ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3507 HLAB HB 466

383

Position Title	Labor Economist II			No. of Positions	Range/Step	Barg. Unit	Gov.	Approv.	Disapp.
Time Status: PFT	Staff Months: 12.0	RP Number:		Location: Juneau	Election District:		Leg.		

Type of Expenditure		Amount
1	2	3
Salary	33,660	
Benefits	10,779	
Premium Pay		
Other		
Total Personal Services		44,439
Travel		
Contractual		8,000
Commodities		400
Equipment		1,200
Other		
Total Cost		54,039

Receipt Code	Funding Source		Amount
	Federal Receipts	1002	
	G. F. Match	1003	
	General Funds	1004	54,039
	I-A Receipts	1005	
	Program Receipts	1028	
	CIP Receipts	1061	
	Other		

For B&M Use Only
Key Number ____ - ____ - ____ - ____ - ____

Justification

This position will have primary responsibility for the analysis of data and preparation of the annual resident hire report. Specifically the duties would include:

1. Coordinate the collection and monitor the validity of relevant resident hire related statistics from other agencies including the Department of Revenue and the Division of Labor Standards and Safety.
2. Coordinate the updating and crossmatching of resident hire related data files on the main-frame computer with the analyst programmer.
3. Analyze microcomputer resident hire data bases to generate resident hire related tables and reports. The reports will include data relating to occupational displacement of nonresidents by census area and other related economic statistics associated with issue of resident hire.
4. Supervise the Statistical Clerk that will prepare the basic resident hire data tables for the report.
5. Prepare the annual resident hire report.

Contractual services costs include phone, training, equipment lease and maintenance, and other miscellaneous items.

Request For New Position

Agency: Labor
BRU: Administrative Services
Component: Special Services

Page ____ of ____
Revised Date

FY 87

Position Title	Statistical Clerk			No. of Positions	Range/Step	Barg. Unit	Gov	Approv.	Disapp
				2	8B	GGU			
Time Status	Staff Months	RP Number		Location	Election District		Leg.		
PFT	12.0			Juneau				**	

Type of Expenditure		Amount
1	2	3
Salary 23,580 X 2	47,160	
Benefits	16,916	
Premium Pay		
Other		
Total Personal Services		64,076
Travel		
Contractual		16,000
Commodities		800
Equipment		2,800
Other		
Total Cost		83,676

Receipt Code	Funding Source		Amount
	Federal Receipts	1002	
	G. F. Match	1003	
	General Funds	1004	83,676
	I-A Receipts	1005	
	Program Receipts	1028	
	CIP Receipts	1061	
	Other		

For B&M Use Only
Key Number __ __ - __ __ - __ __ - __ __ - __ __

Justification

One position will support a labor economist to prepare an annual report on the effect of nonresident employment on Alaskans. Secondarily this position would assist on the quality control of occupational titles which would be submitted by employers each quarter. Specifically the duties would be:

1. Update tables of economic information by resident status.
2. Load information into spreadsheets to show occupational displacement of residents by nonresidents.
3. Assist in the quality control of the occupational displacement of residents by nonresident workers.

The other position will work on the quality control of occupational titles which would be submitted by employers each quarter. Specifically the duties would be:

1. Review detailed edit listings.
2. Update edit data files.
3. Call employers for clarification when necessary.
4. Correct occupational titles.
5. Prepare computer summaries of results.

Contractual costs for these positions include phone, training, equipment lease and maintenance and other miscellaneous items.

Request For New Position

Agency: Labor

BRU: Administrative Services

Component: Special Services

Page of

Revised Date

FY 87

To: Mike Navarre
Fr: SKB
Dt: 1/18/86
Re: HB 466 local hire sectional analysis

Sec. 1=Purpose. loyalty to residents, reduce resident unemployment, assist economically and socially disadvantaged residents. If any part fails constitutional muster, other parts stand. (saving clause)

Sec. 2=Amends AS36.10.005 by adding:
(c) Adequate but not exclusive indicators of ratio between resident and nonresident (R&NR) employees on public works projects are:
(1) Ratio between eligible permanent fund employees and noneligible or nonapplicants.
(2) Ratio between Alaskan registered voters and Out of state registered voters. (note this does not include the large numbers of employees who are not registered in any state.)
(d) commissioner may take job site surveys.
(e) reasonable indicators of the ratio of R to NR employees in state are:
(1) Unemployment insurance (UI) applicants with out of state addresses to those with Alaska addresses
(2)UI applicants eligible for permanent fund to those who aren't eligible or did not apply.
(f)(1) R unemployment is higher than national average.
(2) rural areas have higher unemployment rates which are not reflected in the national statistics than urban areas (probably because of the seasonal employment characteristics of rural areas)
(3) rural residents do not look for jobs as ferquently as required to fit national standards because of the continuing lack of employment opportunities.
(g) Since it is hard to get info on unemployment in Alaska, it is reasonable for the commissioner of labor to rely on information and projections to indicate trends and try to remedy unemployment based on these trends.

Sec. 3= AS36.10 is amended by adding:
36.10.130Resident hire report, wherein the AG and Comm'r of Labor are required to submit yearly reports on the status of unemployment in Alaska and methods to increase resident hire. Reports must be submitted at least 30 days before legislative session begins.
36.10.140 Registration required, wherein to be elibible for preference one must register with the DOL or local hiring hall.
36.10.150 Determination of underemployed area, wherein if the Comm'r determines an area is underemployed, any public works project shall require 95% of its employees be Residents. The whole state can be held an underemployed area. The determination is effective for 3 fiscal

years. The public works project can be wholly or partially situated within the area. The determination is made in worker hours on a craft-by-craft basis. (so what affects plumbers may not affect carpenters)
(b) What is an underemployed area: The Comm'r must find that:
(1) The rate of unemployment is higher than the national average. (What about the seasonal employment factor?)
(2) there is substantial unemployment in the area among the people who would be working on a public works project AND
(3) employed NRs are contributing to the unemployment of Rs in the area.

SEc. 36.10.160 Preference for Rs in an Economically Distressed area.
(a) For the 3 fiscal years following a finding by the Comm'r that an area is econ. dist., at least 50% of employment under 36.10.180 projects sited wholly or partially within the affected area will be of area Rs. Determination made be worker hours on craft-by-craft basis.
(b) What is an economically distressed area:
(1) average annual family income of area Rs is below fed. poverty level, or unemployment rate in area exceed national average by at least 5% And
(2) Employed NR. are contributing to unemployment of area Rs. (Problem with this is that statistics would not be reasonable when applied to bush areas where most of the families are subsistence level, employment is seasonal)

Sec. 36.10.170 Preference for economically disadvantaged minority residents, wherein (a) for 3 fiscal years following the comm'r's determination that area minorities are disadvantaged, at least 25% of the employees hired on 36.10.180 projects shall be minority Rs. Again determined on worker hours and craft-by-craft basis.
(b) What is an econmically disadvantaged minority:
(1) minority population of area exceeds state average;
(2) minority Rs unemployment percentage is at least two times greater than nonminority Rs. and
(3) employed NRs are contributing to unemp. of minority Rs.
(problem with this whole concept is its relevance. I think it violates the equal protection rights of nonminority Rs by treating them differently than minority Rs. It's like a miniature of the first local hire law, held unconstitutional)
(c) for purposes of this section, minorities are those determined minority by the fed. census bureau.

Sec. 36.10.180=Scope of preference (what jobs this law applies to)
(1) contracts let by a municipality for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work, or any other retention of services necessary to complete a given project; and
(2) a construction project involving state money in any way and to which the state or an agency of the state is a signatory.
(b) If governor declares an area affected by economic disaster under AS 44.33.285, the preferences established in 44.33.285 - 44.33.310 supercede those establised in 36.10.150 and .160 for contracts awarded by the state.

Sec. 36.10.900 Effect of Judicial decisions. Saves any constitutional part of this law if any part is found unconstitutional and allows for the sound parts to be implemented as well as possible.
SEC 4 This act is not retroactively applicable
SEC 5 Repeals 36.10.010
SEC 6 This act is effective when AS36.10.010 is found unconstitutional

Addenda: Note how in an Underemployed area in 36.10.150 95% of employees must be R. Compare with 36.10.160 Economically distressed area, where only 50% of employees must be Rs. The definitions for the two indicate that a distressed situation is more severe than an underemployed situation, yet 45% fewer Rs need be hired in the distressed situation.

The Wyoming case mentioned that a saving factor of the Wyo. statute was the fact that it required only that QUALIFIED residents be hired. This bill broadly uses the term Resident, which subjects it to the question, DO I NEED TO HIRE ANY RESIDENT WHO IS FROM THE AREA BEFORE A NON RESIDENT QUALIFIED APPLICANT?

Alaska State Legislature

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CHAIRMAN
Special Committee on
Telecommunications

MEMBER
Labor and Commerce
State Affairs
Finance—Subcommittee Administration

Representative H. A. "Red" Boucher

DATE: January 17, 1986

TO: All Members, Alaska State House of Representatives

FROM: Rep. H.A. "Red" Boucher

SUBJECT: Supreme Court Decision on Resident Hire Law

This decision by the Alaska Supreme Court concerning our resident hire law has just been received in my office and I am distributing it for your information. It looks like we have our work cut out for us, but I see a ray of hope.

THE SUPREME COURT OF THE STATE OF ALASKA

JAMES ROBISON, Commissioner of Labor; ROBERT BACOLAS, Director, Division of Labor Standards and Safety; DONALD WILSON, Deputy Director of the Division of Labor Standards and Safety; JAMES R. CARR, Supervisor of the Wage and Hour Administration; the DEPARTMENT OF LABOR OF THE STATE OF ALASKA, and the STATE OF ALASKA, and the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 751,

Appellants,

v.

JAMES N. FRANCIS,

Appellee.

File No. S-493

O P I N I O N

[No. 3011 - January 17, 1986]

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 751,

Appellant,

v.

JAMES N. FRANCIS,

Appellee.

File No. S-510

JAMES N. FRANCIS, Appellant, v. JAMES ROBISON, Commissioner of Labor; ROBERT BACOLAS, Director, Division of Labor Standards and Safety; DONALD WILSON, Deputy Director of the Division of Labor Standards and Safety; JAMES R. CARR, Supervisor of the Wage and Hour Administration; the DEPARTMENT OF LABOR OF THE STATE OF ALASKA, and the STATE OF ALASKA, and the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 751, Appellees.	)	File No. S-552

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karl S. Johnstone, Judge.

Appearances: Jan Hart DeYoung, Assistant Attorney General, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for State of Alaska, Department of Labor, James Robison, Robert Bacolas, Donald Wilson, and James C. Carr. Allison E. Mendel, Jermain, Dunnagan & Owens, Anchorage, for International Association of Bridge, Structural and Ornamental Ironworkers, Local 751. Ron Zobel, Anchorage, for James N. Francis.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

MATTHEWS, Justice.
BURKE, Justice, concurring.

