

ALASKA LEGISLATURE COMMITTEE FILES 1900-1900 00/2

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HB 301 - HB 327

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STATE	DECEPTIVE SPEECH	LITERATURE DISCLOSURE	CAMPAIGN TACTICS AND DIRTY TRICKS	ENFORCEMENT	OTHER
WISCONSIN		<p>The source of all political campaign advertisements and communications shall be clearly identified on the material. Communications in support of or in opposition to a candidate shall have the words "paid for by" followed by the candidate or committee treasurer's name. (§11.30)</p>	<p>Candidates, committees and certain persons holding public office must disclose any financial interest in a news media before using it for political purposes. (§11.30)</p> <p>No person shall compensate an editor or publisher to induce editorial support or opposition to a candidate. (§11.32)</p> <p>A candidate may make a disbursement from personal funds within 15 days after the general election for the purpose of placing a single advertisement not exceeding 15 columns inches in a local newspaper to thank supporters. (§11.315)</p> <p>Election bribery is prohibited. (§12.11)</p>	<p>A violation of provisions in Chapter 11 is a civil offense subject to a fine of \$500 for violation. (§11.60)</p> <p>Violation of §12.11 is subject to a fine of not more than \$10,000 and/or imprisonment of not more than 3 years, and forfeiture of public office and disqualification from holding public office for five years from time of conviction. (§12.60)</p>	<p>No political advertisement shall be charged a rate in excess of other charges for commercial advertising. (§11.32)</p>
WYOMING		<p>Campaign advertising shall contain the name of the individual or political committee paying the advertising. (§22-25-110)</p>	<p>Election bribery is prohibited. (§22-26-101)</p>	<p>A violation of §§22-25-110 through 22-25-112 is a misdemeanor punishable by a fine not to exceed \$1000 and/or imprisonment not to exceed six months.</p> <p>A violation of §22-26-101 is a felony offense subject to a fine of not more than \$10,000 and/or imprisonment of not more than five years. (§22-26-101)</p>	<p>The rates for political advertising shall be comparable to those charged for equal quality and quantity. (§22-25-112)</p>

identify.

At the time, McConkey was working as a paid consultant for Flood's opponent in the campaign, state Sen. Mitch Abood. Both men said Abood was not aware of McConkey's role in producing the anti-Flood mail-out, though Abood defends the flier as fair.

The brochure was mailed to an estimated 5,000 voters in Anchorage's Senate District G the weekend before the November general election. Flood lost his Senate race against Abood by a 9,672 to 8,926 vote.

Flood and his two former wives all have said that information in the mailer about his tardiness with child-support payments and circumstances regarding his divorces was erroneous and misleading. Flood contends the mailing of the brochure in the last days of the campaign left him unable to publicly respond — and was responsible for his loss to Abood.

In an abbreviated telephone interview Monday, Norris said he wouldn't be submitting any reports to the APOC.

"I'm not submitting anything. I don't need to. All I did was borrow somebody some money," he said.

Norris criticized the Daily News for its coverage of the matter and suggested the paper look deeper into Flood's background.

"Hypothesize in your mind the most obscene thing I could say to you and consider that I said it," he said before hanging up the phone.

McConkey refused to talk

about the matter. "Don't you, personally, ever call my office or house again," he said.

Reports filed by Wednesday may help the commission's staff determine how much more investigation of the matter is needed, Johansen said.

The commission's staff has reviewed transcripts of depositions taken of Clossey and Norris in a recent lawsuit Flood filed over the matter. Flood eventually dropped the suit. But the APOC reviewed their depositions after the Daily News reported some of the testimony of Clossey and Norris.

The campaign disclosure reports the commission has requested should reveal who gave Norris the money, Johansen said. State law requires that each individual person or group making a contribution or expenditure report their activities to the commission, he said.

"They have to disclose the original source of the contribution," Johansen said.

"It is not too farfetched to believe there is some evidence in the deposition of conduct considered criminal under the campaign disclosure law, and the commission may very well determine, after notice and hearing, that these matters should be referred to the office of the attorney general for criminal prosecution," according to the APOC letter to McConkey, Norris and Clossey.

"Further, the commission may determine after review of the matter that civil penalties against all or some of the above persons may be an appropriate sanction," the letter said.

**State demands name of donor who paid for anti-Flood brochure**

By JOHN LINDBACK 5/21/85

Daily News reporter JUNEAU — The state has demanded that political consultant Bill McConkey and two Anchorage residents reveal the donor who financed a campaign brochure produced last year characterizing former Rep. Joe Flood as a wife beater.

A letter sent last week from the Alaska Public Offices Commission to McConkey, Joe Norris and Sarah Clossey, both of 6710 Zurich St., warned that their failure to publicly report their campaign activities against Flood

last year could be construed as "conduct considered criminal under the campaign disclosure law."

The letter also advises all three to retain lawyers for future communications with the commission and file campaign disclosure reports with the state by Wednesday.

"There's no doubt in our mind that these people engaged in some kind of reportable activity," said Chris Johansen, a commission employee charged with enforcing the state's campaign laws.

"Definitely the commission is going to review this thing

at their next meeting, Johansen said. The meeting is scheduled June 21 at the Anchorage.

The Daily News recently reported that Clossey paid McConkey \$1,920 to prepare the campaign brochure that attacked Flood's marital background and characterized him as a family deserter.

Clossey said that Norris loaned her the money to pay McConkey. Norris, in turn, said he borrowed the money from a friend not involved in politics whom he refused to

See Back Page, STATE

# McConkey blames Sheffield in APOC fray

By PAUL JENKINS  
The Associated Press

Angered by an Alaska Public Offices Commission inquiry and stung by recent news reports, political consultant Bill McConkey said Tuesday he believes Gov. Bill Sheffield is directing a campaign to discredit him.

He said Sheffield apparently holds him responsible for publicity that followed revelations of the North Slope Borough's financial dealings. McConkey, owner of the

4800 Corp., a consulting and advertising firm, claimed Sheffield has decided to use the elections watchdog agency to punish him, an assertion labeled "silly" by a Sheffield spokesman.

The commission has ordered McConkey, and Anchorage resident Joe Norris and Sarah Clossy, to reveal who paid \$2,000 for a hard-hitting campaign flier that accused former Democratic Rep. Joe Flood of failing to pay court-ordered child support to two

former wives.

The commission advised the three to get lawyers because their campaign activities against Flood might be considered criminal under the campaign disclosure law.

McConkey's firm played a key role in Mayor George Ahmaogak's election win over former North Slope Mayor Eugene Brower last fall. The consultant encouraged a borough audit that has rocked the state and embarrassed the

leaders of both major political parties.

"We won that election, I would say that. I'll brag a little bit. The decision to run the quiet, targeted kind of campaign that we ran, including sending my wife up there rather than me going up there, allowed us to win that election," McConkey said.

"Those two actions, winning the election and doing the audit, will change forever

See Page C-3, McCONKEY

Anchorage Daily News

Wednesday, May 22, 1985

## McConkey claims Sheffield leading effort to discredit him

Continued from Page C-1

the face of politics in this state," he said.

And that, McConkey said, made him a target.

"I was told last week Sheffield would have the APOC jump on me, and sure enough, he did," McConkey said. He would not elaborate.

But Sheffield aide Pete Spivey said McConkey is wrong.

"I think Bill McConkey is a real smart guy, but he has a tendency to go one step too far, and now that he's been caught again I find it amazing that he would blame it on the governor," Spivey said. "He (Sheffield) did not direct APOC to do anything. You would have heard loud and long from APOC if he or any other person in government had tried to do something like that. It's silly."

But McConkey was unconvinced.

"Members of the governor's staff have told people, who have told me, they are going to do whatever is necessary to deal with the McConkey problem," McConkey said.

The consultant said it is "ludicrous" that the APOC is investigating an advertising agency.

"I'm hired to win elections and I see myself the same way lawyers see themselves," he said. "They don't ding lawyers."

The consultant said he first saw the Flood documents when they just showed up at his office.

"I read it, and went: 'Wow, this is incredible,'" he said. A few days later, he said, he showed the material, a stack of photocopied statements and court records, to Sen. Arliss Sturgulewski, R-Anchorage, and asked what she thought should be done.

"She said she'd give it to a newspaper," McConkey said.

Sturgulewski confirmed the conversation Tuesday, but insisted she never saw the documents.

"I do recall saying that if there were materials affecting the campaign, it certainly would be appropriate for the newspapers to take a look at it," she said.

After the Daily News reported recently that McConkey was paid \$1,920 to put the flier together, Sturgulewski fired him from her fledgling gubernatorial campaign.

McConkey said he had the material delivered to the Daily News before the flier was mailed. Managing Editor Howard Weaver confirmed the materials arrived in his office just before the election.

"We made the determination there was not time for it to be adequately debated before the election," Weaver said. "Our decision was that it was too close to deal with. But we wound up writing about it anyway because of the mailing."

McConkey said a few days after the material arrived back at his office, Clossy showed up with the same information and hired him.

"I suggested a mailer and the rest is history," he said.

McConkey said he lifted information from court records for the flier and Clossy told him the details of her personal life that appear in it.

The flier was mailed to 5,000 voters in the closing days of the 1984 general election campaign. Flood lost narrowly to Sen. Mitch Abood, R-Anchorage.

In a deposition in a lawsuit Flood filed after the election, Clossy said Norris had loaned her the money for the mail-out. Norris would only say he arranged the loan. He would not say where the money came from.

McConkey said he had no idea where the money for the flier came from.

Flood, now working for Juneau radio station KJNO, said the flier "was a lie." However, he said he dropped his lawsuit to avoid a lengthy and expensive trial.

"I did get behind in my child support payments," he said. "I failed in business. I had some tough years. As corny as it sounds I believe the idea that I picked myself up and dusted myself off."

Court records in Anchorage indicate Flood was \$2,150 in arrears by 1975 on support payments to his first wife, Beverly Rose Flood, for their

three children. The records show the case was pursued by Alaska authorities at the request of the state of Oregon, where the woman lived.

It was dropped in 1981 at Oregon's request.

Beverly Rose Flood, reached in Oregon, said Flood had not paid his entire child support bill, "but he paid part of it."

"We agreed on an amount, I don't want to be more specific," she said, adding the agreement was reached sometime after 1976. The couple was divorced in 1963.

She said after the divorce she felt abandoned "at first. He's no knight in shining armor. I imagine he's as good as any politician."

His second wife, Pauline, divorced him in 1969 in Idaho. She could not be located.

Flood was ordered to make \$50 monthly child support payments. The state of Washington, where the woman lived, asked Alaska authorities to pursue the case.

In 1977, the Alaska court won an order directing him to make up more than \$4,000 in back child support and begin making payments.

In January 1978, the court started contempt proceedings, and the next month Flood pledged to pay \$2,000 immediately. He also agreed to make monthly payments of \$100, with \$40 of it going to retiring the rest of the debt.

*Daily News*  
5/22/85

# APOC ponders consultant's acts

By PAUL JENKINS  
The Associated Press

ANCHORAGE — Political consultant Bill McConkey on Wednesday refused to give the Alaska Public Offices Commission any information about a hard-hitting campaign flier containing barbs aimed at former Rep. Joe Flood.

The elections watchdog agency, in an effort to find out who financed the flier, demanded last week by letter that McConkey, Joe Norris and Sarah Clossey register with the commission and file campaign disclosure reports by Wednesday.

The letter was sent by Chris Johansen, the APOC employee charged with enforcing campaign laws. He said Wednesday that Norris and Ms. Clossey had asked for, and were granted, extensions until Tuesday to talk with attorneys.

"Mr. McConkey says he's not going to file a report," Johansen said.

Asked what he would do about McConkey's refusal, Johansen replied: "I haven't figured that out yet."

He said the state's limited options include only criminal or civil penalties or "dismissal of the whole thing. I'm keeping an open mind."

Earlier, Johansen had warned the three that their activities against Flood as he campaigned in 1984 for the state Senate could be "conduct considered criminal under the campaign disclosure law."

The warning and the demand that he register with the commission angered McConkey, head of The 4800 Corp., a consulting and advertising firm. He said Gov. Bill Sheffield

held him responsible for publicity about North Slope Borough financial dealings, and the APOC letter was part of a campaign to discredit him.

