
3933 Geneva Place
Anchorage, AK 99508

While in Juneau
Pouch V
Juneau, AK 99811
465-3709

House of Representatives

RECEIVED
MAR 1 1983

February 28, 1983

TO: House State Affairs Committee

FROM: Representative John Lindauer

RE: House Bill #59 "An Act requiring motor vehicles 10 years or older to be inspected by the Department of Public Safety before registration."

Data: There are 375,000 vehicles registered in Alaska (12/30/82)
There are 125,591 vehicles older than 10 years (1/30/83)

The intent of HB 59 is to provide mandatory mechanical safety inspections prior to registration of motor vehicles which are a minimum of 10 years old.

The administrative code currently provides for the minimum safe operating standards for motor vehicles (13 AAC 04.001 - 13 AAC 04.355). The inspection of unsafe vehicles are left to the discretion of law enforcement officers who then issue the appropriate citations.

While old cars are not necessarily unsafe, they have a greater potential to have worn or unsafe equipment.. By requiring vehicles of a certain age, 10 years or older, to be inspected prior to registration the end result of this legislation would be to remove unsafe older vehicles from the Alaskan highways.

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: HB 59 Date on Bill: 1/18/83
Title: An Act requiring motor vehicles 10 years or older to be inspected....
Sponsor: Lindauer
Requestor: House State Affairs

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
Capital				4.455.0				
Operating				4.257.7	3.516.8	3.727.8		
Total				8.712.7	3.516.8	3.727.8		

b. Revenues:

Revenue								

2. Source of funds to offset fiscal impact of bill:

Not indicated by author.

3. Assumptions:

According to department statistics, there are 125,591 vehicles in Alaska over 10 years old. This figure will change yearly as a new year is added.

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It therefore does not represent the final estimate of fiscal impact.

Prepared By: Robert J. Rowan Phone: 269-5551
Division: Motor Vehicles Date: 1-27-83/2-17-83

Approved by Commissioner: [signature] Date: 2-/23/83
Department: Public SAFETY

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor
Copy to Requestor

2/15/83

HB

62

FROM THE DESK OF IRIS A. LATHROP

P.O. BOX 187, TOK, ALASKA 99730
907-883-5172

Ap[illegible]

RECEIVED
APR 2 2 1984

The Honorable Mitch Abood
Alaska State Legislature
Pouch V, Mail Stop 3100
Juneau, Alaska 99811

Dear Representative Abood: Re: Magistrate Retirement
House Bill 279

I respectfully ask for your "do pass" recommendation on the subject bill. I spoke with Representative Shultz a few days ago and he recommended that I write to you, as Chairman for the State Affairs Committee.

I was present at a teleconference March 25th at Anchorage, where two of our magistrates and a district judge gave testimony to Senator Ray and the senate judiciary committee. During that conference APEA entered their opposition, to which I later responded by letter to Senator Ray and enclose a copy for your information.

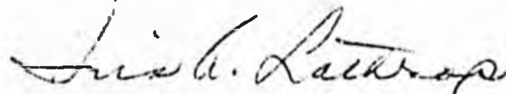
In addition, a representative of the State Division of Retirement and Benefits advised it would cost the state $625,000 to include the magistrates in the judicial retirement system. Inasmuch as I have no conception of what is involved to administer a retirement system, I have written to that division for a cost breakdown. If this figure is accurate, I wonder at the cost to the state for the high-salaried people that are presently participating in that system.

I realize that you have many other issues to decide this session, however, I must ask that you give consideration to our magistrate association's request. We have had bills submitted in prior years, and as you may or may not know, we have been deeply disappointed that none of those bills were enacted. Hopefully, with your help, as well as the members of your committee, this will be the year the legislature acts in our favor.

Thank you for your consideration.

Enclosure
Copy: Honorable Bill Ray

Sincerely,



Iris A. Lathrop

P. S. Please feel free to copy this letter for distribution to other house members.

ial

FROM THE DESK OF IRIS A. LATHROP

P.O. BOX ~~XXX~~ TOK, ALASKA 99780
907-883-5172 Office
907-883-4311 - Home

April 1, 1983

The Honorable Bill Ray
Alaska State Senate
Pouch V (MS 3100)
Juneau, Ak. 99811

Dear Senator Ray: Re: Teleconference 3/25/83 on Senate Bill #20

I respectfully request your "do pass" recommendation for this subject bill and wish to thank you for this teleconference.

In response to APEA's opposition, I wish to point out some differences between state employees and magistrates.

1) Most state employees work 37-1/2 hour weeks and are paid overtime. Magistrates work 37-1/2 hours plus any number of hours overtime and on-call duty 24 hours per day, seven days per week and are not paid overtime.