We hold in this case that Alaska's local hire law, AS 36.10.010,[1] which requires that work on public construction

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1. AS 36.10.010 provides:

> (a) In the performance of contracts let by a municipality for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work or any other retention of services necessary to complete any given project, 95 percent residents shall be employed where they are available and qualified. If 10 or fewer persons are employed under the contract, then 90 percent residents shall be employed where they are available and qualified. In all cases of public works projects, preference shall be given to residents. In an area which has been designated as an area impacted by an economic disaster, residents of that area shall be given employment preference as provided in AS 44.33.290, followed by other residents of the state.
>
> (b) When a construction project is partly or wholly funded by state money and the state or an agency of the state, a department, office, agency, state board, commission, regional school board with respect to an educational facility under AS 14.11.020, public corporation or other organizational unit of or created under the executive, legislative or judicial branch of state government, including the University of Alaska, is a signatory to the construction contract, the contract shall require that the worker hours on a craft-by-craft basis shall be performed at least 95 percent by bona fide state residents. If 10 or fewer persons are employed under the contract, then 90 percent residents shall be employed where they are available and qualified. In an area which has been designated as an area impacted by an economic disaster, residents of that area shall be given employment preference as

(Footnote Continued)

projects be performed almost entirely by Alaska residents, violates the privileges and immunities clause of article IV, § 2 of the United States Constitution.

I. FACTUAL AND PROCEDURAL SETTING

James Francis, a Montana resident, was employed in 1983 as an ironworker by Regan Steel & Supply, a sub-contractor on a North Pole High School project. When the Department of Labor discovered that Regan Steel had a work force of more than five percent non-residents on the project, it sent an enforcement notice to the company. As a result, the company discharged Francis.

Francis sued the state and various state officials,[2] seeking a declaration that the local hire law is unconstitutional under the privileges and immunities and the equal protection clauses of the United States Constitution and under the equal rights clause of the Alaska Constitution. In addition, injunctive relief and damages under 42 U.S.C. § 1983 were sought.

Following a non-jury trial, the superior court entered a partial final judgment declaring that the statute violated the

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(Footnote Continued)

provided in AS 44.33.290, followed by other residents of the state.

2. The International Association of Bridge, Structural and Ornamental Ironworkers, Local 751 intervened as a defendant.

privileges and immunities clause. In support of its decision, the court filed detailed findings of fact, including the following:

> Between April, 1980, and July, 1982, the population of Alaska has grown by nearly fifteen percent (15%).
>
> The population of Alaska has increased in the recent past more rapidly than at any other time in its history, and the State is growing more rapidly than other states in the Union.
>
> Property values in Alaska have been increasing over the last five years.
>
> Alaska is not a depressed area as that term is used in the economics profession.
>
> All sectors of the Alaska economy are expanding and Alaska has experienced very rapid economic growth since 1980.
>
> Employment in Alaska in 1983 was at record levels, and the rate of increase was the best since the days of the Alaska Pipeline in 1974-1975.
>
> In 1983, the construction industry was the strongest sector in the state's economy, and it has had the greatest impact on the Alaska economy since the Alaska Pipeline years.
>
> The construction industry in Alaska was exceptionally strong in both the public and private sectors during 1983.
>
> The major factor affecting the level of employment in Alaska in the construction industry is climatic changes as a result of extreme temperature differentials in the winter and summer months. Construction declines to substantially lower levels during the winter months, and increases, peaking out in August and September, during the latter summer months. During the peak periods of construction activity, the state experiences its lowest rate of unemployment.

The expenditure of state funds are a major factor affecting the level of employment in Alaska generally, and the construction industry in particular. The state expenditure for public works projects accounts for approximately sixty to seventy percent (60% to 70%) or more of the total annual construction dollar outlay within the state.

Private investment has a lesser effect on the level of construction activity from year to year in the State of Alaska, and such effect, from time to time, is affected by interest rates.

Unemployment is substantially greater in the rural areas than in the urban areas. The unemployment rate in Anchorage is less than the national average, while in the rural areas, it is greater than the national average and greater than the average within the State of Alaska.

The construction activity is greater within the urban area than within the rural areas. Unemployment is less within the urban areas than within the rural areas.

Rural Alaskans lack the training that urban Alaskans have access to in construction work.

In-migration in the State of Alaska is a factor affecting unemployment in the construction industry in Alaska.

Reasonable inferences from the evidence support a finding that most of the job seekers coming to Alaska intend to become residents upon their entry into the state, thus contributing to the rapid population growth within the state.

There is not sufficient evidence to support a finding that nonresident construction workers are a peculiar source of unemployment in the construction industry in Alaska any more than they would be in any other state. The only inference that can be drawn from the record is that nonresident construction workers come to Alaska to work during peak construction

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periods of time, during which there are more jobs available and less unemployment resulting.

Among the court's conclusions of law were:

The right to obtain employment in any state is a fundamental right and is a privilege which shall be immune from any burden unless the State of Alaska can show a legitimate purpose for such burden. In this case, the State has failed to establish by a preponderance of the evidence such a legitimate purpose.

The defendants and intervenor have failed to prove by a preponderance of the evidence that nonresident construction workers constitute a peculiar source of unemployment in the State of Alaska.

Serious factors affecting unemployment within the State of Alaska are the extreme climatic conditions, the change in the legislative appropriation for public works construction projects, the extreme rapid growth of population experienced by Alaska, and the wildly fluctuating interest rates which have a direct effect on the private sector construction spending.

Statistics over the last several years demonstrate that Alaska's unemployment rate has increased at a rate lesser than the nationwide average. Whereas Alaska's unemployment rate for several years was substantially greater than the nationwide rate, it now stands much closer to the national average, further supporting the conclusion that nonresident employment is not a serious factor in the unemployment rate in Alaska.

The State and the intervenor have failed to prove by a preponderance of the evidence that there is a substantial reason to discriminate against employment of citizens of other states on public works construction projects within the State of Alaska.

> The State and intervenor have failed to prove by a preponderance of the evidence that the preference granted Alaska residents is closely tailored to alleviate unemployment in the construction industry in the State of Alaska.

II. PURPOSE OF THE PRIVILEGES AND IMMUNITIES CLAUSE

The privileges and immunities clause of section 2, article IV of the United States Constitution provides:

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.[3]

The primary purpose of this clause is to prevent states from enacting measures which discriminate against non-residents for reasons of economic protectionism. Supreme Court of New Hampshire v. Piper, ___ U.S. _____, 53 U.S.L.W. 4238, 4240 n.18 (1985). Historically, it was meant to:

> [h]elp fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. "Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have

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3. The terms "citizen" and "resident" are essentially interchangeable for the purpose of review under the privileges and immunities clause. Hicklin v. Orbeck, 437 U.S. 518, 524, 57 L.Ed.2d 397, 403, n.8 (1978).

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> constituted little more than a league of States; it would not have constituted the Union which now exists."
>
> In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Toomer v. Witsell, 334 U.S. 385, 395-96, 92 L.Ed. 1460, 1471 (1948) (footnote omitted, citations omitted). In brief, the clause was meant "to prevent discrimination against non-residents, to further the concept of federalism, and to create a national economic unit." Shelev v. Alaska Bar Association, 620 P.2d 640, 642 (Alaska 1980) (citations omitted).

III. FRAMEWORK FOR ANALYSIS OF PRIVILEGES AND IMMUNITIES CLAIMS

A. Nature of the Right.

The privileges and immunities clause does not protect non-residents against all forms of discrimination. Its reach is limited to "fundamental rights" - rights involving "basic and essential activities, interference with which would frustrate the purposes of the formation of the union." Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 387, 56 L.Ed.2d 354, 367-68 (1978).

B. Substantial Justification.

If the threshold fundamental rights requirement is met, discrimination is only permitted where there is a substantial

reason which justifies it. Toomer, 334 U.S. at 396, 92 L.Ed. at 1471. "No 'substantial reason' will be found absent some showing that nonresidents are 'a peculiar source of the evil' which the state's action is meant to remedy." Noll v. Alaska Bar Association, 649 P.2d 241, 243 (Alaska 1982) quoting Hicklin v. Orbeck, 437 U.S. 518, 526-27, 57 L.Ed.2d 397, 405 (1978).

C. Close Relationship Between Perceived Proble and Statutory Solution.

Moreover, the presence of a substantial reason for discrimination does not alone suffice. The means employed by the challenged statute must be closely related to the interests served by the statute. Toomer, 334 U.S. at 396, 92 L.Ed. at 1471; Hicklin, 437 U.S. at 527, 57 L.Ed.2d at 405. "In deciding whether the discrimination bears a close or substantial relationship to the state's objective . . . the availability of less restrictive means" is relevant. New Hampshire v. Piper, _____ U.S. at _____, 53 U.S.L.W. at 4241.

D. Market Regulator - Market Participant Distinction.

This method of analysis applies both when the state is acting as a sovereign - a market regulator - and as an owner - a market participant.[4] United Building & Construction Trades v.

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4. When the state acts as an employer, a lender, a landlord, a buyer, a seller, or an owner of natural resources, it may be regarded as a market participant and for some purposes will be treated differently than when it acts solely as a

(Footnote Continued)

Mayor and Council of the City of Camden, ___ U.S. ___ 79 L.Ed.2d 249, 259-61 (1984); Hicklin, 437 U.S. at 528-29, 57 L.Ed.2d at 406. However, more leeway is granted the state in its perception of "local evils and in prescribing appropriate cures" when it is acting in a proprietary capacity, as where it "is merely setting conditions on the expenditures of funds it controls." Camden, ____ U.S. at ____, 79 L.Ed.2d at 261 (citations omitted).

This analytical framework, except for the deference given to the state as a market participant, is quite similar to what has come to be called the level of intermediate scrutiny under the federal equal protection clause. Classifications may be made only for "important" purposes, and the means used to accomplish them must be "fairly and substantially related" to the achievement of those purposes. State v. Ostrosky, 667 P.2d 1184, 1192 (Alaska 1983) (citations omitted).[5]

(Footnote Continued)

sovereign body regulating the conduct of others within its jurisdiction. See generally Wells and Hellerstein, The Governmental Proprietary Distinction in Constitutional Law, 66 Va. L. Rev. 1073 (1980).

5. The coverage of the two clauses is overlapping but not identical. The privileges and immunities clause does not apply to corporations, or to aliens, while the equal protection clause does, and the equal protection clause applies to many classifications, while the privileges and immunities clause applies only to those based on residence. L. Tribe, American Constitutional Law § 6-33 at 411-12. Alienage classifications involving non-U.S. citizens are subject to at least an intermediate level of review under federal equal protection doctrine. Tribe, supra § 16-31 at 1089-90; Sugarman v. Dougall,

(Footnote Continued)

The amount of deference due a state when acting as a market participant is not clear from federal cases. The state suggests, and we believe, that a variable standard must be employed. Thus, where the discrimination is far-reaching and exclusive in nature, and extends to the fringes of the state's proprietary interests, the state is entitled to little deference. On the other hand, where the discrimination is narrow in scope and involves a direct relationship between the state and affected individuals, greater deference is called for.