McConkey played a key role in Mayor George Ahmaogak's victory last year over Eugene Brower, and he said Sheffield was using the APOC to punish him for Brower's defeat and an Ahmaogak-ordered audit detailing North Slope spending practices.

Sheffield's staff dismissed the assertion.

In a letter delivered to the commission Wednesday, McConkey said:

"For your information, I was not a candidate for state Senate Seat G in 1984; I was not a member of a group; I was not a contributor.

"Your letter states that a flier mailed in 1984 is reportable in some fashion under the law. Perhaps you're correct.

"However, as a political consulting and advertising firm, and as an Alaskan small businessman working for a

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fee and for a living, neither The 4800 Corp. nor myself are required to report to you."

The APOC wants to know who provided \$2,000 for the mail-out that said Flood, a Democrat, had left two wives without paying child support. Flood sued over the mail-out, but later dropped the case.

The flier was attributed to Ms. Clossey, who has said she borrowed the money from Norris to pay McConkey. Norris said he borrowed the money from a friend, but he refused to divulge the friend's name.

McConkey said he was hired by Ms. Clossey to help with the flier and doesn't know where the money came from. He said the money did not come from him.

He said he used court records for information on the mail-out, sent to about 5,000 voters in the final days of Flood's campaign.

McConkey at the time was working for Flood's opponent, state Sen. Mitch Abood, R-Anchorage. Abood defeated Flood by a narrow margin.

# McConkey refuses APOC demand for flier information

By PAUL JENKINS  
The Associated Press

Political consultant Bill McConkey on Wednesday refused to give the Alaska Public Offices Commission any information about a hard-hitting, last-minute campaign flier that attacked former Rep. Joe Flood.

The elections watchdog agency, in an effort to find out who financed the flier, demanded last week by letter that McConkey, Joe Norris and Sarah Clossey register with the commission and file campaign disclosure reports by Wednesday.

The letter was sent by Chris Johansen, the APOC employee charged with enforcing campaign laws. He said Wednesday that Norris and Clossey had asked for, and were granted, extensions until Tuesday to talk with attorneys.

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Asked what he would do about McConkey's refusal, Johansen replied: "I haven't figured that out yet."

He said the state's limited options include only criminal or civil penalties or "dismis-



sal of the whole thing. I'm keeping an open mind."

State law requires that the sources of funds used to influence the outcome of an election be disclosed to the public.

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campaigned in 1984 for the state Senate could be "conduct considered criminal under the campaign disclosure law."

The warning and the demand that he register with the commission angered McConkey, head of The 4800 Corp., a consulting and advertising firm.

In a letter delivered to the commission Wednesday, McConkey said:

"For your information, I was not a candidate for state Senate Seat G in 1984; I was not a member of a group; I was not a contributor.

"Your letter states that a flier mailed in 1984 is reportable in some fashion under the law. Perhaps you're correct.

"However, as a political consulting and advertising firm, and as an Alaskan small businessman working for a fee and for a living, neither

The 4800 Corp. nor myself are required to report to you."

The APOC wants to know who provided \$2,000 for the mail-out that said Flood, a Democrat, had left two wives without paying child support. Flood sued over the mail-out, but later dropped the case.

The flier was attributed to Clossey, who has said she borrowed the money from Norris to pay McConkey. Norris said he borrowed the mon-

ey from a friend, but he refused to divulge the friend's name.

McConkey said he was hired by Clossey to help with the flier and doesn't know where the money came from, except that it did not come from him.

McConkey at the time was working for Flood's opponent, state Sen. Mitch Abood, R-Anchorage. Abood defeated Flood by a narrow margin.

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①

# McConkey linked to anti-Flood campaign mailing

by JOHN LINDBACK  
Daily News reporter

JUNEAU — Political consultant Bill McConkey, while working for state Sen. Mitch Abood, helped produce a last-minute campaign smear that may have cost Abood's opponent a seat in the legislature

last November, according to sworn statements just obtained by the Daily News.

The smear was in the form of a brochure characterizing Abood's opponent, former state Rep. Joe Flood, as a family deserter. It claimed Flood hadn't paid child sup-

□ Major figures in disputed campaign mailing summarized. Story, Back Page.

port to two former wives.

The brochure was billed as the work of an independent concerned citizen, Sarah Clossey, who identified herself in

It as "now a counselor for abused women" and the victim of a former husband who didn't pay child support.

"I paid for this filer my-

self," Clossey said at the bottom of the mail-out.

The brochure was distributed during the final week of the state Senate campaign to 5,000 mailboxes in Anchorage Senate District G. Flood lost the seat by a 9,572-to-8,928 vote to Abood.

After the campaign, Clossey told the Daily News that she is not presently a women's counselor, but had served as a counselor when she lived in Wisconsin two years earlier.

See Back Page, POLITICAL

More recently, Clossey has indicated in a sworn statement that she didn't act independently in putting the brochure together and received help in paying for it.

Clossey said the brochure and the last-minute mailing was proposed by Abood consultant Bill McConkey, who helped prepare it. She said she paid McConkey a \$1,920 consulting fee for the mailer, which also covered printing costs.

Clossey said the money came from a \$2,000 loan from her fiancé, Joe Norris, who previously worked for Ed Dankworth, Abood's deputy campaign treasurer.

Norris said he obtained the money from a donor, whom he refused to identify. The donor is not anyone normally involved in state politics and did not know how the loan would be used, Norris said.

At the time of the mailing, Flood complained that the brochure's allegations were untrue — that he met his financial obligations to his former wives. He has been married to his present wife for 14 years.

The brochure contained the headline: "Joe Flood claims ... he is a family man. He left two families — now he wants your vote."

Flood said the last-minute attack left him with no time to respond.

When read the contents of the mailer over the telephone, Flood's two former wives also said the text was misleading. Although Flood was late during the mid-1970s with child support payments because of a failing business venture, he eventually paid his bills and legal complaints filed against him were dismissed, they said.

After he lost the election, Flood filed a lawsuit against Clossey. He dropped the lawsuit last month, saying it would have dragged on for too long and his chances of

would be minimal.

"We still feel it cost us the election," Flood said. The smear publicly humiliated him, he said.

After his defeat he and his wife of 14 years, Myrna, phoned 50 voters in each of the Senate District G's 22 precincts and it was clear the mailing was devastating, Flood said.

"Politically I guess I'll never be able to run for office again," said Flood, who now works as morning radio announcer at Juneau station KJNO.

Clossey said she first became involved in the brochure after she was tipped off about Flood's child support problems by a friend who worked at a child support agency. She said she was angered by Flood's campaign ads that claimed he was committed to family values, and decided to research his history in court cases.

In her deposition, Clossey testified that the \$1,920 fee for McConkey and an \$80 bulk mailing permit was loaned to her by Norris. She said it was Norris who suggested she go to political consultant McConkey and talk to him about how she could publicize what she had learned about Joe Flood.

Norris in 1981-82 worked on the state payroll for former Sen. Ed Dankworth, who is now a lobbyist for VECO International. Dankworth last summer was deputy treasurer of Abood's campaign, and helped send \$6,000 in campaign contributions to Abood as part of a massive VECO International campaign financing effort to win a Republican takeover of the state Senate.

Clossey said that when she first went to talk to McConkey, she wasn't aware he was working for Abood.

In their first meeting, McConkey suggested that she compile the information about Flood's background

and place advertisements with Anchorage newspapers and television stations, Clossey said. When both the Daily News and The Anchorage Times refused to run the ads, Clossey said she went back to McConkey to ask for advice.

Clossey said McConkey then suggested producing an anti-Flood mailer. "He told me what some of my alternatives were," Clossey said, recalling her conversation with McConkey. "I don't remember them exactly, other than I said that we could do a distribution flier to the district," she said, "I would like to do that."

Contacted this week, McConkey said Abood was not aware of his (McConkey's) role in the production of the mailing.

"As a matter of fact, I took very special precautions to see that he did not" know about it, McConkey said.

## Figures in mailing story

Here are the major players in the story of a disputed campaign mailing that may well have helped Sen. Mitch Abood defeat Rep. Joe Flood and win his Anchorage seat in the state Senate:

• **Bill McConkey:** The veteran Anchorage political consultant was hired by Abood to help direct his campaign last year. He also was paid \$1,920 to prepare a flier that attacked the marital background of Abood's opponent, Rep. Joe Flood. McConkey claimed that Abood did not know he prepared the mailing that attacked Flood.

• **Sarah Clossey:** She said she approached McConkey to prepare the mailing because she was angry that Flood claimed he was committed to family values. She borrowed \$2,000 to pay McConkey and a fee for bulk-mailing from her live-in fiancé, Joe Norris. Norris is a former employee of Ed Dankworth, the former state senator who is now a lobbyist for VECO International.

• **Joe Norris:** Norris said he borrowed the money he gave to Sarah Clossey from a friend. He refuses to name the anonymous donor and he contends that Dankworth and Abood were not involved.

• **Sen. Mitch Abood:** He said he did not know his political consultant, McConkey, prepared the mailing that attacked Flood. He also said he thought the content of the mailing and its distribution on the last weekend before the election were fair.

• **Ed Dankworth:** He was a deputy treasurer of Abood's campaign. He angrily denied any tie-in between himself or VECO International and the campaign flier.

Abood said Monday he was unaware that McConkey helped prepare the mailing. "What he does on his own time is his business," Abood said.

But Abood defended both the content and timing of the mailing that attacked Flood.

"I didn't have any problem with it. I thought the mailing was fair," Abood said.

Flood suspects that Norris' involvement in the mailing — because of his past relationship with Dankworth — is evidence that the VECO lobbyist played a role in production of the mailing.

Norris' ex-wife, Mary Call, claims that when they were still married in 1984 Norris told her that he worked for Dankworth and VECO President Bill Allen during the campaign.

"He was very active in that throughout the summer of 1984," Call said. "He always

said throughout the summer that his future employment depended on what politicians got elected."

Dankworth on Monday denied that he or VECO was connected in any way to Clossey's mailing.

"Absolutely not. I never had anything to do with it. Neither did VECO. I've heard that rumor and it really pisses me off. That's bull—," Dankworth said.

Norris, who in his deposition acknowledged working for Dankworth in 1982, denied his ex-wife's claim that he worked for Dankworth and Bill Allen last year. When asked who he worked for, he said, "None of your business." He also said the loan for the damaging campaign brochure did not come from Dankworth.

Both Abood and McConkey said they didn't know how the mailing was financed.

"I do not know where the money came from," McConkey said. "If I was sitting in front of you, I'd say, 'Watch my lips. I do not know where the money came from.'"

McConkey, a veteran political consultant who has experienced success and defeat in major Alaska campaigns, is no stranger to controversy. He has worked mostly for Republican candidates.

In 1981 Anchorage mayoral candidate Joe Hayes fired McConkey as his campaign manager. McConkey lost his job after he told a group of public relations representatives during the Hayes campaign that if an opposing campaign spread lies about one of his candidates he would retaliate by spreading false information about the opposition.

Last year McConkey's firm, the 4800 Corporation, was hired to help the campaign of George Ahmaogak, who was subsequently elected mayor of the North Slope Borough. Ahmaogak pulled off a major upset when he defeated Eugene Brower last October.

McConkey also was hired

by Sen. Frank Murkowski when he won his 1980 race for the U.S. Senate against Clair Grogan. McConkey now is consultant to the gubernatorial campaign of Sen. Arlin Sturgulewski, R-Anchorage.

When asked if he wrote the text of the mailing, McConkey said: "I don't know whether you would say I wrote it or not."

Abood's victory had the effect of allowing a Republican-dominated coalition to organize the Senate, with a margin of 11 GOP senators to 9 Democrats.

Abood was awarded the chairmanship of the Senate State Affairs Committee, the committee that is studying proposed reforms to Alaska campaign financing and disclosure laws. Some of the reform bills referred to the committee would place tighter restrictions on campaign contributions, limit expenditures and establish a "state campaign financing program."

Abood's committee took action this session on 11 bills, choosing instead to hire a study to be performed this summer.