2) State employees can be union members. Magistrates cannot.

3) Most state employees do not have to abide by the Conflict of Interest Law. Magistrates must.

4) Most state employees can contribute to their choice of political parties and candidates. Magistrates cannot.

5) Most state employee's families (if any) do not have to abide by the conflict law and the judicial cannons. Magistrate's families must abide by both.

In addition, any of the state employees that may be bound by either the conflict law or judicial cannons earn salaries which enable them to provide for their retirement years. Magistrate salaries are, in most cases, less than half of those state employees. In addition, many of those state employees have the use of state vehicles. Magistrates must use their own vehicles. Some magistrates use their vehicles to transport bodies in coroner cases. The only mileage magistrates are allowed is for long distance trips and then only from city limit to city limit. Each of us put on many miles for court business which we are unable to be reimbursed for.

Historically, magistrates have been underpaid for their positions of trust, although we are finally becoming recognized to some degree.

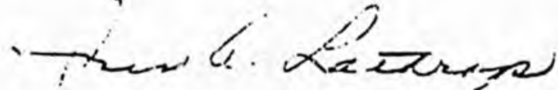
It is very difficult to "blow our own horns" so to speak, as by nature, for the most part, we are humble people and the type that do best in this position. We cannot afford to hire a lobbyist nor can we give or receive any favors, as we are bound by the judicial cannons.

In response to Mr. Humphries, of the Division of Retirement and Benefits, presentation, at this time I am unable to understand the horrendous cost for one year! $625,000 is unbelievable!! I am writing to Mr. Humphries for a copy of this estimate.

I respectfully request that copies of this letter be distributed to all members of the judiciary committee.

I do wish to thank you for any consideration you may give to a "do-pass" recommendation.

Sincerely,



Iris A. Lathrop

Alaska State Legislature

House of Representatives

March 2, 1983

TO: House State Affairs Committee

FROM: Representative John Lindauer

RE: House Bill #62: "An Act relating to the use of public money for the payment of nonresident individuals or businesses."

The purpose of this bill is to assist the state and its educational institutions in the identification of the career opportunities and educational needs of the youth of Alaska.

It is the state's policy to encourage our youth to stay in Alaska. For that reason we have for some years forgiven a portion of our student loans in the event that student borrower resides in Alaska after graduation.

The retention of Alaska's youth requires that we provide them with an educational system which trains them for the jobs which exist in the Alaskan economy. This requires that the state identify those areas for which there are not enough trained Alaskans. This bill will identify the occupational areas and training where our scarce educational dollars can be best concentrated.

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF ADMINISTRATION

DIVISION OF GENERAL SERVICES AND SUPPLY

POUCH C (MS 0210)
JUNEAU, ALASKA 99811

(907) 465-2150

March 8, 1982

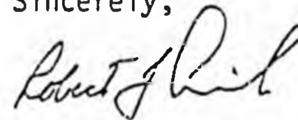
Honorable John Lindauer
Alaska State Legislature
House of Representatives
Pouch V (MS 3100)
Juneau, AK 99811

Dear Representative Lindauer:

Re: HB 62

After discussion with you and further thought I find that I agree with your points regarding HB 62. Though it would be easier to apply if "resident" and "expertise or services" were defined, it would not be impossible to implement the bill as is.

Sincerely,



Robert Link
Acting Director

RL/dlr
6/0308-01/6GSS2
cc: Commissioner Lisa Rudd
Department of Administration

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 March 7, 1983

SUBJECT: Constitutionality of SSHB 62

TO: Representative John Lindauer

FROM: Thomas A. Sofo
Legislative Counsel

This memo supplements my earlier memo to you of February 25, 1983, regarding the constitutionality of SSHB 62. The recent (February 28, 1983) decision of the United States Supreme Court in White v. Massachusetts Council of Construction Employees, Inc. may add strength to arguments supporting the constitutionality of SSHB 62. I have attached a copy of the slip decision in that case for your review.

The case certainly seems to stand for the proposition that the state, as a market participant rather than regulator, may prefer its own residents without a violation of the Commerce Clause. The Court did not decide whether there is a Privileges and Immunities Clause violation. Inasmuch as SSHB 62 involves the use of the state's own money in providing services to the state, the parallel to the White case may support a defense to a challenge to the bill in the basis of its constitutionality.