The "Alaska Hire" statute struck down in Hicklin, which covered all employment which was the "result" of state oil and gas leases, which excluded all non-residents from employment so long as qualified Alaskans were available, and which required private employers to discriminate, including those who had no direct dealings with the state, is an example of a case in which the proprietary interest of the state was entitled to little or no deference. An example where more leeway is due might be a case in which a state law requires residency as a qualification for important non-elective public offices. Cf. Sugarman v. Dougall, 413 U.S. 634, 647-49, 37 L.Ed.2d 853, 862-64 (1973).

(Footnote Continued)

413 U.S. 634, 642, 37 L.Ed.2d 853, 860 (1973). The removal of the "disabilities of alienage" in the sense of discrimination based on residency in another state of the United States is central to the privileges and immunities clause. Paul v. Virginia, 75 U.S. 168, 180, 19 L.Ed. 357, 360 (1868).

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IV. ANALYSIS

A. The Nature of the Right.

For purposes of privileges and immunities analysis employment in the construction industry must be considered to be a fundamental right entitled to the protection of the privileges and immunities clause. That conclusion was implied in Hicklin, 437 U.S. at 524-25, 57 L.Ed.2d at 404 (1978) and was made explicit in Camden, ___ U.S. at ___, 79 L.Ed.2d at 260-61.

B. The State's Justification.

The justification proffered for the discrimination inherent in the local hire law is Alaska's historically high unemployment rate. For each year between 1970 and 1983, except 1975, unemployment in Alaska was higher than the national average.[6]

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6. A table prepared by the state's expert witness shows the following:

Unemployment Rates
U.S., Alaska
1970 - 1983

	U.S.	Alaska
1970	4.9%	7.1%
1971	5.9	8.3
1972	5.6	8.3
1973	4.9	8.5
1974	5.6	7.9
1975	8.5	6.9
1976	7.7	8.5
1977	7.0	9.3
1978	6.0	11.0
1979	5.8	9.3

(Footnote Continued)

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Unemployment in the construction industry is a substantial factor in the overall rate of unemployment. Non-resident construction workers contribute to unemployment in the construction industry because, according to the state, they "take jobs which otherwise would go to Alaskan residents. As such non-resident construction workers are a peculiar source of the unemployment problem in Alaska because they take those construction jobs which otherwise could be filled by unemployed Alaskans." In essence, the state's justification for the local hire law is that it tends to reduce unemployment in Alaska by eliminating non-residents from public works construction projects.

C. Degree of Deference Due The State As A Market Participant.

The scope of the discrimination mandated by the local hire law is extensive. All municipal projects and all projects funded by the state, in whole or in part, are covered. This amounts to some 60 to 70% of all commercial construction in the state. As to those projects covered by the law, non-residents are almost entirely excluded. For example, on Francis's construction crew of 26 workers, 25 of them had to be residents. For crews of fewer than 10 workers all non-residents are

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(Footnote Continued)

1980	7.1	9.6
1981	7.1	9.2
1982	9.7	10.0
1983	9.6	10.4

excluded. The statute applies to subcontractors who have no direct contractual relationship with the state, and it seeks to pressure private employers to discriminate in their hiring practices. However, it is limited to employment on public works projects, and as such does not extend, as did the Alaska Hire Act struck down in Hicklin, to activity in which the state has no proprietary interest.

The pervasiveness and intensity of the discrimination mandated by the act indicate that review should be conducted untempered by consideration of the state's status as a market participant in public works projects. The fact that the act does not extend to activities in which the state's proprietary interest is lacking, taken alone, would suggest a less rigorous standard of review. However, this cannot be conclusive in light of the scope and magnitude of the discrimination. On balance we conclude that review approaching that of the intermediate level of scrutiny is called for.

D. Substantiality Of The Justification As A Factual Matter.

There is no doubt that Alaska has an unemployment rate which is higher than the national average and that this constitutes a serious problem. What is lacking is a showing that non-residents are a "peculiar source of the evil" of unemployment. This is in the first instance a factual question. Camden,

____ U.S. at ____, 79 L.Ed.2d at 262; Hicklin, 437 U.S. at 526-27, 57 L.Ed.2d at 405.

The trial court found that "there is not sufficient evidence to support a finding that non-resident construction workers are a peculiar source of unemployment in the construction industry in Alaska anymore than they would be in any other state." Instead, the trial court detailed other causes of unemployment in the construction industry, including climatic extremes, the absence of construction activities in rural areas, and the lack of training prevalent among rural Alaskans. These findings, which are similar to those noted by the United States Supreme Court in Hicklin, 437 U.S. at 526-27, 57 L.Ed.2d at 405, are supported by the record.[7] As such they are not clearly erroneous and may not by disturbed on appeal. Civil Rule 52(a).

E. Substantiality Of The Justification As A Matter Of Law.

As noted, the purpose of the local hire law is to exclude non-residents from public construction jobs so that more jobs will be available to Alaskans. In our view this is not a permissible justification for discrimination under the privileges

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7. In State v. Wylie, 516 P.2d 142 (1973), we struck on equal protection grounds a statute giving a preference in state employment to persons who had resided in the state for one year. We referred to evidence "which indicates that the state's unemployment problems stem from inadequate education and vocational training and from insufficient job opportunities in remote areas of the state." Id. at 149 (footnote omitted).

and immunities clause. To state the same conclusion in conventional privileges and immunities terms, the justification is not "substantial."

A related point recently was made by the United States Supreme Court in New Hampshire v. Piper, ___ U.S. at ___, 53 U.S.L.W. at 4241 n.18. One reason suggested for New Hampshire's law prohibiting non-resident lawyers from becoming members of the bar was the protection of its own lawyers from professional competition. The court dismissed this suggestion: "[T]his reason is not 'substantial'. The privileges and immunities clause was designed primarily to prevent such economic protectionism."

Discrimination for the purpose of benefiting local residents economically was recognized by us as improper in Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975) which involved a statute granting grandfather rights to resident trucking companies but not to non-resident trucking companies. We struck down the statute stating:

> A discrimination between residents and non-residents based solely on the object of assisting the one class over the other economically can not be upheld under either the privileges and immunities or equal protection clauses. . . .
>
> Benefiting economic interests of residents over non-residents is not a purpose which may constitutionally vindicate legislation. . . .

Id. at 710-11.

Other authorities which suggest that a state may not discriminate against non-residents in order to benefit residents economically include:

- Hicklin, 437 U.S. at 526, 57 L.Ed.2d at 405. The court observed that for a state to attempt to eliminate its unemployment problem by requiring private employers within the state to discriminate against non-residents was a policy which was "at least dubious."

- Toomer v. Witsell, 334 U.S. 385, 92 L.Ed. 1460 (1948). South Carolina was precluded from excluding non-resident shrimp fishermen in order to create a commercial monopoly which benefited resident fishermen.

- Ward v. Marvland, 12 Wall 418, 20 L.Ed. 449 (1871). Maryland was precluded from discriminating against non-resident salesmen so that resident merchants might reap greater economic benefits.

- Metropolitan Life Insurance Co. v. Ward, __ U.S. __, 105 S. Ct. 1676 (1985). The Court struck an Alabama law discriminating against out-of-state insurance companies as violative of the equal protection clause. The purpose of the law was to promote domestic industry. The Court held that this purpose was not a legitimate justification for discriminatory treatment: "[P]romotion of domestic business within a state, by discriminating against foreign corporations that wish to compete by doing

business there, is not a legitimate state purpose." ____ U.S. at ____, 105 S.Ct. at 1683.[8]

These cases reflect the view that our constitution protects non-residents from economic discrimination so that our nation can function as an economic unit. Justice Brennan expressed this theme in his concurring opinion in Allied Stores of Ohio v. Bowers, 358 U.S. 522, 533, 3 L.Ed.2d 480, 488 (1959) cited with approval by the Court in Metropolitan Life, ____ U.S. at ____, 105 S.Ct. at 1682, stating:

> Wheeling [Steel Corp v. Glander 337 U.S. 562] teaches that a distinction which burdens . . . nonresidents but not . . . residents is outside the constitutional pale. But this is not because no rational ground can be conceived for a classification which

---

8. This case was decided on equal protection rather than privileges and immunities grounds. The difference, however, is not significant in the present context because the method of analysis is similar and the privileges and immunities clause provides non-resident individuals with more stringent protection against economic discrimination than does the equal protection clause in cases where the basis for the challenged classification is non-residence. L. Tribe, American Constitutional Law § 6-33, at 411-12.

In United Building and Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, ___ U.S. ____, 79 L.Ed.2d 249 (1984), the United States Supreme Court neither rejected nor approved a city program involving discrimination against non-city residents on public works projects. That case is discussed more fully on pages 24 through 25, infra. The fact that the program was not rejected in the face of a justification of grave economic and social ills may mean that local or state governments may foster discrimination in order to stave off an economic or social collapse, a goal broader than, but related to, that of benefiting local residents economically.

> discriminates against nonresidents solely because they are nonresidents: could not such a ground be found in the State's benign and beneficent desire to favor its own residents, to increase their prosperity at the expense of outlanders, to protect them from, and give them an advantage over, "foreign" competition? These bases of legislative distinction are adopted in the national policies of too many countries, including from time to time our own, to say that, absolutely considered, they are arbitrary or irrational. The proper analysis, it seems to me is that Wheeling applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation.

Restricting entry by non-residents into a job market will make more positions available to residents. It is not difficult to make a case to a sympathetic legislature, whose members are accountable only to residents, that residents are deserving of protection because some of them are unemployed. But the universality of this condition is itself a reason why it is impermissible as a justification in privileges and immunities analysis. If every state could exclude or severely limit non-resident workers because some of its residents were unemployed our country would be "little more than a league of states" rather than "the Union which now exists." Paul v. Virginia, 75 U.S. 168, 180, 19 L.Ed. 357, 360 (1869). Such a result would run strongly counter to the policy of national economic unity on which the privileges and immunities clause is based. The result would not be much better if the power to exclude non-resident

workers were limited to those states with above average unemployment. Many states fit that category and many of the others, no doubt, have particular industries in which a case for protection can be made.

F. Relationship Between the Statute and its Purpose.

The preferential hire statute involved in Hicklin was struck down because, among other reasons, the statute was too broad. It applied not only to unemployed residents or residents enrolled in job training programs, but to all residents whether employed or unemployed, well trained or poorly trained. The Court observed that less restrictive alternatives were available:

> A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program. If Alaska is to attempt to ease its unemployment problem by forcing employers within the state to discriminate against non-residents - again, a policy which may present serious constitutional questions - the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit. Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

Hicklin, 437 U.S. at 527-28, 57 L.Ed.2d at 406.

By giving preferential treatment to residents who do not need it, the present statute suffers from the same vice as that struck down by the United States Supreme Court in Hicklin.[9]

V. PRIOR DECISIONS CONCERNING PREFERENTIAL HIRE STATUTES

In general, preferential hire systems have not fared well in the courts. The leading case is Hicklin, where the United States Supreme Court struck down the Alaska Hire statute.