Clossey's and Norris' positions, made while Flood's lawsuit was still active, will be reviewed by the Alaska Public Offices Commission to see if state campaign laws were violated, said Therese Pittman, the commission's executive director.

State campaign disclosure laws require campaign materials designed to influence the outcome of an election to state who paid for them. Violators of the law could be subject to criminal misdemeanor penalties.

Since Clossey received a loan to finance the mailing it's possible the commission would construe it as the product of group activity, Pittman said. Political groups by state law are required to register with the commission and disclose the source of contributions.

# MEMORANDUM

# State of Alaska

TO APOC Members

DATE Feb. 12, 1986

FROM <sup>TSP</sup>  
Theda Pittman  
Executive Director

TELEPHONE NO: 2/6-4176

SUBJECT: Attached Article

Attached is an article from the Fall, 1985 Journal of Law & Politics which is published at the School of Law, University of Virginia.

Truth in Political Advertising is the subject of HB 301 which was introduced last year. Copy enclosed. So far that bill hasn't seen any action and it remains in House State Affairs, chaired by Rep. Hurley, where it was initially referred. I haven't heard of any effort to move it, but I thought you might find the related article interesting.

## Campaign Hyperbole: The Advisability of Legislating False Statements Out of Politics

The broadside attack on an opposing candidate is a time-honored tradition in American politics. The distortion of voting records, the exposure of private indiscretions, and the trumpeting of public improprieties are devices which have been used frequently by politicians and their supporters. There is usually at least a kernel of truth to the charges, but sometimes there is not.

Even the Founding Fathers, as candidates for public office, felt the sting of scurrilous charges leveled at them by opponents. John Adams faced accusations in Republican handbills that he was an avowed monarchist.<sup>1</sup> Thomas Jefferson, a frequent target of bitter Federalist attacks, stood accused of much worse—everything from keeping a slave mistress to having once defrauded a widow and her children as the executor of an estate.<sup>2</sup> Jefferson stoically ignored the attacks on his character, at least publicly.<sup>3</sup> In the intervening years, more than a few elected officials have been less inclined to exercise such restraint.

A number of state legislatures have attempted to rid the political process of the worst of these practices. Seventeen statutes, usually enacted as part of a state's corrupt practices act, forbid the making, publishing or circulating of false statements about a candidate for public office.<sup>4</sup> This note will examine the provisions and judicial interpretation of these statutes, consider their first amendment implications and contend that campaign falsity statutes are

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<sup>1</sup> 2 P. Smith, *John Adams* 898-901 (1962).

<sup>2</sup> D. Malone, *Jefferson and the Ordeal of Liberty* 479-81 (1962); D. Malone, *Jefferson the President: First Term, 1801-1085*, 206-23 (1970).

<sup>3</sup> *Id.*

<sup>4</sup> Although three of these laws (Colo., Neb., and Tenn.) were enacted during the election reform movement of the 1970's, most campaign falsity laws have been on the statute books for fifty years or more. Washington and Minnesota have the oldest falsity statutes, laws which trace their origins to the late nineteenth century. Wash. Code § 3140 (1881) (current version at Wash. Rev. Code Ann. § 29.85.070 (1965)); 1893 Minn. Laws c. 4, § 194 (current version at Minn. Stat. Ann. § 210A.04 (West Supp. 1985)).

inadvisable.

## I. Campaign Falsity Statutes

### A. Elements of the Offense

Seventeen states today have provisions in their election laws prohibiting the use of false statements in political campaigns.<sup>5</sup> Although variations exist in the composition of these statutes, several features are common to most of them. All of the statutes prohibit any person from publishing or distributing false statements which relate to a candidate for public office. Except for the Indiana corrupt practices act,<sup>6</sup> these statutes require that the person have known the statement was false. The Montana, North Carolina, Ohio and Oregon statutes also prohibit the publication or distribution of false statements with reckless disregard of their truth or falsity.<sup>7</sup> All but the Oregon statute<sup>8</sup> impose misdemeanor penalties for

<sup>5</sup> See Alaska Stat. § 15.56.010(a)(3) (Supp. 1982); Colo. Rev. Stat. § 1-13-109 (1980); Ind. Code Ann. § 3-4-7-5 (Burns 1982); Mass. Gen. Laws Ann. ch. 56, § 42 (1975); Minn. Stat. Ann. § 210A.04 (West Supp. 1985); Miss. Code Ann. § 23-3-33 (1972); Mont. Code Ann. § 13-35-234 (1983); Neb. Rev. Stat. § 49-1474(2) (1978); N.C. Gen. Stat. § 163-274(8) (1982); N.D. Cent. Code § 16.1-10-04 (1984); Ohio Rev. Code Ann. § 3599.091(B) (Page Supp. 1983); Or. Rev. Stat. § 260.532 (1983); Tenn. Code Ann. § 2-19-142 (1979); Utah Code Ann. § 20-14-28 (1984); Wash. Rev. Code Ann. § 29.85.070 (1965); W. Va. Code § 3-8-11(e) (1979); Wis. Stat. Ann. § 12.05 (West Supp. 1984). The California electorate in 1984 amended that state's constitution to provide that a candidate, who in a civil action is found to have libeled or slandered an opponent during an election, shall be disqualified from holding the office. Cal. Const. art. 7, § 10. The libel or slander must have been committed with knowledge that the statement was false or in reckless disregard; it must have been a major contributing cause in the defeat of the opposing candidate. Cal. Const. art. 7, § 10(b).

In 1975, Michigan repealed its campaign falsity statute, Mich. Comp. Laws Ann. 168.915 (West 1967). 1975 Mich. Pub. Acts no. 121, § 1. After *Vanasco v. Schwartz*, 401 F. Supp. 87 (E.D. N.Y. 1975) held unconstitutional its campaign falsity statute, New York in 1978 excised from N.Y. Elec. Law § 3-106 (McKinney 1978) the offending provisions. 1978 N.Y. Laws ch. 8, § 3.

Several attempts to enact a campaign falsity statute in Virginia have failed since 1982. Wash. Post, Apr. 22, 1982, at B1, col. 6; Richmond Times-Dispatch, Feb. 1, 1985, at A6, col. 6.

A number of states regulate by statute limited types of false statements. See Cal. Elec. Code § 11707 (West 1977) (misrepresentation of party support); Fla. Stat. § 104.271 (1979) (falsely charging opponent violated election law); Hawaii Rev. Stat. § 19-3(6) (1976) (bogus candidate withdrawal statement); La. Rev. Stat. Ann. § 18:1463(B) (West 1979) (false allegations candidate is supported by another candidate or faction); Mass. Gen. Laws Ann. ch. 56, § 43A (West Supp. 1984) (misuse of term "veteran" in reference to a candidate); Minn. Stat. § 210A.02 (Supp. 1985) (false claim of party support); Or. Rev. Stat. § 260.542 (1983) (use of term "re-elect" by nonincumbent); S.D. Codified Laws Ann. § 12-13-16 (1982) (false information as to a ballot question); Tex. Elec. Code Ann. art. 14.10(B)(1) (Vernon Supp. 1984) (false statement that candidate holds an office).

<sup>6</sup> Ind. Code Ann. § 3-4-7-5 (Burns 1982).

<sup>7</sup> See Mont. Code Ann. § 13-35-234(1) (1983); N.C. Gen. Stat. § 163-274(8) (1982); Ohio Rev.

a violation of their provisions.

A majority of these statutes apply to any false statement, whether made to benefit or harm the candidate.<sup>9</sup> Several of the laws, though, are more narrowly focused. In Alaska, Indiana, Mississippi and Montana, a campaign falsity violation is limited to statements which are defamatory at common law (e.g., statements which damage reputation, or expose a person to hatred, contempt or ridicule, or cause a person to be shunned or avoided).<sup>10</sup> The Alaska and Montana laws are slightly broader than the other two. Alaska also proscribes any false statement which would provoke a reasonable person to a breach of the peace; Montana additionally prohibits knowing misrepresentation of a candidate's voting record or position on a public issue.<sup>11</sup>

The manner in which a false statement is circulated is another area where the coverage of several statutes is limited. The seventeen statutes are divided between those which apply both to written and oral false statements and those which concern only written false statements.<sup>12</sup> Three statutes specifically limit the type of written statement covered: the Minnesota provision is restricted to paid political advertising or campaign material;<sup>13</sup> the North Dakota law is limited to political advertisements or news releases;<sup>14</sup> and the Tennessee proscription covers only campaign literature.<sup>15</sup> The remaining campaign falsity statutes make no distinctions as to the type of written false statement prohibited.<sup>16</sup> The statement may be contained in a letter, circular, bill, advertisement, poster or any other

Code Ann. § 3599.091(B)(10) (Page Supp. 1983); Or. Rev. Stat. § 260.532(1) (1983).

<sup>9</sup> Or. Rev. Stat. § 260.532(4)-(9) (1983).

<sup>10</sup> See statutes cited supra note 5 for Colo., Mass., Minn., Neb., N.C., N.D., Ohio, Or., Utah, W.Va. and Wis.

<sup>11</sup> See Alaska Stat. § 15.56.010(a)(3) (Supp. 1982); Ind. Code Ann. § 3-4-7-5 (Burns 1982); Miss. Code Ann. § 23-3-33 (1972); Mont. Code Ann. § 13-35-234(1) (1983).

<sup>12</sup> See Alaska Stat. § 15.56.010(a)(3)(C) (Supp. 1982); Mont. Code Ann. § 13-35-234(1) (1983).

<sup>13</sup> See statutes cited supra note 5 for Mass., Miss., Mont., N.C., Ohio, Utah, Wash., W.Va., and Wis. (for those laws which apply to written and oral false statements); see statutes cited supra note 5 for Alaska, Colo., Ind., Minn., Neb., N.D., Or., and Tenn. (for those laws which apply only to written false statements).

<sup>14</sup> Minn. Stat. Ann. § 210A.04(1) (West Supp. 1985).

<sup>15</sup> N.D. Cent. Code § 16.1-10-04 (1981).

<sup>16</sup> Tenn. Code Ann. § 2-19-142 (1979).

<sup>17</sup> See statutes cited supra note 5 for Alaska, Colo., Mass., Miss., Mont., Neb., N.C., Ohio, Or., Utah, Wash., W.Va., and Wis.

writing.

In addition to false statements about candidates, half of these statutes also proscribe false statements about political committees or ballot questions.<sup>17</sup> Among those statutes whose scope is limited to false statements concerning candidates, those in Tennessee and Washington are restricted further to statements made in opposition to (not on behalf of) candidates.<sup>18</sup>

Several campaign falsity statutes specify proof of additional elements as prerequisites for a violation. Nebraska and Oregon require that the false statement must be of a material fact.<sup>19</sup> Mississippi and Washington require that a person willfully, as well as knowingly, make a false statement before the misdemeanor penalty is imposed.<sup>20</sup> Moreover, ten statutes require that the false statement have been designed or have the tendency to affect the vote on a candidate or ballot question.<sup>21</sup>

The Mississippi corrupt practices act has a unique and constitutionally questionable<sup>22</sup> provision for controlling election-eve accusations. That state prohibits the making of any charge against a candidate, whether true or false, during the period five days before the primary election date.<sup>23</sup>

## B. Penalties for Violations

Violations of campaign falsity statutes, except in Oregon, are classified as misdemeanor offenses. The criminal penalties affixed by these statutes provide for imposition of a fine or imprisonment or both.<sup>24</sup> The maximum amount of the fine and length of imprison-

<sup>17</sup> See statutes cited *supra* note 5 for Colo. (any issue submitted to the voters); Ind. (any measure or proposition); Mass. (any question submitted to the voters); Neb. (any committee or ballot question); N.D. (initiated measure, referred measure or constitutional amendment); Or. (any political committee or measure); Utah (proposed constitutional amendment or other measure).

<sup>18</sup> See Tenn. Code Ann. § 2-19-142 (1979); Wash. Rev. Code Ann. § 29.85.070 (1965).

<sup>19</sup> See Neb. Rev. Stat. § 49-1474(2) (1978); Or. Rev. Stat. § 260.532(1) (1983).

<sup>20</sup> See Miss. Code Ann. § 23-3-33 (1972); Wash. Rev. Code Ann. § 29.85.070 (1965).