TAS:ljb

Enclosure
1/011

MAR 0 3 1983
AM PM
7,8,9,10,11,12,1,2,3,4,5,6

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WHITE, MAYOR OF BOSTON, ET AL. *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 81-1003. Argued November 1, 1982—Decided February 28, 1983

Petitioner Mayor of Boston, Mass., issued an executive order requiring all construction projects funded in whole or in part by city funds or funds that the city had authority to administer to be performed by a work force at least half of which are bona fide residents of the city. The Massachusetts Supreme Judicial Court held the order unconstitutional under the Commerce Clause.

Held: The Commerce Clause does not prevent the city from giving effect to the Mayor's executive order. Pp. 2–11.

(a) When a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause. *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794; *Reeves, Inc.* v. *Stake*, 447 U. S. 429. In a case like the instant one, the only inquiry is whether the challenged program constituted direct state or local participation in the market. Pp. 2–4.

(b) Insofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of *Alexandria Scrap Corp.* Even if implementation of the Mayor's order might have a significant impact on specialized construction firms employing out-of-state residents, this is not relevant to the inquiry of whether the city is participating in the marketplace when it provides funds for construction. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause. And, even if the Mayor's order is characterized as sweeping too broadly, such

3

Syllabus

characterization is relevant only if the Commerce Clause imposes restraints on the city's activity and is no help in deciding whether those restraints apply. Pp. 5–7.

(c) Insofar as the Mayor's order was applied to projects funded in part with funds obtained from certain federal programs, the order was affirmatively sanctioned by the pertinent regulations of those programs. Where the restrictions imposed by the city on construction projects financed in part by federal funds are directed by Congress, then no dormant Commerce Clause issue is presented. Pp. 7–9.

384 Mass. 466, 425 N. E. 2d 346, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which WHITE, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-1003

KEVIN H. WHITE, ETC., ET AL., PETITIONERS *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[February 28, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

In 1979 the mayor of Boston, Massachusetts, issued an executive order[1] which required that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half *bona fide* residents of Boston.[2] The Supreme Judicial Court of Massachusetts decided that the order was unconstitutional, observing that

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[1] The executive order provides:

"On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:

a. at least 50% by bona fide Boston residents;

b. at least 25% by minorities;

c. at least 10% by women."

Only the residency requirement is being challenged.

[2] In 1980, of approximately $482 million expended on construction in the City of Boston, some $54 million, or 11%, was spent on projects to which the executive order applied. Of this latter amount, approximately $34 million represented projects being funded in part through federal Urban Development Action Grants (UDAGs).

the Commerce Clause "presents a clear obstacle to the city's order." 384 Mass. 446, 425 N. E. 2d 346 (1981). We granted certiorari to decide whether the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, prevents the city from giving effect to the mayor's order. 455 U. S. 919 (1982). We now conclude that it does not and reverse.

I

We were first asked in *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976), to decide whether state and local governments are restrained by the Commerce Clause when they seek to effect commercial transactions not as "regulators" but as "market participants." In that case, the Maryland legislature, in an attempt to encourage the recycling of abandoned automobiles, offered a bounty for every Maryland-titled automobile converted into scrap if the scrap processor supplied documentation of ownership. An amendment to the Maryland statute imposed more exacting documentation requirements on out-of-state than in-state processors, who in turn demanded more exacting documentation from those who sold the junked automobiles for scrap. As a result, it became easier for those in possession of the automobiles to sell to in-state processors. "The practical effect was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors." 426 U. S., at 803, n. 13. In upholding the Maryland statute in the face of a Commerce Clause challenge, we said that "[n]othing in the purpose animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*, at 810 (footnotes omitted). Because Maryland was participating in the market, rather than acting as a market regulator, we concluded that the Commerce Clause was not "intended to require independent justification," *id.*, at 809, for the statutory bounty.

We faced the question again in *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980), when confronted with a South Dakota policy to confine the sale of cement by a state operated cement plant to residents of South Dakota. We underscored the holding of *Hughes* v. *Alexandria Scrap Corp.*, saying:

> "The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. [Citation omitted]. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 447 U. S., at 436–437.[3]

We concluded that South Dakota, "as a seller of cement, unquestionably fits the 'market participant' label" and applied the "general rule of *Alexandria Scrap*." *Id.*, at 440.

Alexandria Scrap and *Reeves*, therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. As we said in *Reeves*, in this kind of case there is "a single inquiry: whether the challenged 'pro-

[3] We also noted the policy in support of this limitation on the Commerce Clause:

"Restraint in this area is also counseled by considerations of state sovereignty, the role of each State 'as guardian and trustee for its people,' *Heim* v. *McCall*, 239 U. S. 175, 191 (1915), quoting *Atkin* v. *Kansas*, 191 U. S. 207, 222–223 (1903), and 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919). Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." 447 U. S., at 438–439 (footnotes omitted).