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9. We made similar observations in State v. Wylie, 516 P.2d 142, 149 (Alaska 1973) (one year residency preference in state employment violates equal protection):

> It does not appear, however, that the employment preference furthers the purpose of reducing unemployment except by deterring the in-migration of persons from other states. The personnel rules in question do not increase the number of available state employment opportunities, but simply limit the universe of persons who may compete for them. To the extent that the personnel rules "lower unemployment" by fencing out competition from other states, the rules impermissibly discriminate against persons who have recently traveled to the state. . . . The personnel rules creating an employment preference are poorly "tailored" to achieve the objective of lower state unemployment. There are certainly available to the state other means for lower unemployment which impose a lesser burden on the constitutionally protected right to interstate travel.

We suggested in a footnote to this statement that "[j]ob training programs, for example, may reduce unemployment without imposing a burden on the right of interstate travel." Id., n.14.

Following Hicklin, the courts of several states have held preferential hire statutes concerning state public works invalid on privileges and immunities grounds. Massachusetts Council of Construction Employers, Inc. v. Mayor of Boston, 425 N.E.2d 346 (Mass. 1981) rev'd on other grounds, White v. Massachusetts Council of Construction Employers, 460 U.S. 204, 75 L.Ed.2d 1 (1983); Neshaminy Constructors, Inc. v. Krause, 437 A.2d 733 (N.J. Super. Ct. Ch. Div. 1981), aff'd 453 A.2d 1359 (N.J. Super. Ct. App. Div. 1982); Salla v. County of Monroe, 399 N.E.2d 909, 423 N.Y.S. 2d 878 (N.Y. 1979), cert. denied, 446 U.S. 909, 64 L.Ed.2d 262 (1980); Laborers Local Union No. 374 v. Felton Construction Co., 654 P.2d 67 (Wash. 1982).

The Supreme Court of Wyoming took a different view in Wyoming v. Antonich, 694 P.2d 60 (Wyo. 1984). It rejected a privileges and immunities challenge to a statute giving an employment preference to Wyoming residents on public works projects. In doing so it relied heavily on the recent case of United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, __ U.S. __, 79 L.Ed.2d 249 (1984).[10]

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10. Camden involved a municipal ordinance of the City of Camden, New Jersey, which established as a "goal" with which contractors must make a good faith effort to comply that at least forty percent of the employees of contractors and subcontractors working on city construction projects be Camden residents. The

(Footnote Continued)

We do not read Camden as casting much new light on the present case. The primary issue in Camden, and certainly the most controversial, was whether a municipal ordinance which discriminated against in-state residents as well as out-of-state residents was subject to privileges and immunities scrutiny. Id. at ____, 79 L.Ed.2d at 262 (Blackmun, J., dissenting). The Court did not rule on the question of whether the discrimination was justified by conditions in Camden, or whether the remedy contained in the ordinance was sufficiently closely directed to curing those conditions. It would thus be unwarranted to conclude that the Court approved of Camden's system of discrimination.

Furthermore, the differences between the local hire act here and the ordinance in Camden are noteworthy. As the findings of the trial court indicate, the Alaskan economy is a dynamic and

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(Footnote Continued)

New Jersey Supreme Court had sustained the ordinance against a privilege and immunities challenge because it was not aimed primarily at out of state residents; instead it discriminated against all non-residents of the city, regardless of their state of residence. 443 A.2d 148 (N.J. 1982). The United States Supreme Court reversed the New Jersey court on this point, and went on to hold that a non-resident's interest in public works employment was "fundamental," thus subject to protection under the privilege and immunities clause. ___ U.S. at ____, 79 L.Ed.2d at 259-61. The City also contended that the ordinance was justified in order to cure high unemployment and arrest a sharp decline in population. The Court found it impossible to evaluate these justifications as no trial had been held. The case was therefore remanded to the New Jersey courts for further action. ___ U.S. at ___, 79 L.Ed.2d at 261-62.

3011

growing one, property values are increasing, and Alaska's population is expanding rapidly. In contrast, in Camden the city claimed that it was in a condition of decay, with property values eroding, population sharply declining, and unemployment "spiralling." Id. at ___, 79 L.Ed.2d at 261. While Alaska's unemployment is chronically high due in large part to unique conditions in rural areas, the economy of the state does not seem remotely comparable to the picture of "grave economic and social ills" suggested in Camden. In addition, it appears that the discrimination effected by the Alaska statute is greater than that in Camden. Public works account for the majority of commercial construction activity in Alaska. While the opinion does not indicate whether the same is true in Camden, the exclusion mandated by our statute - 90% to 100% resident workers required - is far more absolute than that in the Camden ordinance. As presented to the Court, the ordinance contained only a goal, not a requirement, that 40% of workers on public works construction projects be residents. For these reasons, unlike the Wyoming Supreme Court in Antonich, we do not regard Camden as precedent supporting approval of our local hire law.

One other case is instructive. It is Sugarman v. Dougall, 413 U.S. 634, 37 L.Ed.2d 853 (1973), which involved a New York statute which precluded non-citizens of the United

States from holding competitive civil service positions.[11] The court held the statute invalid under the equal protection clause of the 14th Amendment.[12] One justification offered for the statute was an economic benefits theory which is similar to the reduction in unemployment rationale, and is relevant to the factor of market participation as well.[13] The argument was that the state had a "special public interest" in confining public employment to its citizens, based on its interest in using state resources for the advancement and profit of members of the state. Id. at 643-44, 37 L.Ed.2d at 860-61. The Court rejected this argument, finding that it was rooted in the discredited concept that constitutional rights turn on whether a government benefit is characterized as a "right" or "privilege." Id.

In the final section of the Sugarman opinion the Court suggested the kinds of discriminatory practices against aliens

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11. The competitive class included all positions for which it was practicable to determine merit and fitness by a competitive examination and included "nearly the full range of the work tasks, that is, all the way from the menial to the policy making." 413 U.S. at 640, 37 L.Ed.2d at 858.

12. See Tribe, supra n.8.

13. In a case following Sugarman, C.D.R. Enterprises v. Board of Education of the City of New York, 412 F. Supp. 1164 (1967), summarily aff'd sub nom. Lefkowitz v. C.D.R. Enterprises Limited, 429 U.S. 1031, 50 L.Ed.2d 742 (1977), the reduction in unemployment rationale was expressly rejected as insufficient as a justification for discrimination against resident aliens and U.S. citizens who had not been residents of New York for at least 12 months.

which are permissible. Id. at 646-50, 37 L.Ed.2d 862-64. The Court did not distinguish between alienage in the non-state resident or non-United States citizen senses, and referred to authorities which concerned alienage only of non-state residents. The Court noted that alienage could be a bar to public employment if the statute was based on legitimate state interests relating "to qualifications for a particular position or to the characteristics of the employee."[14] Id. at 646-47, 37 L.Ed.2d at 862.

Sugarman lends support to the conclusion we have reached in the present case for two reasons The first is that

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14. The Court also stated that "in an appropriately defined class of positions" citizenship could be required as a qualification for office.

> "[E]ach state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." Such power inheres in the State by virtue of its obligation, already noted above, "to preserve the basic conception of a political community." And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There . . . is "where citizenship bears some rational relationship to the special demands of the particular position."

Id. at 647, 37 L.Ed.2d at 862-63 (citations omitted).

it rejects the argument that the state's interest in restricting the resources of the state for the advancement and profit of the members of the state entitles the state to discriminate regarding the employment of aliens. The second is that it suggests that the state may restrict the employment of aliens only for reasons which are much narrower than those used in the present case.

VI. MISCELLANEOUS ISSUES

The appellees also argue that Francis lacks standing because he did not prove that he was dismissed because he was a non-resident. The evidence on this point, although circumstantial, is adequate to sustain the trial court's finding that Francis lost his job because he was not a resident. The appellees also argue that Francis is a resident in fact. This point is frivolous. Not only does the evidence support a finding of non-residency, the state admitted non-residency in its answer. Appellees further contend that Francis lacks standing because injunctive relief will do him no good. This point, too, is frivolous, for it ignores his claim for damages and for declaratory relief.

In view of our decision, it is unnecessary to address Francis's further arguments that the local hire statute violates the equal rights clause of article I, section 1 of the Alaska Constitution and the equal protection and privileges and

immunities clauses of the Fourteenth Amendment to the United States Constitution.

VII. CONCLUSION

Our federal constitution contains a number of provisions designed to protect legally those who lack the power or influence to protect themselves politically. It also manifests a strong commitment to free trade and an aversion to economic protectionism. The privileges and immunities clause combines both of these themes and the local hire act is in substantial conflict with them. For the reasons stated we AFFIRM the judgment of the superior court declaring that the act violates the privileges and immunities clause of article IV, § 2 of the United States Constitution.

BURKE, Justice, concurring.

I concur in the determination that Alaska's "local hire" law[1] violates the Privileges and Immunities Clause of the Constitution of the United States,[2] for the reasons stated in the opinion of the court, authored by Justice Matthews. In my judgment, however, we should decide this case on an independent ground. Thus, as Francis urges us to do in one of his alternative arguments, I would hold the local hire law invalid upon the ground that it violates the clear and unambiguous language of article I, section 1 of the Alaska Constitution.[3]

When called upon to determine the constitutionality of an Alaska statute under both the state and federal constitutions, it is my belief that this court should consider first the requirements of the Alaska Constitution. Shafer v. Vest, 680 P.2d 1169, 1172 (Alaska 1984) (Burke, C.J., concurring). Although this approach has been criticized by some, it is the one favored by a number of respected judges and legal commentators, whose reasons appear far more persuasive to me than do those of the persons in the opposite camp. See R.F. Utter, Freedom and

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1. AS 36.10.

2. U.S. Const. art. IV, § 2.

3. Article I, section 1 of the Alaska Constitution provides, in part, "that all persons are equal and entitled to equal rights, opportunities, and protection under the law."

Diversity in the Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491 (1984). In any event, it is the approach that I would employ in the case at bar, for the following reasons.

A decision by this court that the local hire law violates the Alaska Constitution would bring this case to an immediate end, since it has long been held that it is beyond the power of the United States Supreme Court to review a state court's interpretation of its state constitution, "as long as the state ground is independent of any federal ground and is adequate to support the judgment." Id. at 505, citing Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983) and Fox Film Corp. v. Miller, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935). The majority opinion, however, leaves the final result still uncertain.

Given the understandable popularity of local hire measures in Alaska, it is a foregone conclusion that state officials will be under considerable pressure to seek review of our determination of the federal question by the final arbiter of such disputes, the United States Supreme Court. Should the advocates of local hire prevail in that forum, it will still be necessary for this court to decide whether the present statute

violates the Alaska Constitution. Thus, the ultimate outcome could remain unsettled until there is a second decision by this court. Rather than expose the parties and the people of this state to such uncertainty, and the added cost of future litigation, I think we should decide this critical issue of state law here and now.

Another reason for us to examine the requirements of the Alaska Constitution is the almost certain fact that the state legislature will be asked to enact new local hire legislation, after the announcement of our decision. The main difficulty that the legislature faces, as I see it, is the clear and unambiguous statement contained in our state constitution, "that all persons are equal and entitled to equal rights [and] opportunities." Alaska Const. art. I, § 1 (emphasis added). The fact that it may be possible to draft a statute that would satisfy the requirement of the United States Constitution does not mean that the same statute will pass muster under this or some other provision of the Alaska Constitution. It is important, I think, to make this clear to the people of this state and their elected representatives.