<sup>21</sup> See statutes cited *supra* note 5 for Colo., Ind., Mass., Minn., N.C., Ohio, Utah, Wash., W.Va., and Wis.

<sup>22</sup> See *infra* notes 83-88 and accompanying text.

<sup>23</sup> Miss. Code Ann. § 23-3-33 (1972).

<sup>24</sup> See Alaska Stat. § 15.56.010(c) (Supp. 1982) (class A misdemeanor: no more than \$5,000 fine, no more than one-year imprisonment, Alaska Stat. §§ 12.55.035, 12.55.135 (Supp. 1984)); Colo. Rev. Stat. § 1-13-109(2) (1980) (class 2 misdemeanor: no more than \$1,000 fine and/or no more than one-

ment vary with each statute, the average maximum being a \$1,000 fine and one-year incarceration. Wisconsin has enacted the harshest penalty: a maximum fine of \$10,000 and/or imprisonment for no more than three years.<sup>25</sup>

Oregon takes a different approach. Rather than attaching a criminal penalty, the Oregon statute permits the aggrieved party a private right of action to recover compensatory damages from the violator.<sup>26</sup> If the false statement is found by clear and convincing evidence to have reversed the election's outcome, the Oregon law further provides that the violator be deprived of his nomination or election and the office declared vacant.<sup>27</sup>

Seven other states also provide in their election laws that if a candidate knowingly makes a false statement in the course of a campaign, the election may be invalidated.<sup>28</sup> Though Oregon requires a showing that the false statement reversed the election's outcome, the other seven states do not impose so strict a measure of proof. Min-

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year imprisonment, Cal. Rev. Stat. § 10-1-106 (Supp. 1984)); Ind. Code Ann. § 3-4-7-5 (Burns 1982) (class B misdemeanor: no more than \$1,000 fine, no more than 180-days imprisonment, Ind. Code Ann. § 35-50-3-3 (Burns 1985)); Mass. Gen. Laws Ann. ch. 56 § 42 (not more than \$1,000 fine or not more than six-months imprisonment); Minn. Stat. Ann. § 210A.04(1) (West Supp. 1985) (gross misdemeanor: not more than \$3,000 fine and/or not more than one-year imprisonment, Minn. Stat. Ann. § 609.03 (West Supp. 1985)); Miss. Code Ann. § 23-3-33 (1972 (misdemeanor)); Mont. Code Ann. § 13-35-234(1) (1983) (misdemeanor: no more than \$500 fine and/or no more than six-month imprisonment, Mont. Code Ann. § 46-18-212 (1983)); Neb. Rev. Stat. § 49-1474(2) (1978) (class III misdemeanor: no more than \$500 fine and/or no more three-months imprisonment, Neb. Rev. Stat. § 28-106 (1979)); N.C. Gen. Stat. § 163-274 (1982) (misdemeanor: fine and/or imprisonment in court's discretion); N.D. Cent. Code § 16.1-10-04 (1981) (class A misdemeanor: no more than \$1,000 fine and/or no more than one-year imprisonment, N.D. Cent. Code § 12.1-32-01 (Supp. 1983)); Ohio Rev. Code Ann. § 3599.091(D) (Page Supp. 1983) (first-degree misdemeanor: no more than \$1,000 fine and/or no more than six-months imprisonment, Ohio Rev. Code Ann. § 2929.21 (Page 1982)); Tenn. Code Ann. § 2-19-142 (1979) (misdemeanor: no more than \$1,000 fine and/or no more than one-year imprisonment, Tenn. Code Ann. § 39-1-202 (1982)); Utah Code Ann. § 20-14-47 (1984) (class B misdemeanor: no more than \$299 fine or no more than six-months imprisonment, Utah Code Ann. §§ 76-3-301(4), 76-3-204(2) (1978)); Wash. Rev. Code Ann. § 29.85.070 (1965) (misdemeanor: no more than \$250 fine and/or no more than six-months imprisonment); W. Va. Code § 3-8-11 (1979) (misdemeanor: no more than \$10,000 fine and/or no more than one-year imprisonment); Wis. Stat. Ann. § 12.60 (West Supp. 1984) (no more than \$10,000 fine and/or no more than three-year imprisonment).

<sup>25</sup> Wis. Stat. Ann. § 12.60 (West Supp. 1984).

<sup>26</sup> Or. Rev. Stat. §§ 260.532(4)-532(5) (1983).

<sup>27</sup> Or. Rev. Stat. § 260.532(7) (1983).

<sup>28</sup> See Alaska Stat. § 15.56.110(a) (Supp. 1982); Minn. Stat. Ann. § 209.02(1) (West Supp. 1985); Mont. Code Ann. § 13-35-234(2) (1983); N.C. Gen. Stat. § 163-276 (1982); N.D. Cent. Code § 16.1-10-07 (1981); Utah Code Ann. § 20-14-47 (1984); Wis. Stat. Ann. § 12.60(2) (West Supp. 1984).

nesota provides that an election may be invalidated if a court finds that a deliberate, serious and material violation of state election law occurred.<sup>29</sup> The other states—Alaska, Montana, North Carolina, North Dakota, Utah and Wisconsin—require only that the candidate or his committee be found guilty of a corrupt practices offense to void an election.<sup>30</sup> North Carolina also disqualifies those convicted of the misdemeanor offense from voting for two years.<sup>31</sup>

Generally, these statutes make no special provisions for how a prosecution of a violation may be initiated. As with most prosecutions, it is left to the prosecuting attorney in the appropriate jurisdiction to bring charges when a suspected violation comes to his attention. In Oregon, the aggrieved party must file his own civil action. Mississippi law provides that the affidavit of any two credible citizens may initiate the process, leading to the issuance by a judicial officer of an arrest warrant for the alleged offender.<sup>32</sup> The Ohio statute, in contrast, first requires that a complaint be filed with the Ohio Elections Commission by any person with personal knowledge of a violation.<sup>33</sup> The commission, in turn, investigates the charges and if it finds probable cause that a violation has been committed, it then is to submit its findings to the appropriate prosecuting attorney for possible prosecution.<sup>34</sup>

## II. The Statutes and the Courts

The campaign falsity statutes have generated only a sparse collection of reported cases—and even fewer final determinations that any violation, in fact, occurred. The fewer than three dozen reported cases in this area are concentrated in only six states.<sup>35</sup> Of these

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<sup>29</sup> Minn. Stat. Ann. § 209.02(1) (West Supp. 1985).

<sup>30</sup> See statutes cited *supra* note 28 for Alaska, Mont., N.C., N.D., Utah, and Wis.

The Wisconsin Supreme Court has read into that state's statute a requirement for ousting an election winner from office that the violation must be deliberate, willful and substantial. *State ex rel. Skibinski v. Tadych*, 31 Wis. 2d 189, 192 142 N.W.2d 838, 840 (1966).

<sup>31</sup> N.C. Gen. Stat. § 163-276 (1982).

<sup>32</sup> Miss. Code Ann. § 23-3-33 (1972).

<sup>33</sup> Ohio Rev. Code Ann. § 3599.091(C) (Page Supp. 1983).

<sup>34</sup> *Id.*

<sup>35</sup> Minnesota: *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Scheibel v. Pavlak*, 282 N.W.2d 843 (Minn. 1979); *Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979); *Graves v. Meland*, 264 N.W.2d 401 (Minn. 1978); *Grojohn v. McCollar*, 291 Minn. 344, 191 N.W.2d 396 (1971); *Barthel v. Zachman*, 289 Minn. 523, 185 N.W.2d 277 (1971); *Moulton v. Newton*, 274 Minn. 545, 144

states only three—Minnesota, Oregon and Wisconsin—have developed a body of case law of any size.

From the cases which have been reported, though, two trends are apparent. Generally, appellate courts have applied a rule of strict construction to campaign falsity statutes. At the same time, they have taken a comparatively liberal attitude when examining statements at issue in a case, often choosing a broad interpretation of the statement which places it outside the statute's scope. Essentially, courts are reluctant to overturn an election and, in so doing, interfere with the will of the electorate.<sup>16</sup>

The Minnesota Supreme Court has applied a rule of strict construction to that state's election statute with the justification that, as a penal statute, it warrants such treatment.<sup>17</sup> The Oregon Supreme Court also strictly construes its state's corrupt practices act, even though the provision of the act that regulates campaign statements is not a criminal provision. As the Oregon high court has noted, a finding that a victorious candidate violated the statute, and must consequently forfeit the office, effectively disenfranchises those who voted for the election winner.<sup>18</sup> Strict construction of the statute makes such findings less likely.

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N.W.2d 706 (1966); *Bank v. Egan*, 240 Minn. 192, 60 N.W.2d 257 (1953); *Efferz v. Schimelpfenig*, 207 Minn. 324, 291 N.W. 286 (1940); *Dart v. Erickson*, 188 Minn. 313, 248 N.W. 706 (1933); *Englebert v. Tuttle*, 185 Minn. 608, 242 N.W. 425 (1932); *Flaten v. Kvale*, 146 Minn. 463, 179 N.W. 213 (1920); *Hawley v. Wallace*, 137 Minn. 183, 163 N.W. 127 (1917); Mississippi: *Boydman v. State*, 249 So. 2d 411 (Miss. 1971); North Dakota: *Snortland v. Crawford*, 306 N.W.2d 614 (N.D. 1981); Ohio: *State v. Davis*, No. 1164 (Ohio Ct. App. May 17, 1985); *State v. Gall*, No. 1169 (Ohio Ct. App. May 17, 1985); *State v. Manfredi*, No. 1166 (Ohio Ct. App. May 17, 1985); *State v. Schanzel*, No. 1165 (Ohio Ct. App. May 17, 1985); *Dewine v. Ohio Elections Comm'n*, 61 Ohio App. 2d 25, 399 N.E.2d 99 (1978); Oregon: *Committee of One Thousand to Re-Elect Senator Walt Brown v. Eivers*, 296 Or. 195, 674 P.2d 1159 (1983); *Bevan v. Garrett*, 284 Or. 293, 586 P.2d 1119 (1978); *Committee to Retain Judge Jacob Tanzer v. Lee*, 270 Or. 215, 527 P.2d 247 (1974); *Combs v. Groener*, 256 Or. 336, 472 P.2d 281 (1970); *Thornton v. Johnson*, 253 Or. 342, 453 P.2d 178 (1969); *Mosee v. Clark*, 253 Or. 83, 453 P.2d 176 (1969); *Cook v. Corbett*, 251 Or. 263, 446 P.2d 179 (1968); *Stork v. Columbia River People's Utility Dist.*, 58 Or. App. 51, 646 P.2d 1372 (1982); *Koch v. Makinson*, 52 Or. App. 155, 628 P.2d 397 (1981); *Sumner v. Bennett*, 45 Or. App. 275, 608 P.2d 566 (1980); *Eustace v. Speckhart*, 14 Or. App. 485, 514 P.2d 65 (1973); Wisconsin: *State ex rel. Skibinski v. Tadych*, 31 Wis. 2d 189, 142 N.W.2d 838 (1966); *State ex rel. Mattison v. Baudhuin*, 270 Wis. 249, 70 N.W.2d 674 (1955); *State ex rel. Hampel v. Mitten*, 227 Wis. 598, 278 N.W. 431 (1938).

<sup>16</sup> *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); *Mosee v. Clark*, 253 Or. 83, 88, 453 P.2d 176, 178 (1969).

<sup>17</sup> *Graves v. Meland*, 264 N.W.2d 401, 403 (Minn. 1978); *Dart v. Erickson*, 188 Minn. 313, 319, 248 N.W. 706, 709 (1933).

<sup>18</sup> *Mosee v. Clark*, 253 Or. 83, 88, 453 P.2d 176, 178 (1969).

Using this strict construction approach, courts have interpreted campaign falsity statutes as applying only to statements of fact.<sup>39</sup> For instance, the Minnesota Supreme Court, in *Hawley v. Wallace*,<sup>40</sup> narrowly interpreted the term "false statement" in its statute:

The statute is directed against false statements relative to facts. It is not intended to prevent criticism of candidates for office nor to prevent deductions and arguments from their official conduct unfavorable to them. It does not reach criticism which is merely unfair or unjust. It does reach false statements of specific facts.<sup>41</sup>

Alternatively, a court may go beyond a literal reading of the statutory language to further restrict its application. The Wisconsin Supreme Court has construed Wisconsin's election law to require the courts, despite the statute's literal meaning, to deny ouster from office in cases where the violations either were technical, insubstantial or trivial, or by their nature could not have corrupted or mislead the voters.<sup>42</sup> The Wisconsin court based its interpretation on the expressed statutory objective of giving effect to the will of the voters.<sup>43</sup>

By reading these statutes narrowly, courts have declined in a number of cases to find that a punishable violation occurred. One defeated incumbent failed to prevail in his election contest although the court recognized a false statement had been published. The statement referred not to the incumbent but to his supporters and, therefore, the court concluded, did not fall within that state's statute.<sup>44</sup> Other election contests have been rejected because the court found the defendant candidate did not know the statement was false<sup>45</sup> or did not have any knowledge of nor responsibility for the publication of the statement.<sup>46</sup> When a candidate anonymously sent his opponent a bogus letter, purportedly a warning from one of the

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<sup>39</sup> *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979); *Bank v. Egan*, 240 Minn. 192, 194-95, 60 N.W.2d 257, 259 (1953); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *State ex rel. Skibinski v. Tadych*, 31 Wis. 2d 189, 193, 142 N.W.2d 838, 840 (1966); *State ex rel. Hampel v. Mitten*, 227 Wis. 598, 609, 278 N.W. 431, 436 (1938).

<sup>40</sup> 137 Minn. 183, 163 N.W. 127.

<sup>41</sup> 137 Minn. at 186, 163 N.W. at 128.

<sup>42</sup> *State ex rel. Hampel v. Mitten*, 227 Wis. 598, 605, 278 N.W. 431, 433-34 (1938).

<sup>43</sup> 227 Wis. at 605, 278 N.W. at 433.

<sup>44</sup> *Dart v. Erickson*, 188 Minn. 313, 319-20, 248 N.W. 706, 708-09 (1933).

<sup>45</sup> *Snortland v. Crawford*, 306 N.W.2d 614, 624 (N.D. 1981).

<sup>46</sup> *Barthel v. Zachman*, 289 Minn. 523, 526, 185 N.W.2d 277, 279 (1971).

opponent's supporters that dirty campaign tactics should cease, no actionable violation was found. The letter was not circulated among the electorate and, the court concluded, had no effect on the voters. Thus, it could not be considered a material violation of the act.<sup>47</sup>

When reviewing campaign falsity cases, appellate courts often conclude that the statements in issue are not false statements of fact subject to statutory penalty. By interpreting the statement to be a comment,<sup>48</sup> opinion,<sup>49</sup> or campaign pledge<sup>50</sup> rather than a statement of fact, courts find that it is outside the scope of the campaign falsity laws. When a candidate for sheriff suggested his opponent was a "love pirate" and a "demoralizer of homes" (because he allegedly had written a questionable letter to a married woman), the Wisconsin Supreme Court decided the statements fell within the field of political comment.<sup>51</sup> When a challenger insisted the incumbent state legislator had voted against a popular farm-use tax deferral law (by opposing a bill which actually would have excluded nonincome-producing farmland from qualifying for deferral), the Oregon Court of Appeals called it opinion.<sup>52</sup> The court said the incumbent's vote could reasonably be viewed either as supporting the deferral law by opposing its limitation or as opposing the deferral law by fighting a measure designed to preserve tax benefits for farmers with income-producing land.<sup>53</sup>

The Oregon courts also have held that ambiguous statements—those capable of different meanings, some false and some not—do not constitute campaign falsity violations.<sup>54</sup> In one case, a

<sup>47</sup> *Effertz v. Schimelpfenig*, 207 Minn. 324, 329, 291 N.W. 286, 288 (1940).

<sup>48</sup> *Moulton v. Newton*, 274 Minn. 545, 551, 144 N.W.2d 706, 710 (1966); *State ex rel. Skibinski v. Tadych*, 31 Wis. 2d 189, 194, 142 N.W.2d 838, 841 (1966); *State ex rel. Hampel v. Mitten*, 227 Wis. 598, 610, 278 N.W. 431, 436 (1938).

<sup>49</sup> *Thornton v. Johnson*, 253 Or. 342, 367, 453 P.2d 178, 188 (1969); *Sumner v. Bennett*, 45 Or. App. 275, 281, 608 P.2d 566, 569 (1980); *State ex rel. Skibinski v. Tadych*, 31 Wis. 2d 189, 194, 142 N.W.2d 838, 841 (1966).

<sup>50</sup> See *Stork v. Columbia River People's Utility District*, 58 Or. App. 51, 57-58, 646 P.2d 1372, 1376 (1982) (aff'd on other grounds).

<sup>51</sup> *Hampel*, 227 Wis. at 610, 278 N.W. at 436.

<sup>52</sup> *Sumner*, 45 Or. App. at 281, 608 P.2d at 569.

<sup>53</sup> *Id.*

<sup>54</sup> *Committee to Retain Judge Jacob Tanzer v. Lee*, 270 Or. 215, 220, 527 P.2d 247, 249 (1974); *Thornton v. Johnson*, 253 Or. 342, 362, 453 P.2d 178, 188 (1969); *Mosee v. Clark*, 253 Or. 83, 87, 453 P.2d 176, 178 (1969).

For a criticism of the Oregon approach, see *Rees, Uncandid Candidates and the Oregon Corrupt Practices Act*, 50 Or. L. Rev. 299, 308 (1971).

former elected official used the slogan "Return a Proven Leader" when challenging an incumbent for a different office. The Oregon Supreme Court found the slogan susceptible to two inferences: one false (that the candidate is the incumbent) and one true (that the candidate has served before in public office).<sup>55</sup> That court decided the ambiguous statement was not false so long as any reasonable and truthful inference could be drawn from it.<sup>56</sup>

Although all but one of the campaign falsity laws are criminal statutes, very few criminal prosecutions have been reported.<sup>57</sup> Almost exclusively, these statutes are used as the basis for civil actions seeking to invalidate elections and oust from office winning candidates alleged to have violated the campaign falsity laws. Although these election contests generally are unsuccessful, in seven cases, appellate courts have found the existence of actionable campaign falsity violations.<sup>58</sup>

### III. Constitutional Implications

Campaign falsity statutes, by regulating political speech, raise

<sup>55</sup> *Mosee* 253 Or. 87, 453 P.2d at 177-78.

<sup>56</sup> *Id.*

<sup>57</sup> See *Boydston v. State*, 249 So.2d 411 (Miss. 1971) (court reversed a criminal libel conviction, refusing to enforce the state's criminal libel law as a penal offense "because the common law elements were too indefinite."); *State v. Davis*, No. 1164 (Ohio Ct. App. May 17, 1985); *State v. Gall*, No. 1169 (Ohio Ct. App. May 17, 1985); *State v. Manfredi*, No. 1166 (Ohio Ct. App. May 17, 1985); *State v. Schanzel*, No. 1165 (Ohio Ct. App. May 17, 1985) (court affirmed two criminal convictions, reversed two criminal convictions in four cases arising out of same campaign controversy over advertisement); *Dewine v. Ohio Elections Comm'n*, 61 Ohio App. 2d 25, 399 N.E.2d 99 (1978) (court rejected plaintiff's civil challenge to commission's decision to refer its findings to prosecuting attorney for possible prosecution of plaintiff).

<sup>58</sup> See *Scheibel v. Pavlak*, 282 N.W.2d 843 (Minn. 1979) (advisory opinion suggested a violation in a false statement about incumbent's voting and attendance records; Minnesota House of Representative subsequently excluded defendant from his seat); *Flaten v. Kvale*, 146 Minn. 463, 179 N.W. 213 (1920) (affirmed trial court's invalidation of defendant's Republican nomination in congressional race, finding violation in defendant's written statement to voters suggesting that his opponent was a "pronounced atheist" and opposed to the Bible); *Hawley v. Wallace*, 137 Minn. 183, 163 N.W. 127, (1917) (affirmed annulment of defendant's election, finding violation to extent charges uttered exceeded criticism and were false statements of specific acts of wrongdoing); *State v. Davis*, No. 1164 (Ohio Ct. App. May 17, 1985) and *State v. Manfredi*, No. 1166 (Ohio Ct. App. May 17, 1985) (affirmed convictions for knowingly including false statements in political advertising about opposing candidate); *Cook v. Corbett*, 251 Or. 263, 446 P.2d 179 (1968) (reversed dismissal of election contest, finding nonincumbent's use of term "re-elect" a deliberate and material violation); *State ex rel. Mattison v. Baudhuin*, 270 Wis. 249, 70 N.W.2d 674 (1955) (affirmed overruling of defendant's demurrer, agreeing with trial court that, if statements alleging opponent was in arrears in alimony and child support payments were untrue, they would be a substantial violation).

immediate constitutional concerns. Protection of individual expression about political issues lies at the core of the first amendment's freedom of speech guarantee.<sup>59</sup> However, only a few judicial decisions have addressed this area of potential conflict. Just how much can a state regulate false statements in the area of political speech before it runs afoul of first amendment rights applied to the states through the fourteenth amendment?<sup>60</sup>

*Vanasco v. Schwartz*<sup>61</sup> is the leading case on this question. There, a United States district court, in a decision later affirmed by the United States Supreme Court without opinion, struck down New York's campaign falsity statutes.<sup>62</sup> New York election law authorized the state Board of Elections to promulgate a fair campaign code, in part to prohibit any deliberate misrepresentation of any candidate's qualifications, positions on issues, party affiliation or endorsements.<sup>63</sup> The code itself did not specify that the misrepresentation must be deliberate; it identified among proscribed misrepresentations the use of "personal vilification" and "scurrilous attacks."<sup>64</sup> The three-judge court that decided *Vanasco* in 1975 found the challenged statute and code provisions unconstitutionally overbroad on their face.<sup>65</sup> Any state regulation of campaign speech, the court said, must conform to the "actual malice" standard applicable to public figures under *New York Times Co. v. Sullivan*<sup>66</sup> (to be

<sup>59</sup> See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

Justices Holmes and Brandeis championed the view of the first amendment as protecting "free trade in ideas" and that the best test for truth is to entrust it to "the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

This protection is strongest in the field of political speech for it goes to the heart of a political democracy. Harvard law professor Archibald Cox has observed: "[o]nly by freedom of expression can the people voice their grievances and obtain redress. Only by speech and the press can they exercise the power of criticism. Only by freedom of speech, of the press, and of association, can people build and assert political power, including the power to change the men who govern them." A. Cox, *Freedom of Expression* 3 (1981).

<sup>60</sup> For a discussion of constitutional issues raised by campaign falsity statutes, see Note, *Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1272-94 (1975).

<sup>61</sup> 401 F. Supp. 87 (E.D.N.Y. 1975), aff'd mem., 423 U.S. 1041 (1976).

<sup>62</sup> *Id.*

<sup>63</sup> N.Y. Elec. Law § 472 (McKinney Supp. 1974) (offending provisions excised in 1978; current version at N.Y. Elec. Law § 3-106 (McKinney 1978)).

<sup>64</sup> N.Y. Admin. Code tit. 9, § 6201.1 (1974).

<sup>65</sup> *Vanasco*, 401 F. Supp. at 95.

<sup>66</sup> 376 U.S. 254 (1964).

actionable defamation, a statute must be made with knowledge that it is false or in reckless disregard of its truth or falsity).<sup>67</sup> The challenged New York laws' prohibition of misrepresentations, according to the court, reached beyond the limits of this standard because the term "misrepresentation" may be applied to protected speech.<sup>68</sup>

The *Vanasco* court recognized, however, that calculated falsehoods are not constitutionally protected,<sup>69</sup> relying on the Supreme Court opinion in *Garrison v. Louisiana*,<sup>70</sup> which said:

Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence the knowing false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.<sup>71</sup>

Since the New York statute was invalidated in *Vanasco*, the Ohio campaign falsity statute<sup>72</sup> has withstood similar constitutional attack. In *Dewine v. Ohio Elections Commission*,<sup>73</sup> the Ohio Court of Appeals found that the statute satisfied the *New York Times* standard because it prohibited only knowingly false statements about candidates.<sup>74</sup> The North Dakota Supreme Court recently upheld that state's campaign falsity statute, finding that it did meet the standard mandated by *New York Times*.<sup>75</sup> The Oregon Supreme Court has declined several opportunities to rule on the constitutionality of Oregon's campaign falsity statute, preferring to rest its decisions on nonconstitutional grounds.<sup>76</sup>

The "actual malice" standard has become the recognized standard by which to measure the constitutionality of the campaign falsity statutes. By that standard, these statutes appear, with one ex-

<sup>67</sup> *Vanasco*, 401 F. Supp. at 91-92.