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 January 20, 1986

SUBJECT: Sectional analysis of HB 466

TO: Representative Red Boucher

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have requested a sectional analysis of HB 466, relating to Alaskan resident employment preferences.

Section 1 sets out the legislature's purpose for the bill.

Section 2 adds several subsections to the findings of fact that already exist in statute concerning the need for resident preference in employment. Subsection (c) addresses how to determine the ratio between residents and nonresidents on a public works project. Subsection (d) permits the commissioner to consider information gathered from the job site. Subsection (e) addresses how to determine the ratio between residents and nonresidents working in the state as a whole. Subsection (f) addresses the need for resident preferences. Subsection (g) permits the commissioner of labor to base remedies to the unemployment problem on information gathered from projections and trends.

Section 3 adds new sections to the chapter on employment preferences.

Sec. 36.10.130 requires the attorney general and the commissioner of labor to report annually on unemployment in the state and to recommend methods to increase resident hire.

Sec. 36.10.140 requires registration before a person is eligible for a resident hiring preference.

Secs. 36.10.150 - 36.10.170 establish various preferences. In all three, the preferences last for three years and apply

to worker hours on a craft-by-craft basis on projects included in AS 36.10.180.

As noted in my memorandum of December 31, 1985, these preferences raise constitutional issues. Under the Privileges and Immunities Clause of the United States Constitution, nonresident workers on public works projects would have to be shown as a significant contributor to the unemployment of residents. The preference created by this bill would also have to be shown to be an effective solution to the problem and one that limited the rights of nonresidents as little as possible.

The Alaska Supreme Court held in State v. Francis, Opinion no. 3011, January 17, 1986, that the preference created in AS 36.10.010 is unconstitutional under the federal Privileges and Immunities Clause. In its discussion of the factual basis for the preference, the court upheld the trial court finding that the State had failed to establish that nonresidents constituted a "peculiar source of the evil." Id at 15. The trial court found that unemployment resulted from "climatic extremes, the absence of construction activities in rural areas, and the lack of training prevalent among rural Alaskans." Id at 16. The constitutionality of the preferences created in this bill depend on mustering sufficient facts to show that nonresident workers are the source of the unemployment problem and that the preferences impose as little as possible on the rights of nonresidents in solving that problem. If the problem is the high unemployment rate in the state, it would help the constitutionality of the bill to limit the preference to unemployed or underemployed residents.

The preference for minority residents also raises equal protection questions. The state would need to demonstrate that it was acting reasonably in defining the group as the bill does and that the preference would be an effective solution that infringed on the rights of others as little as possible.

Sec. 36.10.150 establishes a resident hiring preference for underemployed areas of the state. The preference requires that 95 percent of the worker hours on a public works project wholly or partially sited within the area be performed by residents of the area. Subsection (b) sets the criteria that an economic region must meet to be considered an underemployed area.

Sec. 36.10.160 establishes a hiring preference for economically distressed areas of the state. The preference requires that 50 percent of the employment on a project wholly or partially sited within the area be performed by residents of the area. Subsection (b) sets the criteria that an area must meet to be considered an economically distressed area.

Sec. 36.10.170 establishes a preference for economically disadvantaged minority residents. The preference requires that 25 percent of the employment on a project wholly or partially sited within the area be performed by minority residents of the area. Subsection (b) sets the criteria for the preference. It applies to census areas where the minority population exceeds the average minority population for the state, minority resident unemployment is twice as high as nonminority unemployment in the census area, and workers who are not residents of the area are a contributing cause of unemployment in the area. Subsection (c) defines who is considered a member of a minority.

Sec. 36.10.180 defines the scope of projects to which the preferences under AS 36.10.150 - 36.10.170 apply. Subsection (a) applies the preference to the same kinds of projects now covered by AS 36.10.010. Subsection (b) establishes that the preferences established under AS 44.33.285 for residents of an area affected by an economic disaster supercede the preferences under secs. 36.10.150 and 36.10.160.

Sec. 36.10.900 is consistent with general state severability clause at AS 01.10.030 and requires that if a portion of the chapter is held invalid, then the rest of the chapter remains in force.

Section 4 applies the Act to contracts entered on or after the effective date of the Act.

Section 5 repeals the current resident preference law.

Section 6 makes the Act effective on the date the current resident preference law is held unconstitutional.

If I may be of further assistance, please advise.

TC:mkr
M2:041

To: Rep. Navarre, ch. House L&C
Fr: Sid Billingslea, comm. aide
Dt: 1/18/86
Re: Brief of Robison v. Francis, S-493

FACTS

Francis is a nonresident (hereinafter NR) ironworker who got fired from his public works job because he was a NR.
AS 36.10.010 required 95% of the employees on a public works project be residents (hereinafter R). Figures changed to 90% on projects hiring 10 or fewer employees.

ISSUE

Does AS 36.10.010 violate Francis's federal Privileges & Immunities clause right to travel, his Equal Protection right, and his State equal rights under the Alaska Constitution's equal rights clause?

HOLDING

AS 36.10.010 violates Francis's Privileges and Immunities right.

RULE

Privileges and Immunities (hereinafter P&I) protects fundamental rights.
The Court's level of scrutiny is INTERMEDIATE REVIEW, which means:
The State must have an IMPORTANT PURPOSE and
the means (AS 36.10.010) must be FAIRLY AND SUBSTANTIALLY RELATED to the ends (R employment) (at 11)

The state must have substantial justification for its action. Here, NRs must be a "peculiar source of evil" which the state seeks to remedy. (at10)
The means must be the least onerous to the discriminated group (NRs).

MARKET REGULATER VS. MARKET PARTICIPANT DISTINCTION

Where the state is acting only as a sovereign (regulator) it is afforded little deference in its discriminatory actions, using the "variable standard" (at 12)
In a market participant (e.g. public works project) capacity more leeway is given. Here, the state as market participant used a broad scope of discrimination and extends it to "the fringes of the state's proprietary interests" (at 12). Therefore, little deference is given.

The "broad scope" referred to is the fact the 60-70% of all commercial construction in Alaska was affected by AS 36.01.010.

THE STATE'S JUSTIFICATION

a)Facts: Alaska has higher than national average unemployment, but the state failed to show that NRs were the "peculiar source ofevil" other factors could be climate, lack of training in Rs, lack of construction projects in rural areas. (at 16)

b)Law: Rationale that excluding NRs lets more Rs work* not a "substantial justification" under P&I. The purposes of P&I are to prevent Rs from discriminating against NRs for economic protectionism. (at8); to further the concept of federalism and create a national economic unit. (at9).

RELATION OF MEANS TO ENDS

a) Too broad scope: See Hicklin, which required any R, regardless of qualifications be hired over an NR. (at22) Need less onerous means.

b) See Wyoming case, which upheld a local hire law

c) Sugarman i) rejects under Fqual Protection the argument that states interest in restricting resources for the advancement and profit of Rs entitles state to discriminate against aliens for employment purposes. ii) State can restrict employment for aliens, but on a much narrower scope. (at 28)

JUSTICE BURKE'S CONCURRING OPINION

Justice Burke would address the Alaska Const's equal rights provision first because it would preclude further review unless as substantial federal question was left unresolved.

Alaska State Legislature

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CHAIRMAN
Special Committee on
Telecommunications

MEMBER
Labor and Commerce
State Affairs
Finance—Subcommittee Administration

Representative H. A. "Red" Boucher

FOR IMMEDIATE RELEASE
January 21, 1986

FOR MORE INFORMATION, CALL:
465-4931

HOUSE LABOR AND COMMERCE COMMITEE HEARING ON HB 466

THE MOST IMPORTANT PIECE OF ALASKA RESIDENT HIRE LEGISLATION YET DEVELOPED, HB 466, WAS PREFILED THIS SESSION BY REPRESENTATIVE H.A. "Red" BOUCHER (D-ANCHORAGE). A PRELIMINARY HEARING WILL BE HELD ON IT TODAY IN THE HOUSE LABOR AND COMMERCE COMMITTEE. THIS BILL SUBSTANTIALLY INCREASES THE FACTUAL EVIDENCE THAT HAS BEEN REQUIRED BY THE COURTS IN RECENT RESIDENT HIRE CASES. IT WILL ALSO ESTABLISH THE BASIS FOR A RESIDENT HIRE LAW FOR THE STATE OF ALASKA THAT SHOULD STAND UP TO A CONSTITUTIONAL CHALLENGE.

LAST FRIDAY, THE ALASKA SUPREME COURT CAME OUT WITH IT`S LONG AWAITED DECISION IN THE FRANCIS CASE. THAT CASE CHALLENGED THE ORIGINAL ALASKA HIRE STATUTES THAT WERE ON THE BOOK, AND IN EFFECT DECLARED THEM UNCONSTITUTIONAL, DUE IN LARGE PART TO LACK OF SUPPORTING DATA. HOWEVER, THAT CASE WAS BASED ON THE OLD LAW, WHICH HAS SINCE BEEN CHANGED BY HOUSE BILL 294. THAT BILL WAS SUBMITTED LAST YEAR BY REP. BOUCHER, PASSED BOTH HOUSES, AND WAS SIGNED INTO LAW.

HB 294 LAID THE GROUNDWORK FOR FUTURE RESIDENT HIRE ISSUES IN ALASKA BY SPELLING OUT MORE SPECIFIC AREAS WHERE DATA WOULD AND SHOULD BE COLLECTED TO SUPPORT THE STATE'S CASE FOR RESIDENT HIRE. IN KEEPING WITH THE INTENT OF HB 294, THE DEPARTMENT OF LABOR SPENT THE PAST 6 MONTHS COLLECTING DETAILED STATISTICAL DATA SHOWING THAT NON-RESIDENTS ARE TAKING JOBS THAT SHOULD BE GOING TO DESERVING AND QUALIFIED ALASKANS.

THE BILL SPONSORED BY REP. BOUCHER THIS YEAR, HB 466, GOES INTO MUCH MORE DETAIL SPELLING OUT WAYS AND MEANS BY WHICH MORE EVIDENCE CAN BE COLLECTED. MORE IMPORTANTLY, THIS BILL WAS DESIGNED IN SUCH A WAY THAT IT ANTICIPATED THE COURT DECISION IN MANY WAYS, AND THUS IT SPEAKS DIRECTLY TO ALMOST EVERY CONCERN THAT WAS MENTIONED IN LAST FRIDAY'S COURT DECISION.

"THE COURT DECISION BASICALLY STRUCK DOWN A LAW THAT HAS SINCE BEEN CHANGED, FIRST BY HB 294 LAST YEAR, AND EVEN MORE BY HB 466 WHEN IT IS PASSED THIS YEAR," OBSERVED BOUCHER. "FAR FROM BEING DEALT A CRIPPLING BLOW, THE ALASKA HIRE LAWS ARE MOVING SUBSTANTIALLY CLOSER TO THE DAY WHEN THEY WILL WITHSTAND A CONSTITUTIONAL CHALLENGE, AND HB 466 WILL BE AN IMPORTANT BUILDING BLOCK IN THAT PROCESS."