<sup>68</sup> *Id.* at 96-97.

<sup>69</sup> *Id.* at 91.

<sup>70</sup> 379 U.S. 64 (1964).

<sup>71</sup> *Id.* at 75 (quoting *Chaplinski v. New Hampshire*, 315 U.S. 568, 572 (1942)).

<sup>72</sup> Ohio Rev. Code Ann. § 3599.091(B) (Page Supp. 1983).

<sup>73</sup> 61 Ohio App. 2d 25, 399 N.E.2d 99 (1978).

<sup>74</sup> 61 Ohio App. 2d at 29, 399 N.E.2d at 103.

<sup>75</sup> *Snortland v. Crawford*, 306 N.W.2d 614, 622-23 (N.D. 1981).

<sup>76</sup> *Committee to Retain Judge Jacob Tanzer v. Lee*, 270 Or. 215, 216, 527 P.2d 247, 247 (1974); *Bevan v. Garrett*, 284 Or. 293, 300, 586 P.2d 1119, 1123 n.2 (1978).

ception, to be constitutionally sound. Unlike other states' statutes, the Indiana law does not expressly require a showing of knowledge of a statement's falsity or reckless disregard prerequisite to a campaign falsity violation.<sup>77</sup> The Indiana statute, therefore, must be considered unconstitutional on its face.

The Indiana statute may be interpreted to reach false statements made unknowingly or without reckless disregard of their falsity.<sup>78</sup> Thus, it could be applied to constitutionally protected speech and has a potential chilling effect on such speech. Under the first amendment overbreadth doctrine, a court would likely be inclined to find the statute facially unconstitutional.<sup>79</sup> The Indiana statute, therefore, appears squarely at odds with *New York Times*. While it is limited, in essence, to defamatory statements,<sup>80</sup> it does not incorporate the "actual malice" test required by *New York Times* in defamation actions brought by public officials.<sup>81</sup> There are no reported cases applying the Indiana statute; how it will fare under judicial scrutiny remains to be seen.<sup>82</sup>

The constitutionality of one provision in the Mississippi campaign falsity statute also appears dubious. The provision prohibits the making of any charges against a candidate, whether true or false, during the last five days before a primary election.<sup>83</sup> This

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<sup>77</sup> Ind. Code Ann. § 3-4-7.3 (Burns 1982).

<sup>78</sup> Ind. Code Ann. § 3-4-7-5 (Burns 1982) reads, in part, a person commits a misdemeanor "who, for the purpose of intimidating, influencing, inducing, or procuring any person to vote, or refrain from voting, for or against any person, . . . transmits any false matter to the publisher of a newspaper, book, or other publication. . . ."

<sup>79</sup> By use of the first amendment overbreadth doctrine, a court may invalidate an entire statute on its face if the statute is so broad that it might be applied to constitutionally protected activities. The doctrine's use has been somewhat curtailed by the Burger Court to one requiring "substantial overbreadth." See generally Monaghan, *Overbreadth*, Sup. Ct. Rev. 1 (1981); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

<sup>80</sup> The Indiana statute requires, for there to be a violation, that publication of the false matter would "(1) expose any person to hatred, contempt, ridicule, or obloquy; (2) cause any person to be shunned or avoided; or (3) tend to damage any person in his business. . . ." Ind. Code Ann. § 3-4-7-5 (Burns 1982).

<sup>81</sup> *New York Times*, 376 U.S. at 279-80.

<sup>82</sup> A court conceivably could deflect an overbreadth attack by narrowly construing the challenged statute. By applying a separability analysis and by use of a rule of first amendment privilege (in this case, the "actual malice" test) as a guide, a court could excise from the statute an unconstitutional application but leave standing that part which is not overbroad. Monaghan, *Overbreadth*, Sup. Ct. Rev. 1, 1-39 (1981); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 882-90 (1970).

<sup>83</sup> Miss. Code Ann. § 23-3-33 (1972).

sweeping prohibition directly conflicts with the first amendment's freedom of speech guarantees. While important, the state interest in protecting the integrity of the electoral process is not sufficiently compelling to justify a ban extending to true charges leveled late in a campaign. In *Mills v. Alabama*,<sup>66</sup> the Supreme Court held unconstitutional a similar Alabama statute; that law prohibited any electioneering on election day.<sup>67</sup>

The objections to the Alabama statute in *Mills* can be applied equally well to the Mississippi provision. Its blanket prohibition of charges, regardless of their truth or falsity, in the closing days of a campaign, sweeps protected speech into its coverage. Although a state understandably would want to ensure that the electorate is not misinformed by last-minute attacks, it cannot outlaw protected speech in the process. The "actual malice" test should be a component of any such regulation, and the prohibition of constitutionally unprotected expression such as calculated falsehoods the sole objective.<sup>68</sup> As the *Mills* Court noted, a central purpose of the first amendment was to safeguard the free discussion of governmental and political affairs, the very area targeted by the statute.<sup>69</sup> In *Mills*, the Supreme Court also questioned the desirability of such a statute; it observed that candidates would be barred from responding to accusations made by opponents on the eve of the curfew period, which would not serve the state's interest in an informed electorate.<sup>70</sup> No reported cases have considered or applied Mississippi's blanket prohibition of political charges in the closing days of a campaign.

#### IV. The Statutes' Advisability

Most existing campaign falsity statutes appear to pass constitutional muster. But an inquiry into their advisability should not end there. Whenever an attempt is made to regulate political expression,

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<sup>66</sup> 384 U.S. 214 (1966).

<sup>67</sup> Ala. Code § 285 (1940).

<sup>68</sup> For a discussion questioning the constitutionality of any prohibition of merely negligent falsehoods in a campaign's final days, see Note, Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1285-86 (1975).

<sup>69</sup> *Mills*, 384 U.S. at 218.

<sup>70</sup> *Id.* at 220.

the restriction should provide a sufficient remedy to the targeted ill to justify its application in a constitutionally sensitive area.

No one can seriously contend that the use of calculated falsehoods in a political campaign is a practice deserving of free speech protection. The difficulties arise in attempting to prove the falsity of the political statement and, in particular, the speaker's knowledge of its falsity. For instance, any observer of politics can attest that there are nearly as many different ways to interpret a voting record as there are politicians to do the interpreting. Unfair though one interpretation may be, it normally will not warrant the label falsehood.

One measure of a statute's effectiveness is the degree to which proscribed activity is actually punished under the statute. The reported campaign falsity cases reveal a hesitation by appellate courts to find violations.<sup>89</sup> This reluctance can partially be explained by recognizing that campaign statements often represent expressions of opinion or contain a kernel of truth. More generally, courts have expressed reluctance in election contests to replace the electorate's judgment with that of the judiciary—which is what happens, in effect, when an election is invalidated because of a campaign falsity violation.<sup>90</sup> Given the few reported cases, and even fewer findings of violations, the effectiveness of campaign falsity statutes seems extremely limited.

In many respects, campaign falsity statutes are nothing more than incumbency protection laws. More than sixty-three percent of the report campaign falsity cases have been brought by or on behalf of incumbents.<sup>91</sup> A challenger, by necessity, is much more likely

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<sup>89</sup> *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); *Mosee v. Clark*, 253 Or. 83, 88, 453 P.2d 176, 178 (1969).

<sup>90</sup> *Thornton v. Johnson*, 253 Or. 342, 362, 453 P.2d 178, 188 (1969).

<sup>91</sup> Campaign falsity cases brought by or on behalf of incumbents include: *Kennedy v. Voss*, 304 N.W.2d 299, (Minn. 1981); *Scheibel v. Pavlak*, 282 N.W.2d 843 (Minn. 1979); *Bundlie v. Christensen*, 276 N.W.2d 69, (Minn. 1979); *Barthel v. Zachman*, 289 Minn. 523, 185 N.W.2d 277, (1971); *Moulton v. Newton*, 274 Minn. 545, 144 N.W.2d 706, (1966); *Bank v. Egan*, 240 Minn. 192, 60 N.W.2d 257, (1953); *Dart v. Erickson*, 188 Minn. 313, 248 N.W. 706, (1933); *Flaten v. Kvale*, 146 Minn. 463, 179 N.W. 213 (1920); *Hawley v. Wallace*, 137 Minn. 183, 163 N.W. 127, (1917); *Boydston v. State*, 249 So.2d 411 (Miss. 1971); *Snortland v. Crawford*, 306 N.W.2d 614 (N.D. 1981); *Dewine v. Ohio Elections Comm'n*, 61 Ohio App. 2d 25, 399 N.E.2d 99 (1978) (arising out of alleged wrong to incumbent); *Committee of One Thousand to Re-Elect Senator Walt Brown v. Eivers*, 296 Or. 195, 674 P.2d 1159 (1983); *Committee to Retain Judge Jacob Tanzer v. Lee*, 270 Or. 215, 527 P.2d 247, (1974); *Thornton v. Johnson*, 253 Or. 342, 453 P.2d 178, (1969); *Mosee v. Clark*, 253 Or. 83, 453 P.2d 176, (1969); *Cook v. Corbett*, 251 Or. 263, 446 P.2d 179 (1968); *Sum-*

than an incumbent to wage an aggressive campaign questioning the incumbent's record and fitness for office. Given the inherent advantages an incumbent already has, why should another be added to further dissuade the challenger from pressing the incumbent too forcefully?

Proponents of these laws would argue that they restrain candidates who might otherwise resort to rhetorical excess. Protection of the integrity of the electoral process and assurance that the voters will cast their ballots free from misleading information, are among the state interests which the campaign falsity statutes have been enacted to vindicate.<sup>92</sup> But the statutes' presence may have a chilling effect upon a challenger, prompting self-censorship of what would have been legitimate, protected speech. Free and robust discussion of public affairs is a key ingredient of the electoral process. A campaign falsity statute, by potentially inhibiting political discussion, could serve to weaken rather than strengthen the integrity of the electoral process. As for protecting the voters from being misled, a campaign falsity statute cannot adhere to the constitutional restraints of the "actual malice" standard and, at the same time, include in its prohibitions misleading statements of opinion. A better way to help the electorate make an informed choice is to promote full discussion during the campaign—not to impose regulations on political speech.

If a state is to have a campaign falsity statute, it should be drafted as narrowly as possible. At a minimum, the statute must incorporate the constitutionally mandated "actual malice" standard. It also should require clear and convincing evidence of a violation, another constitutional requirement announced in *New York Times*.<sup>93</sup> Violations should be limited to statements of material fact deemed knowingly false.

The provisions in the revised Oregon campaign falsity statute also merit consideration. The Oregon law provides for a civil remedy for damages rather than a criminal penalty. It requires, before

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ner v. Bennett, 45 Or. App. 275, 608 P.2d 566, (1980); State ex rel. Skibinski v. Tadych, 31 Wis. 2d 189, 142 N.W.2d 838, (1966).

<sup>92</sup> See Snortland v. Crawford, 306 N.W.2d 614, 623 (N.D. 1981); Dewine v. Ohio Elections Comm'n, 61 Ohio App. 2d 25, 29, 399 N.E.2d 99, 103 (1978).

<sup>93</sup> 376 U.S. at 285-86.

an election can be invalidated, clear and convincing evidence that a false statement reversed the election's outcome." The Oregon approach is preferable to criminal statutes because it intrudes less into the realm of public expression than do other campaign falsity laws. The law does not threaten criminal prosecution. Consequently, it is less likely that protected speech will be chilled. The statute also does not overturn the will of the electorate unless the proponent of an election contest clearly and convincingly shows the false statement made such an impact that the electorate was swayed to decide as it otherwise would not have. That the Oregon statute has seen more frequent use than any other state's campaign falsity law, save Minnesota's, suggests that its more narrowly drawn provisions have not posed a serious obstacle to the statute's invocation."

The better approach, however, would be for a state to have no campaign falsity statute at all. Criticism is an accepted part of political life, and political figures can respond to falsehoods in the same way that they respond to legitimate criticism—through their access to the media<sup>44</sup> and the public.

Moreover, political figures can always resort to a civil action for defamation seeking damages or a preliminary injunction to bar distribution of the allegedly defamatory statement. A victory in such a civil action, if timely, would likely generate favorable publicity for the defamed candidate.<sup>45</sup> At least one court, however, has held that a preliminary injunction imposed on a candidate for county assessor violated his freedom of expression rights.<sup>46</sup> Thus, because any restraint on expression must overcome a heavy presumption against its validity, a defamed candidate likely would find it difficult to ob-

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<sup>44</sup> Or. Rev. Stat. § 260.532(2)-(9) (1983) (amendments made in 1973 Or. Laws ch. 744, § 36).

<sup>45</sup> The Minnesota campaign falsity statute has been the subject of thirteen reported cases; the Oregon statute has been raised in eleven reported cases. In the twelve years since the Oregon law's revision, though, six reported cases have been brought in Oregon, compared to four in Minnesota. Nevertheless, neither state's statute has seen significant usage. See cases cited *supra* note 35 for Minn. and Or.

<sup>46</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

<sup>47</sup> Echan, *The Use of Injunctions in Political Campaigns*, 49 L.A.B. Bull. 229, 231 (1974).

<sup>48</sup> *Wilson v. Los Angeles County Superior Court*, 13 Cal. 3d 652, 661-62, 119 Cal. Rptr. 468, 474, 532 P.2d 116, 122 (1975) (incumbent had obtained a preliminary injunction barring his opponent from publishing or distributing leaflets in which were reproduced seven-year-old newspaper articles detailing a bribery indictment against the incumbent; the original leaflets did not explain that the incumbent later had been acquitted, nor did they indicate the age of the articles. Notwithstanding this, the injunction was reversed).

tain an injunction barring his opponent from publishing even a defamatory statement, absent extraordinary circumstances." State commissions on fair campaign practices provide an alternative for candidates who believe they have been wronged by a false campaign statement. In those localities where they have been established, these bipartisan panels hear complaints about campaign tactics and issue opinions valued for the publicity they generate for the complaining party seeking vindication. Given the alternatives available to candidates, enacting a campaign falsity statute is not the answer.

The United States Supreme Court has noted that erroneous statements are inevitable in public debate and, therefore, false statements negligently made must be constitutionally protected so that free speech will have "breathing space" to survive.<sup>100</sup> This rationale may explain the courts' narrow construction of even those regulations aimed at false statements knowingly made. Although knowingly false statements properly are not afforded constitutional protection, a regulation attempting to proscribe such statements could cut perilously close to legitimate, protected speech.

As an illustration, consider the plight of hypothetical candidate Jones. As county commissioner, Jones supported proposed outlays in the county human services budget for bicycle trails and a county library. Subsequently, the proposed budget was amended to include an \$18,000 allocation for new administrative positions. As a matter of principle, Jones voted against the entire county budget because it contained the \$18,000 provision. The county board adopted the budget and, at election time, Jones made much of his support for human services. Candidate Smith, seeking to unseat Jones, saw a chink in the incumbent's armor. Smith distributed a pamphlet accusing Jones of not actually supporting the programs of which Jones now spoke so highly. By citing Jones' "no" vote on the county budget, Smith's literature concluded that Jones did not sup-

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<sup>100</sup> *Id.*

See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), in which the U.S. Supreme Court held that a prior restraint on a publication referring to the malfeasance of public officers would violate the first and fourth amendments.

The U.S. district court in *Vanasco* declined to consider whether the imposition of an injunction forbidding a candidate from distributing an allegedly misleading statement would violate the U.S. Constitution. *Vanasco*, 401 F. Supp. at 100.

<sup>101</sup> See *New York Times Co.*, 376 U.S. at 271-72; *Garrison*, 379 U.S. at 73-74.

port the human services allocations. "Jones is not a supporter of programs for the elderly," the pamphlet proclaimed.

If Jones loses the election, he could bring an election contest, accusing Smith of violating the state's campaign law. Yet because the statute proscribes only false statements made knowingly, a court would likely find Smith's statements to be lawful. The statute only proscribes knowingly false statements of fact, and Jones *did* cast a "no" vote on the county budget. Smith simply drew an inference from that fact to buttress his opinion that Jones had not supported human services. These facts faced the Minnesota Supreme Court in *Kennedy v. Voss*.<sup>101</sup> The court in that case found no violation of the campaign falsity statute.<sup>102</sup> But regardless of the outcome, and despite expedited procedures, an election contest and the inevitable appeal will create a period in which the voters' representation on the county board will be uncertain.

A more effective way to combat an opponent's charges is to use the same public forum which gave life to the charges initially. In our hypothetical, candidate Jones could have turned the liability into an asset. Before election day, Jones could distribute flyers, hold news conferences and use his speaking opportunities to accuse Smith of misrepresenting his voting record. Jones could explain the reasons for his "no" vote on the budget and detail how he has supported public services. Further, Jones could turn the issue to his advantage by depicting himself as a public servant who works to ensure that taxpayers' money is used for public services and not increased government bureaucracy.

There will be occasions where a candidate will not be able to adequately refute an opponent's charges. The candidate admittedly is at a disadvantage when forced to convince voters that an opponent's charge, once made, is groundless. The broadside may come too late in the campaign or the candidate may not have sufficient campaign funds to reach the voters with a response. These factors are inherent in the political process of a democracy. A candidate can best protect himself by aggressively presenting his case to the voters and anticipating where he may be vulnerable to attack from an

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<sup>101</sup> 304 N.W.2d 299 (Minn. 1981).

<sup>102</sup> *Id.* at 300. "The public is adequately protected from such extreme inferences by the campaign process itself." *Id.*

opponent.<sup>103</sup>

### V. Conclusion

The seventeen existing campaign falsity statutes have much in common. They prohibit any person from publishing or distributing false statements about a candidate for public office. Except for the Indiana law and a provision in the Mississippi statute, the campaign falsity statutes conform to the constitutional "actual malice" standard of *New York Times v. Sullivan*. Except for the Oregon statute, these laws establish criminal sanctions for campaign falsity violations.

The campaign falsity statutes are rarely invoked. Most of the reported cases are election contests, not criminal prosecutions. The plaintiffs are usually defeated incumbents. Appellate courts strictly construe the statutes' provisions and tend to give a broad interpretation to challenged statements. As a result, courts rarely find campaign falsity violations.

Although most campaign falsity statutes satisfy constitutional requirements, their advisability is questionable. The statutes are ineffective in combatting calculated campaign falsity, and candidates have an effective way to respond to such attacks through their access to the media and the public. Moreover, the statutes regulate an area of expression that lies at the core of the first amendment's freedom of speech guarantees. Campaign falsity statutes, then, are unnecessary and undesirable. They are a poor alternative to free and unfettered discussion of public affairs.

*Richard F. Neel, Jr.*

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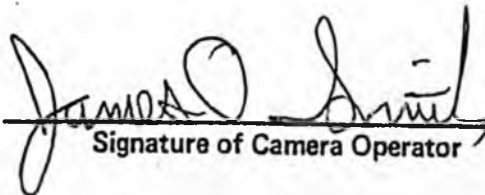
<sup>103</sup> For a contrary view, see Note, Gutter Politics and the First Amendment, 6 *Valparaiso L. Rev.* 185, 203-12 (1972).

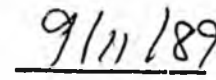


# RECORDS CERTIFICATION



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Date

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A M E N D M E N T

#1

OFFERED IN THE HOUSE:

BY: CLOCKSIN

To: CS HOUSE BILL No. 327 (Judiciary)

SENATE BILL No. \_\_\_\_\_

PAGE: 2

LINE: 3

Insert a new section (c) and renumber accordingly:

"(c) This section and AS 23.10.510 do not apply if the report made under subsections (a) (1) or (a) (3) of this section discloses information which is legally required to be confidential."

Adopted

STATE OF ALASKA 1986 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: 1/30/86

REQUEST

Bill Resolution No.: CSHB 327 (State Affairs)  
Title: "An Act relating to disclosure of information..."

Sponsor: Repr. Koponen  
Requestor: House Judiciary Committee  
Date of Request: January 30, 1986

FISCAL DETAIL

Agency Affected: Department of Law  
BRU: Legal Services, Prosecution

Components: Legal Services Operations, ALL - Prosecution

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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**FUNDING : (Thousands of Dollars)**

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

**POSITIONS :**

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

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

-Please see attached analysis.-

Prepared by: Richard I. Pegues, Director Phone: 465-3672  
Division: Administrative Services Division Date: 1/30/86  
Approved by Commissioner: Richard I. Pegues / F.R.K.  
Harold M. Brown, Attorney General Date: 1/30/86  
Agency: Department of Law

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 327

Enactment of this bill will probably result in some additional legal work on the part of Department of Law staff. It does not appear that any increase in workload will be significant enough to warrant fiscal note costs. However, when considered in conjunction with other similar measures, bills of this nature divert the department's existing resource from other more pressing assignments because of their cumulative effect.

To the extent that misdemeanor charges may be brought against a public employee for allegedly violating proposed Sec. 39.51.040, it is doubtful that a conviction could ever be obtained. The term cooperate, as it is used in the section, is sufficiently vague that it is unlikely criminal intent could ever be established.

Original sponsors: Koponen, Thompson  
and Marrou

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IN THE HOUSE

BY THE STATE AFFAIRS COMMITTEE

CS FOR HOUSE BILL NO. 327 (State Affairs)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL.

For an Act entitled: "An Act relating to the disclosure of information."

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

\* Section 1. FINDING. The legislature finds that free access to information at all levels of state government and concerning issues before the legislature is critical to the exercise of legislative responsibilities under Article II of the Alaska constitution. The legislature further finds that retaliation for providing information to a legislator impairs the people's rights to freedom of speech and to petition the government under Article I of the Alaska constitution.

\* Sec. 2. AS 39.51.020(c) is amended to read:

(c) A violation of this section is a class A misdemeanor.

\* Sec. 3. AS 39.51 is amended by adding new sections to read:

Sec. 39.51.040. LEGISLATIVE ACCESS TO PUBLIC INFORMATION. (a)

An employee of a public agency shall cooperate with the request of a legislator for public information or a public record under AS 09.25.-110 and 09.25.120.

(b) A public agency may not impose restrictions on the release of information to a legislator or a legislative committee unless those restrictions apply equally to the release of information to other members of the public.

(c) In this section, "public agency" includes the state, a public or quasi-public corporation or authority established by law, the University of Alaska, and a political subdivision of the state.

(d) A violation of this section is a class A misdemeanor.

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Sec. 39.51.050. RETALIATION FOR COMMUNICATING PROHIBITED. (a) Except as provided in (b) of this section, a public agency may not dismiss, demote, suspend, lay off, or otherwise subject an employee to disciplinary action for communicating to a legislator or legislative committee information relevant to a legislative inquiry unless disclosure of the information is prohibited by law. A public agency may require an employee who is communicating to a legislator or legislative committee on behalf of a person or entity other than the agency to state clearly to the legislator or committee that the communication is not on behalf of the agency and may prohibit the employee from making the communication during the employee's hours of work. However, an agency may not unreasonably deny an employee's request for annual or personal leave or leave without pay to present information to the legislature.

(b) A public agency may discipline an employee who has principal responsibility for the determination of policy or who has principal responsibility for the way in which policies are implemented for communicating an opinion contrary to the agency's official opinion to a legislator or legislative committee about a job-related matter. However, an agency may not discipline the employee for communicating information about a violation or suspected violation of statute or regulation.

(c) If an employee believes that a public agency has taken disciplinary action in violation of (a) of this section, the employee may request a legislative committee to investigate the matter. The committee's investigation is not a public record under AS 09.25.110. Committee meetings on the matter may be held in executive session under AS 44.62.320.