THE ALLIANCE
P.O. Box 100100 / Anchorage, Alaska 99510 / (907) 562-0100

August 30, 1985

File - Local Hire

Commissioner Jim Robison
State of Alaska
Department of Labor
P.O. Box 1149
Juneau, Alaska 99802

Dear Commissioner Robison:

On behalf of the Alliance, I want to thank you for joining us to discuss issues and initiatives relating to "local hire"; reauthorization of alternative methods of overtime compensation and the "good faith" defense amendment to Alaska labor law.

Although the Public Policy Committee of the Alliance has not yet had the opportunity to debate the issues raised in your presentation, some observations can be made within the scope of our adopted policy statements on the issues. Our members will be presented with a synopsis of the discussion and will be asked for input before we get back to you with any potential revisions to our current position or new directions. As you know, our members feel strongly that an effective participatory process leading to state policy on these issues is essential. We want to work with whomever the Governor has tasked with the assignment and are prepared to provide substantive contributions to the development process. Your invitation for the Alliance to participate in the Title 36 Resident Hire Committee might prove to be that avenue. We are anxious to learn more about it, so please do provide us with specifics on the group.

Meanwhile, we offer the following observations:

- We are concerned that the survey undertaken to delineate the scope of the "local hire" problem is both misdirected and flawed in its design;
- We are concerned that an incentive system to promote employment of Alaska residents is not under consideration;
- More basically, we are concerned that a broadly-based participatory process has not been established in order to define the problem, to recommend policy and to develop goals, objectives and strategies to resolve the problem.

SURVEY

You described the "local hire issue" as Governor Sheffiled's "highest priority". Yet you indicated that the survey had to be restricted in scope due to the unavailability of funds with which to conduct a more comprehensive survey of Alaska's industry. We believe that the Governor's highest priority ought to be able to garner sufficient support in the Legislature to be able to conduct a survey considered to be optimum in scope. Given the relatively modest cost required to conduct a comprehensive survey, we think the Governor has sufficient executive authority to allocate resources to the study from already appropriated funds.

Keying in on the oil industry and its support contractors due to the higher paying jobs available in those industries, plays into te hands of those who would fault the State onthe local hire issue. As you know, employment opportunities for Alaskans are spread thorughout all industries in Alaska, perhaps none more so than government. Our research reveals that State government alone accounts for 18-20 percent of all payroll earnings in Alaska. When a conservative multiplier is applied, we find that an estimated 40-45 percent of Alaska's economy is driven by State government. More revealing is the total influence of government including military on the Alaska economy. Fully two-thirds of our payroll earnings is dependent on the economic stimulation attributable to the public sector. In reconstructing the survey as currently conceived, we must urge that all industries in Alaska and all levels of government be assessed as to employment opportunities and practices.

Going beyond the academic, we are persuaded that a survey of industry employment opportunities and practices will not define the essential problem which demands resolution, i.e. unemployed Alaskans. We are convinced that the very real social and economic problem demanding attention within the catch phrase of "local hire" is the Alaskan resident who is looking for work and can find none. Without dwelling on the societal distress generated by the unemployed, nothing can be of higher priority than actions to ameliorate this situation. And nothing can be more important than to immediately launch an all out effort to study the scope of the problem of unemployment in Alaska; to determine the extent of those unemployed due to the cyclical nature of their chosen field of work; to determine the extent of structural imbalances driving unemployment which may define needs for programs to retrain workers caught in that trap; to identify paths for industrial development initiatives within a comprehensive,

statewide economic development program. This, we submit, is the direction required of studies by the State as we deal with the problem of "local hire".

INCENTIVES v. PENALTIES

You indicated that two members of the Senate have approached the administration with requests for assistance in devising an incentive system which would make attractive to employers in Alaska the employment of Alaska residents. On the other hand, there are those in the legislature who appear wedded to the "stick" approach to spurring employment of state residents - an approach routinely found to be unconstitutional in our courts and one which is clearly counterproductive to establishing in Alaska a fertile environment designed to generate new and expanded business opportunities.

The Alliance strongly recommends that the Administration embark on a reordered path designed to achieve employment of Alaskans; a path underpinned with incentives for employers to hire Alaskans and to promote the reality that "Alaskans are good business; hire them". After all, the spirit of independence, of self-sufficiency and of self-motivation prevades the Alaskan workforce unlike any other. An employer cannot put a better worker to work than an Alaskan. Your department ought to advertise that fact; the Alliance is prepared to help.

PLANNING PROCESS

For several months now, the Governor has been on a campaign to achieve "local hire" in Alaska. Again, you have stressed that the issue is his highest priority. Yet, until you invited the Alliance to participate on the Title 36 Resident Hire Committee last week, Alliance members have not been asked to help in resolving the problem.

It is imperative that a truly participatory process be established around this priority of the Governor, tasked with the responsibility of defining the problem, recommending to the Governor policy options for dealing with it and, once he has selected a recommended option, setting goals, objectives and strategies designed to resolve the problem. Moreover, given the priority of the issue with the Governor, the task force must have sufficient authority and resources available to it to achieve its defined goals expeditiously and promptly.

As we mentioned earlier, the Alliance is prepared to play a major role in resolving the problem. We trust that these

preliminary observations will be accepted in the constructive manner in which they are intended.

LABOR LAW MODIFICATIONS

Finally, we all were pleased to hear that your Department is prepared to pursue reauthorization of alternative methods for overtime compensation and authorization of a "good faith" defense in Alaska's labor law to a successful conclusion during the forthcoming session of the Legislature. As you know, the Alliance has worked with leaders of Alaska's key labor organizations and your Department to forge an acceptable compromise on the issue, resulting in Senator Zharoff's introduction of the agreed to language in the late part of the last session.

With your help, we all look forward to enactment of this important measure.

Once again, Commissioner, thank you for meeting with us and for engaging our members and guests in productive dialogue. I can only reiterate the sentiments echoed by the group, that the State Department of Labor, under your guidance, has been scrupulously evenhanded in dealing with these sensitive issues. You and your staff are to be commended.

Sincerely,

William F. Webb
President

Alaska State Legislature

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CHAIRMAN
Special Committee on
Telecommunications

MEMBER
Labor and Commerce
State Affairs
Finance—Subcommittee Administration

Representative H. A. "Red" Boucher

M E M O R A N D U M

To: Rep. Red Boucher, Chair
House Special Committee on Telecommunications

From: Dave Donley, Legislative Aide
and Attorney at Law

Date: January 16, 1986

Subject: Alaskan Resident Employment Preference Legislation: HB 466

Unlike HB 294, which you sponsored and which became law in 1985, HB 466 goes beyond the limits imposed on the legislature last year by the existence of pending litigation in the Alaska Supreme Court (the Francis case).

HB 466 is designed to replace the current Alaska Hire law (AS 36.10.020), which provides a preference to Alaska residents on public works projects for up to 95% of these jobs, should the current law be found unconstitutional.

The bill incorporates guidance provided by judicial decisions since the current law was passed in 1983. It relies heavily on the criteria adopted by the U.S. Supreme Court in the Camden case and the Wyoming Supreme Court in its 1985 Antonich decision (upholding Wyoming's local hire law).

The key to the constitutionality of any resident preference legislation is the availability of proof that such a preference is reasonable. HB 466, unlike any previous legislation, makes the resident preferences provided contingent on the presence of factual circumstances constitutionally adequate to justify such preferences. This legislation for the first time bases resident employment preferences on factually established causes and needs.

The legislation adds additional findings of fact to those of 1985's HB 294, and together they provide the necessary constitutional factual foundation. It makes clear that the intent of the legislature is to adopt the strongest law constitutionally possible, and says that the courts should not

reject the whole law if only one part of it is found unconstitutional.

This legislation is drafted in such a way that most of it's sections stand on their own and may be deleted, if found not to be necessary, without requiring changes in other sections.

The bill includes three types of employment preferences for residents, which for the first time provide alternative constitutional justifications for local hire. First, a statewide employment preference for residents is placed in effect when Alaska's unemployment rate exceeds the national average, and other justifying factors exist.

Secondly, regional employment preferences for local residents may also be involved in areas of Alaska suffering from economic distress. Thirdly, the bill also includes protections for Alaskans living in areas suffering from economic discrimination because of cultural and ethnic factors. These regional preferences will place qualified, economically needy members of a community, in which a public project takes place, first in line for at least a portion of those jobs.

These three preferences are contingent on the Commissioner of Labor finding, among other things, that employment of non-resident workers is a contributing cause of resident unemployment. If properly based in fact, this finding, together with other appropriate facts, should be sufficient to sustain a constitutional challenge based on the Privileges and Immunities clause of the U.S. Constitution (Article XIV, Section 1). That clause prohibits a state from enforcing any law that abridges the privileges or immunities of citizens of the United States, including the right to travel.

Preferences for residents over non-residents are constitutional only if 1) there is a substantial reason for the discrimination, 2) the degree of discrimination bears a close relation to the reasons, and 3) non-residents can be shown "to constitute a peculiar source of the evil at which the statute is arrived," (United Building and Construction Trades Council v. Camden, 104 Supreme Court 1020, 79 L. Ed 2d 249, 52 LW 4187 at 4191, 1984). If the Commissioner of Labor bases his findings on factual information sufficient to meet this test, the preferences should withstand a constitutional challenge.

The employment preference for disadvantaged minority residents is the most difficult to constitutionally defend. In addition to challenges on Privilege and Immunities clause grounds, it may also be subject to Equal Protection Clause challenges. Its constitutionality will depend on the reasonableness of the group given preference and whether the remedy is appropriately tailored to address the problem the state is seeking to solve.

This legislation is drafted such that any of the three preferences, if not needed, may be deleted from the bill with no, or only slight, changes being necessary. Depending on the final decision in the State Supreme Court Francis case, such fine tuning may or may not be advisable.

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 December 31, 1985

JAN 10 1986

SUBJECT: Resident Employment Preference
(Work Order No. 14-1472)

TO: Representative Red Boucher

FROM: Teresa B. Cramer TBC
Legislative Counsel

Enclosed is a draft of the work order you requested. It raises several constitutional issues of which you should be aware.

The draft creates three new employment preferences. Sec. 36.10.150 creates a preference for residents of an underemployed area. Sec. 36.10.160 creates a preference for residents of an economically distressed area, and sec. 36.10.170 creates a preference for economically disadvantaged minority residents. All three preferences are implemented through the mechanism established in AS 36.10.180 and based on AS 36.10.010. All three also extend the preference for three years following a determination by the commissioner of labor that the area meets the necessary criteria.

The preferences in the three sections apply if the commissioner finds, among other things, that employment of nonresident workers is a contributing cause of the unemployment of residents. This finding may be sufficient to overcome a challenge to implementation of the preference based on the Privileges and Immunities Clause which prohibits a state from enforcing any law that abridges the privileges or immunities of citizens of the United States. Constitution of the United States, Article XIV, Section 1.

The United States Supreme Court permits statutes that discriminate against nonresidents to stand only when there is a substantial reason for the discrimination, the degree of discrimination bears a close relation to the reasons, and

if nonresidents are shown to "constitute a peculiar source of the evil at which the statute is aimed." United Building and Construction Trades Council v. Camden, 104 S.Ct. 1020, 79 L.Ed. 2d 249, 52 LW 4187 at 4191 (1984), (citations omitted). If the factual information used by the commissioner of labor to impose a preference under this chapter meets this test, then the preference should withstand a challenge.

The preference for minority residents under AS 36.10.170 may also raise equal protection challenges based on the reasonableness of the group given preference and whether the remedy is appropriately tailored to the problem the state is seeking to solve.

If I may be of further assistance, please advise.

TC:mkr
M2:002

Enclosure

Introduced: 3/15/85
Referred: Labor & Commerce,
Judiciary and Finance

BY BOUCHER, DAVIS, HURLEY, SUND, KOPONEN, GOLL, CATO, CLOCKSIN, COTTEN, DUNCAN, FRANK, GRUENBERG, GRUSSENDORF, HANLEY, JENKINS, LARSON, M.M. MILLER, NAVARRE, PEARCE, PIGNALBERI, POURCHOT, SHULTZ, SZYMANSKI, TAYLOR, THOMPSON, UEHLING, MARTIN, BINKLEY, COLLINS, MARROU, ADAMS, PETTYJOHN, M.W. MILLER AND PHILLIPS

IN THE HOUSE

HOUSE BILL NO. 294

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to preferential hire of Alaskans; and providing for an effective date."

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

* Section 1. AS 36.10 is amended by adding new sections to read:

Sec. 36.10.005. LEGISLATIVE FINDINGS. (a) The legislature finds that

(1) because of its unique climate and its distance from the contiguous states, the state has historically suffered from unique social, seasonal, geographic, and economic conditions that result in an unstable economy;

(2) the unstable economy is a hardship on the residents of the state and is aggravated by the large numbers of seasonal and transient nonresident workers;

(3) the rate of unemployment among residents of the state is one of the highest in the nation;

(4) the state has one of the highest ratios of nonresident to resident workers in the nation;

(5) the state has a compelling interest in reducing the level of unemployment among its residents;

(6) the construction industry in the state accounts for a substantial percentage of the available employment;

(7) construction workers receive a greater percentage of all unemployment benefits paid by the state than is typical of other states;

(8) historically, the rate of unemployment in the construction industry in the state is higher than the rate of unemployment in other industries in the state;

(9) it is appropriate for the state to consider the welfare of its residents when it funds construction activity;

(10) it is in the public interest for the state to allocate public funds for capital projects in order to reduce unemployment among its resident construction workers;

(11) in-migration of nonresident construction workers contributes to or causes the high unemployment rate among resident construction workers because nonresident workers compete with residents for the limited number of available construction jobs;

(12) nonresident workers displace a substantial number of qualified, available, and unemployed Alaska workers on jobs on state funded public works projects;

(13) the state has a special interest in seeing that the benefits of state construction spending accrue to its residents;

(14) the natural resources of land owned by the state belong to the citizens of the state;

(15) Alaskans have chosen to use the majority of the royalties derived from the state's natural resources to fund state government;

(16) the vast majority of the state's revenue is derived from these royalties rather than from other forms of taxation;

(17) because the state has no personal income tax or sales tax, nonresident workers use services provided by the state but do not contribute fairly to the costs of those services; and

(18) Alaskans, more than the residents of other states, suffer economically when nonresidents displace qualified residents

since resident workers contribute local taxes as well as their share of the royalties from natural resources.

(b) The legislature further finds that

(1) the state and its political subdivisions, when acting as a market participant in funding public works projects, should give Alaska residents an employment preference to promote a more stable economy;

(2) the state and its political subdivisions have a duty of loyalty to their citizens and should fulfill this duty by giving residents preference for employment on public works projects they fund;

(3) there is a legitimate and compelling governmental interest and that the public health and welfare will suffer if state residents are not afforded employment preference in state-funded construction-related work.

Sec. 36.10.006. STATEMENT OF PURPOSE. The legislature adopted AS 36.10.010 in response to problems and concerns identified by the findings of facts in AS 36.10.005 to

(1) ensure that qualified resident workers do not remain unemployed while nonresident workers are employed on construction projects funded by the state or a political subdivision of the state if the purpose of the project includes reducing the unemployment of residents;

(2) ensure that qualified resident workers do not remain unemployed while nonresident workers are employed on construction projects funded by the state or a political subdivision of the state;

(3) reduce the level of unemployment among residents of the state.

Sec. 36.10.007. STATE POLICY. It is the policy of this state that, to fulfill the duty of loyalty owed to its citizens and to

remedy social or economic problems, the state will grant an employment preference to residents when the state is acting as a market participant.

* Sec. 2. Section 1 of this Act is retroactive to July 16, 1983.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.-10.070(c).

My name is Gary Brooks & I am President of VALUE (The Valley Alliance of Labor & Union Employees) which is comprised of 9 Labor Unions and Associations, having approximately 3500 members which reside here in the Mat-Su Valley. I am here to speak in support of SSHB 466. The figures recently released by the State D.O.L. certainly support the need, as well as identify the problem concerning resident hire and resident unemployment issues. VALUE ~~fully heartily~~ totally supports legislation which addresses the opportunity for our local work force to secure employment prior to those jobs going to people who reside outside our state & who would be more prone to spend monies earned in Alaska in ~~local~~ states other than our own. I am also an officer of the IBEW L.U. 1547 and know full well the lack of

employment opportunity on my own union brothers & sisters, many of who for the first time in many, many years have had to resort to traveling to other states inorder to secure employment allowing them to remain home owners here in Alaska. I urge your committee's support for strong resident hire legislation & appreciate the opportunity to have input to your committee.

Thank you

Gary Beaks
BRB Box 7516
Palmer 99645
745-3394

file — local hire

HIGHLIGHTS OF BRIEFING
NONRESIDENTS WORKING IN ALASKA

At least 16,000 nonresidents were working in every month of 1984 (page 26)
At least 19,000 residents were unemployed in every month of 1984 (page 26)
71,000 nonresidents earned about $677 million (pages 6, 12,16)

INDUSTRIES WITH THE HIGHEST NONRESIDENT WAGES (pages 8-12)

1.	Heavy construction	$105,154,362
2.	Oil and Gas mining	71,585,450
3.	Food processing	58,079,179
4.	Special trades	51,095,513
5.	Building construction	45,438,783

INDUSTRIES WITH THE HIGHEST PERCENTAGE OF NONRESIDENT WAGES (pages 8-12)

1.	Food processing	53%
2.	Nonclassifiable	31%
3.	Heavy construction	29%
4.	Miscellaneous repair	29%

INDUSTRIES WITH THE HIGHEST NUMBERS OF NONRESIDENT WORKERS (pages 13-16)

1.	Food processing	12,068
2.	Eating and drinking places	7,473
3.	Special trades construction[1]	4,572
4.	Heavy construction	4,094
5.	Business services[2]	3,990
6.	Building construction	3,976

NONRESIDENT VERSUS RESIDENT EARNINGS AND EMPLOYEES

Nonresidents averaged 48% as much annual earning as residents (pages 17-19)
Non residents worked in significantly fewer quarters than residents (pages 6-7)
Nonresidents were more than three times as likely as residents to work in only one quarter.
Nonresidents were only about one-fifth as likely as nonresidents to work in all four quarters.

AREAS WITH THE HIGHEST PERCENTAGE OF NONRESIDENT WORKERS AND WAGES (pages 20-25)

Bristol Bay Borough
Aleutian Islands
Dillingham
North Slope Borough

Footnotes

1) Such as plumbing, heating, painting, electrical, insulation, flooring, roofing, and excavating.

2) Such as advertising, consumer credit, commercial art, word processing, building cleaning, temporary help, data processing, consulting, leasing, commercial testing, and other miscellaneous services to business.

AREAS WITH THE HIGHEST TOTAL NONRESIDENT EARNINGS (pages 20-25)

Anchorage
Fairbanks
North Slope Borough
Kenai Borough

UNEMPLOYMENT

Alaska had the fifth highest unemployment rate of all states in 1984 (page 40)

More than $20 million in unemployment benefits was paid to nonresidents in 1984 (page 44)

Alaska had the highest percentage of interstate liable unemployment payments of the states (page 46)

WORKERS ON STATE FUNDED CONSTRUCTION (page 52)

11,800 worked on public construction projects at some time during 1984. 18.3% of all construction wages were paid to workers on State funded construction

NONRESIDENTS EMPLOYED IN CONSTRUCTION

Total construction 29%
State funded construction 17.9%

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M E M O R A N D U M

DATE: January 27, 1986

TO: Representative H.A. "Red" Boucher

FROM: Dave Donley, Attorney at Law

SUBJECT: HB 466 (a bill creating an Alaskan worker employment preference) and the effect of the recent Alaska Supreme Court decision on Alaska Hire (Francis v. Robinson)

GENERAL COMMENTS

ANALYSIS OF THE IMPACT OF FRANCIS v. ROBISON ON HB 466

I. The Supreme Court accepted without comment the Superior Court's findings of fact.

A. Testimony on HB 294 (1985) and HCR 20 (1985) clearly contridicts these 1984 findings by the Superior Court.

B. The decision ingores existence of HB 294 -- makes no comment at all on its significance and effect or lack of it.

C. HB 294's backup and the recent DOL study appear to provide part of the factual basis the court says is necessary in the Francis decision. Additional findings based on evidence of social ills caused by resident unemployment need to be included in HB 466.

D. Additionally HB 466 adds new findings (page 1, sec. 2) which are designed to assist and guide the Commissioner of Labor and reviewing courts in making future fact findings.

E. Sec. 2 of HB 466 also helps identify the special employment problems of rural Alaska.

II. Resident preference law must have a substantial reason which justifies it.

A. Reason for any state mandated employment preference for residents can not be only to provide an economic advantage for residents over non-residents. Reason must be to correct a social ill or ills that result from resident unemployment.

B. Francis decision requires "some showing that nonresidents are 'a peculiar source of evil' which state action is meant to remedy," and the Supreme Court finds this 'findings of fact' evidence lacking in the Superior Court.

C. The Supreme Court uses "clearly erroneous" standard for review of facts established by Superior Court. This very high standard prevented modification of these fact findings which, given newly available data, appear very erroneous.

D. HB 466 incorporates the "peculiar source of evil" standard as a threshold finding that must be made by Commissioner of Labor before any preference for residents goes into effect.

E. The new DOL study, HB 294 (1985), new findings of fact in HB 466 (sec.2), together with evidence of resulting social ills from resident unemployment, will create a new constitutional fact basis for the resident employment preference in HB 466.

F. Legislative public hearings are needed to carefully document evidence by testimony of specific examples of non-residents displacing residents and resulting social ills.

III. The means employed by the challenged statute must be closely related to the interests served by the statute.

A. In deciding whether discrimination bears a close or substantial relationship to the state's objective . . . the availability of less restrictive means is relevant.

B. This means the justification for legislation must not be just to give Alaskans jobs before outsiders. The reason for legislation must be something else other than to benefit residents economically.

C. The U.S. Supreme Court, in it's Camden recognized one possible justification for resident employment preference is to stave off grave economic and social ills.

D. High unemployment alone is not enough: HB 466 answers this issue through findings of fact (sec. 2) but possibly needs strenthening to address the strong emphasis on this concern by the court by making clear that the purpose of the legislation is to address articulated economic or social ill(s).

E. "Closely related" means the State needs to limit preference to those Alaskans who really need it.

F. HB 466 does limits preference by requiring those Alaskans who desire the preference to register as unemployed, underemployed or as recently completing job training. HB 466 also adopts a method to target unemployment preference to those geographical areas and social groups who need it the most: preference for residents of economically distressed areas; and preference for economically disadvantaged minority residents.

IV. Market Regulator vs. Market Participant Distinction

A. More leeway is granted states in their perception of "local evils and in prescribing appropriate cures" when they are acting in a proprietary capacity, as where it is merely setting conditions on the expenditures of funds it controls.

B. The Alaska Supreme Court in Francis adopts a sliding scale as to amount of deference appropriate to the state as a market participant little deference is appropriate when state action (discrimination against non-residents) is far reaching and greater deference is appropriate when state action is narrow in focus.

C. This implies that percentages or scope of preference may be important. HB 466 handles this by incorporating Rep. Gruenberg's proposal for a "judical decisions effect" savings clause.

D. This distinction also implies that it is important to separate contracts where there the state is a signatory vs. others. HB 466 does this by including a separate severable section to cover expenditures by grantees and subcontractors.

V. Level of Scrutiny: "Low, interrediate and high"

An "intermediate level" of scrutiny is adopted under the facts found by the Superior Court. At this intermediate level of scrutiny classification/discrimination in favor of residents may be made only for "important" purposes and the means used to accomplish them must be "fairly and substantially related" to achievement of those purposes.

VI. Miscellaneous

A. Distinguishes the U.S. Supreme Court's Camden decision -- Alaska economy growing while New Jersey's was not.

B. Disagrees with Wyoming's Supreme Court's Antonich decision reasoning which upheld Wyoming's resident preference law.

C. The Court says Alaskan unemployment is a rural and not an urban problem (HB 466 takes this into account in economic distressed area preference and disadvantaged minority preference.)

VII. The Concurring Opinion by Justice Burke

A. Justice Burke's solo concurring opinion cites the Alaska Constitution, Art. I, Sec. 1: "that all persons are equal and entitled to equal rights, opportunities, and protection under the law" as prohibiting a resident employment preference.

B. I necessary an amendment to the Alaskan Constitution can be designed to answer their concern.

CONCLUSIONS

1) The Francis case decision offers some guidance to preparation of a new Alaska Hire law but not directly -- it must be carefully extracted from implication, logic and reasoning.

2) HB 466 already directly addresses almost every fault the court found with the old law. With some careful fine tuning, HB 466 can cover every concern of the court except that raised by the concurring opinion regarding the Alaska Constitution.

3) A careful legislative process is needed to do this form of legislation correctly. Findings of fact must be substantiated on the record by testimony and/or evidence.

4) Additional severable sections may be added to HB 466 to cover jobs on state-owned lands based on the courts reasoning.

FEB 11 1986

House Labor & Commerce Committee Hearing HB 466
Soldotna, Alaska February 6, 1986

I am Joan Bennett Schrader, P.O. Box 1264, Kenai and a resident of this Borough. I am a member of Teamsters Local 959.

Page 2, lines 10-12 (#2)

"the ratio between applicants for unemployment compensation who did not apply for, or, who were denied a permenent fund dividend to those applicants who were found eligable for a dividend."

I support this as a reliable indicator of residency. The permenent fund application approval is a careful, legal method of determining who is qualified. It further may punish anyone who fraudently applies and accepts the permenent fund cheque.

Page 2, lines 14-16

"the actual rate of unemployment among residents of the state is considerably higher then is reflected by unemployment rates based on nationally accepted measures."

Example: In November 1985 the Kenai Peninsula Borough had a 14.7% unemployment rate. I have been unemployed since February, 1985. In September, 1985, my extended benifits were pulled. (mine along with many other Alaskan's) Because I no longer was qualified for an extended benifit cheque I was no longer listed as unemployed and seeking work. Weekly, or monthly written notification to the employment office and or weekly or monthly physical visits to the employment office would not get me back on their list as unemployed. The October rate of unemployed on the Kenai Peninsula Borough will not find me listed. Nor will you find me in the November 14.7% unemployed. I am not counted

during December when the Kenai Peninsula Borough had 16.5% unemployed. I should now be counted as the employment office in Kenai notified me in January to re-sign for extended benifits.

Why was I one of the many workers in this State who were not counted as unemployed in part of September, all of October, November and December? I don't know, do you?

We were out of work; willing to work; able to work but were not considered unemployed. Who is trying to fool who?

The Salvation Army does not publically comment at hearings. The following figures are from Lt. John Ptack, Salvation Army, P.O. Box 5024, Kenai, Alaska 99611.

People seeking shelter (emergency) from the churches, etc. on the central area of the Kenai Peninsula Borough in FY 84-85.

Out of 800 applications

562 (70%) were local residents
164 (21%) were Alaska state residents
74 (9%) were out of state residents

These figures are documented by "Concerned Citizens for the Central Peninsula", an Ad Hoc group of various churches, the Salvation Army, Viet Nam Vetrans and concerned community members. There is no public shelter in this area. Neither the Kenai Peninsula Borough nor the cities of Kenai or Soldotna have social service programs to assist down and out people. The need is desperate and growing. Unemployed people must sleep on the floors of churches when possible and women and children at the Battered Women's Shelter when possible.

Lt. Ptack states there has been a 50% increase in requests for emergency shelter in 1985 and the projection for 1986 is even higher. People with jobs rent or own houses. Unemployed people must ask for assistance.

The Dep artment of Public Assistance has a schedule of 3 weeks wait for a appointment for aid interviews in Homer. In Kenai/ Soldotna it is 2 and 1/2 weeks. This interview only tells you if you qualify for public assistance. The Kenai Peninsula Borough has approximately 40,000 population. The open case-load at the public assistance office is 1650 cases. I have no way of knowing howmany are involved in each case that is open. Those figures would be available to you, as a serving department of the government. Because of confidentuality community members must estimate. If each open case involves 2 adults and 2 children then we take 1650 and multiply by 4 and come up with 6600 residents of this Borough who are in need of aid. If my figures are correct that is over 17% of our population. I have no figures for the amount of applications that have been denied aid.

The Department of Health and Social Services, Division of Family and Youth Services are able to document the negative effects of loss of employment on families, and individuals.

There are two docks projected for the Kenai Peninsula Borough. One, across from Kenai at Granite Point, is the coal dock. The other at Bradley Lake. I hope that these docks will use local men and materials, unlike the Ketchikan drydock that is joint ventured by Alaska Bridge and Dock of Anchorage and Samsung of Korea. The Ketchikan drydock will be built in Korea and barged to Ketchikan for installation. If every dollar invested in a community multiplies 5 - 7 times, then you can see the haemorrhaging loss Ketchikan and Alaska are taking on that drydock contract.

On "SOUND OFF" a radio call in show on K.S.R.M. today, February 6, Sen. Mitch Abood, District G, and chairman of the State Affairs Committee, commented on Subsistance via telephone. Sen Abood then spoke fleetingly about local hire. Sen. Abood felt the oil companies were being mistreated. He spoke of his cabin in the Soldotna area and wished he could move down here to live, but he would need to be able to earn his living, in this area. I commiserate with Sen. Abood and can understand his perplexity. It is hard to earn a living here, many of us have that problem. I request the Labor & Commerce Committee send Sen. Abood a transscript of these hearings on resident local hire. It might make him less sensitive to the Oil companies and more sensitive to the working people of Alaska; especially those of us who are unemployed.

I support HB466 as a first step in your effort to stabilize our communities. We must start somewhere. Contract workers being brought into the canneries, out of state workers landing jobs in place of local workers and construction money pouring into foreign nations to add to our national deficit only weaken this nation more. The Constitution of the United States of America <u>does not</u> mandate the State of Alaska or the Congress of the United States to ignore rights and needs of the governed.

Thank you, this ends my testimony.

Joan Bennett Schrader

Joan Bennett Schrader

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL UNION # 2162
P.O. Box 967 (Suite 204 Tony's Building) Kodiak AK 99615 (907) 486-3331

02-12-86

TO: Jim Robison, Commissioner
Department of Labor
P.O. Box 1149
Juneau AK 99802

RE: Local Hire Legislation

Dear Sir:

I have been following the Teleconference Hearings on HB 466 with great interest. The major question I have concerns Sec.36.10.140, which is also essentially the same in SB 367.

In short, what exactly are the "resident requirements" for registration with the Department of Labor?

I was elighted to see that registration with a local hiring hall is also permitted, however there are variances on a craft by craft basis as to what a resident actually is.

For example, Carpenters South of 63 Degrees North - Article 3 Sec (E) - define a resident as one who has "maintained a domicile in this jurisdictional area for not less than six (6) months prior to referral". In addition, Article 4 Sec (B) defines "geographic area priority of hire" which provides for 75% of those called to work on any given project to be residents as defined previously.

Unfortunately I would have questions as to the validity of such a requirement should it ever be challenged in spite of the fact that everyone concerned has agreed to this as a definition and a ratio to be maintained on any given project.

The aim and purpose of such definitions is two fold: to afford a certain protection to a resident of the State over a qualified applicant from out of state (as in the keeping of A, B, and C Lists) and also for a resident of a particular locality over a qualified applicant from another region within the State.

Without some similar and quite particular guidelines set forth by the Department of Labor - that would necessarily fly in court - some problems could be anticipated in the future. For example, would there be any difference in someone registering in Kodiak who is from Montana as compared to Sitka, or would both individuals be in the same boat with such things as domicile or voter registration as equal conditions to be met?

Perhaps it was never the intention of any of the forms of local hire legislation considered so far to breach the subject of distinctions between "in state" and "out of state", but rather merely to address the

question concerning a particular locality. This is a question which needs to be addressed as it is one of great concern to at least the members of the construction industry.

A concrete example would be if I were to clear into the hiring hall in Juneau while maintaining a domicile in Kodiak, how could I compete against a cab over camper with Idaho plates and a G. D. or numbered P. O. Box which would seem to indicate Juneau residency?

Thus, as I understand things at present, the Department of Labor has or will set up procedures and qualifications for "resident registration" which will function as a caveat to these bills under consideration, and there remains a real concern among individuals as well as Organized Labor as to exactly what this would entail.

This concern revolves around the question of whether this is really the legislation which will best speak to the issue, or perhaps backfire somewhere down the road. In order to truly examine these bills and participate in the democratic process, a clear delineation of this "resident registration" procedure would seem a very basic place to start.

Your timely response will be appreciated in order that things might not progress at too great a rate within the Legislature prior to a consideration and addressing of these concerns.

Sincerely,

W. Bruce Finke
Business Representative

cc: Bill Sheffield, Governor

Fred Zharoff, Chairman
Senate Labor and Commerce

Mike Navarre, Chairman
House Labor and Commerce