(d) At the request of an employee, a legislative committee may

1  
2 refer a violation of this section to the attorney general. The attorney  
3 general shall investigate each referral and report the results of  
4 the investigation to the committee.

5 (e) If an employee is disciplined within 90 days after  
6 communicating to a legislator or a legislative committee, the public  
7 agency shall provide the committee with information and justification  
8 for the disciplinary action if a legislative committee requests the  
9 information.

10 (f) An employee who has been disciplined in violation of (a) of  
11 this section has a private cause of action against the agency for  
12 reinstatement, lost wages, other compensation and damages, and for  
13 reasonable attorneys fees incurred in connection with the disciplinary  
14 action.

15 (g) A public agency shall advise an employee in writing at the  
16 time of hiring of the employee's rights under this section.

17 (h) The protections of this section do not apply to an employee  
18 if the employee knowingly communicated false information or if the  
19 employee violated a law in making the communication.

20 (i) In this section "public agency" includes the state, a polit-  
21 ical subdivision of the state, a public or quasi-public corporation or  
22 authority established by law, and the University of Alaska.

23 (j) A violation of this section is a class A misdemeanor.  
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# MEMORANDUM

# State of Alaska

TO: Nevette Bowen, Legislative Aide  
to Rep. Katie Hurley

DATE: April 24, 1985

FILE NO:

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch  
Attorney General

SUBJECT: Review of CSHB 327,  
legislative wit-  
nesses

By: Susan D. Cox *Susan D. Cox*  
Assistant Attorney General  
Governmental Affairs-Juneau

I have reviewed Terry's work draft of CSHB 327 and am concerned that the legislative committee's ability to investigate suspected unlawful job retaliation may impinge the employee's right to have personnel records kept confidential. I assume in most circumstances a legislative investigation would be prompted by a disciplined employee's complaint, so the employee would not object to the legislative committee accessing personnel records. However, there might be an uncooperative employee whose privacy rights in those records should be preserved, if demanded. Therefore, I suggest the following to be inserted in a new paragraph to AS 39.51.050:

( ) A public agency may not disclose personnel records that are confidential by law to a legislative committee under (c) or (e) of this section unless the disciplined employee waives their confidentiality.

Please call if you have questions.

SDC/pjg

cc: Deborah Neidermeir, Legislative Aide  
to Rep. Koponen

Theresa Cramer, Legal Services Div.  
Legislative Affairs Agency

TO: Representative Koponen  
FROM: Deborah Niedermeyer, Aide to House HESS Committee  
RE: State Affairs CS for HB 327, "Whistleblowers"  
DATE: 24 April, 1985

Comparison of CS with Original Bill

page 1, lines 23-26: The addition of this subsection is in response to the difficulty sometimes experienced by legislators in obtaining public information. Some departments (DHSS for example) have at times instituted a policy of requiring legislators to make a written request to the Commissioner for information when the same information was available to the general public simply through a verbal request to a local office.

page 1, lines 27-29: The bill has changed from using the concept of "public employee" to the concept of "public agency". This is a drafting rather than a substantive difference. The definition of "public agency", however, does not include the Alaska Railroad.

page 2, line 4: The CS adds "communicate to a legislator". This would protect a public employee's right to speak freely to any one legislator as well as the right to testify before a legislative committee.

page 2, lines 7-15: The CS adds language which allows a public agency to require an employee to make it clear that the employee is expressing a personal opinion, not the policy of the employer. It also allows a public agency to forbid testifying on paid work time. However, the employer may not unreasonably deny personal leave or leave without pay to the employee for the purpose of testifying.

page 2, lines 16-23: The CS specifies that principal policy-makers (commissioners for example), may be subject to discipline if they express opinions contrary to the agency's official opinion, UNLESS THEY ARE INFORMING THE LEGISLATURE ABOUT A VIOLATION OR SUSPECTED VIOLATION OF LAW OR STATUTE.

page 2, line 29: The CS retains the language which forbids a legislative committee to refer a possible violation of the whistleblower law to the AG without the employee's consent.

page 3, line 15-16: Adds a new section which requires the employee to be informed of the whistleblower law at the time of hiring. (The model law required posting of notices.)

page 3, lines 17-19: Adds a section to protect employers from employees who knowingly provide false information to the Legislature.

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SDC/pjg

cc: Deborah Neidermeir, Legislative Aide  
to Rep. Koponen

Theresa Cramer, Legal Services Div.  
Legislative Affairs Agency

*Railroad and above  
amendment included*

TO: The Alaska State Legislature

April 18, 1985

I would like to take this time to address the committee concerning the bill before you now, House Bill #327. I whole-heartedly support this bill, because I recently became an example of this exact same problem.

On Jan. 26, 1985, I testified before a teleconference concerning H.B. #5, which some of you might remember. My testimony was given after work hours and was the beginning of a nightmare. My testimony became headlines and a subject for the Fairbanks North Star Borough Administration. On Feb 7, 1985, I was terminated, because of my testimony. Several of the top Borough officials, including the Mayor, gave public statements to the press and news media, stating these facts. This type of retaliation was very stressful. My professional career and reputation was permanently damaged, not only by the public termination, but also by the Administration making public statements about me.

I was told on three separate occasions, that I was not to talk to any legislators or representatives. My termination and testimony was on the front page of the local newspapers at least four times. This caused a great personal embarrassment to me, and to my family. My family suffered financial losses and pressures. The Administration kept the local newspapers "informed" about their concern of my testimony to the legislators, and the media printed every story, of theirs.

It finally came to the point that I could not support my family. I filed for un-employment, but was refused because I had been terminated and was penalized a six week penalty. I then decided to file a civil law suit.


Page 2

.On March 26, 1985, I returned to work. My returning to work, with back wages, still does not heal the wounds or repair the damage to my career, or punish the actual persons responsible for my embarrassments. Returning to work does not pay for all the late bills, late charges or my childrens embarrassment because of their father in the paper.

A person has the right to talk with you, however, they must be somehow protected. Since my termination and re-instatement, I have been contacted by other persons that are in the same position. Something must be done to protect them, soon,

I am sorry I can not be here in person to give this to you. Again am fearful that I might lose my position, even at the writing of this letter. Please, I ask you as a citizen, presently employed, push this legislation through.

Respectfully

  
Mike Oden

# 457-2789

# CSG INQUIRY LINE

**Q.** *What are lifeline rates and how many states have them?*

**A.** Lifeline rates give eligible consumers, usually the elderly and others with low incomes, a price discount on a basic amount of electricity or other utilities. The goal of lifeline rates is to enable low-income consumers to purchase a basic amount of electricity necessary for sustaining a decent standard of living. According to the National Association of Regulatory Utility Commissioners (NARUC), states which have lifeline rates are: Alabama, California, Georgia, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Oklahoma, Wisconsin, and the District of Columbia. States which are considering lifeline proposals or have test programs are: North Carolina, New York, Maine, Delaware and Arizona, according to NARUC.

**Q.** *How many states have called for a constitutional amendment for a balanced federal budget?*

**A.** Thirty-two states, two shy of the 34 needed, have called for a constitutional convention to require a balanced federal budget. There is no constitutional or statutory deadline for the remaining two states to call for a convention. However, a state may revoke its call at any time until 34 states have passed resolutions. Most recently, the Montana and California supreme courts have struck ballot initiatives calling for a convention on the basis the measures infringed on legislative powers. The 32 states which have called for constitutional conventions

and the dates of action for each are: Alaska (1982), Arizona (1979, 1977), Arkansas (1979), Colorado (1978), Delaware (1975), Florida (1976), Georgia (1976), Idaho (1979), Indiana (1979), Iowa (1979), Kansas (1978), Louisiana (1979, 1978, 1975), Maryland (1975), Mississippi (1975), Missouri (1983), Nebraska (1976), Nevada (1979, 1977), New Hampshire (1979), New Mexico (1976), North Carolina (1979), North Dakota (1975), Oklahoma (1976), Oregon (1977), Pennsylvania (1976), South Carolina (1978, 1976), South Dakota (1979), Tennessee (1977), Texas (1978), Utah (1979), Virginia (1976), Wyoming (1977).

**Q.** *Which states have passed whistleblower laws?*

**A.** Whistleblower laws protect employees who "blow the whistle" on improper practices by their employers. California,

Connecticut, Illinois, Kansas, Louisiana, Michigan, Ohio, Oregon, Maine, Michigan, New York, and Rhode Island have some form of whistleblower laws. Courts in California, Connecticut, Indiana, Massachusetts, Michigan, New Hampshire, New Jersey, Oregon, Pennsylvania, and West Virginia have banned retaliatory firings. A model whistleblower law was published in CSG's *Suggested State Legislation* 1982, pp. 155-157.

The States Information Center (SIC) inquiry service can help you locate relevant information quickly and will respond to requests by phone or letter. The SIC maintains statistical information and program documents, as well as lists of resources, on issues of concern to state governments. The service is confidential and free to state officials and staff. Write or call Debbie C. Tillett or Shery Kearney: The Council of State Governments, States Information Center, Iron Works Pike, P.O. Box 11910, Lexington, KY 40578, (606) 252-2291.

## Calendar EVENTS

April 24-26—Southern Region State Treasurers Annual Meeting, Asheville, N.C., Grove Park Inn, Pohlmann, Lexington.

April 29-May 1—NCLG Spring Meeting, Washington, D.C., Feigenbaum, Lexington.

May 8-10—NCSL State-Federal Assembly, Washington, D.C., Hyatt Regency/Capitol Hill, Carden, D.C.

May 8-10—Western Region State Treasurers Meeting, Seattle, Wash., Seattle Sheraton Hotel and Towers, Pohlmann, Lexington.

May 8-11—Southern Conference of Attorneys General, Louisville, Ky., Brown Hotel, Williams, Atlanta.

May 19—NASIS Finance and Executive Committee Meetings, Newport, R.I., Treadway Inn, Parish, Lexington.

May 20-21—NASIS Eastern Regional Meeting, Newport, R.I., Treadway Inn, Parish, Lexington.

June 5-7—Conference of Western Attorneys General Annual Meeting, Juneau, Alaska, Stockholm, San Francisco.

June 6-8—NCSL Executive Committee Meeting, Pittsburgh, Pa., Lake, Denver.

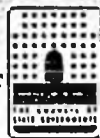
June 9-12—Eastern Region State Treasurers Meeting, Vergennes, Vt., Basin Harbor Club, Hebard, Montpelier.

June 10-12—National State Auditors Association Annual Meeting, Phoenix, Ariz., Pointe Resort, Pohlmann, Schumacher, Lexington.

June 16-20—Leaders' Advanced Management Program, Boston, Mass., Boston University, Lakis, Boston (617) 267-8120.

June 17-21—Western Governors' Association Annual Meeting, Waikiki, Hawaii, Sheraton Waikiki, Madde, Colorado.

The  
Council of  
State  
Governments



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# SUGGESTED STATE LEGISLATION®

1982

Volume 41

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Juneau, Alaska 99811

## Controlled Substances

Containing such substance, shall be in opium or heroin" and if the mixture involved:

an 14 grams, such person shall be sentenced to a term of at least 14 years in prison and a fine of not less than \$50,000.

an 28 grams, such person shall be sentenced to a term of at least 18 years in prison and a fine of not less than \$100,000.

shall be punished as a felon and shall be imprisoned in the state's prison and shall

through 6 is not eligible for early release as a committed youthful offender. The sentencing judge may reduce the sentence or place the offender in the applicable minimum prison term. The sentence shall run consecutively with any other sentence being served by the offender.

provided in Sections 2 through 6 of this act shall be subject to the provisions of any act enacted after the effective date of this act.

ability clause.]

ause.]

ffective date.]

## Protection of Public Employees Act

This draft act provides protection to employees who report a violation or suspected violation of state, local or federal law. It also protects employees who participate in hearings, investigations, legislative inquiries and court actions. Penalties and remedies are specified.

This draft legislation is based on a Michigan statute.

### Suggested Legislation

(Title, enacting clause, etc.)

1 Section 1. [Short Title.] This act may be cited as the [state] Protection of  
2 Public Employees Act.

1 Section 2. [Definitions.] As used in this act:

2 (1) "Employee" means a person who performs a service for wages or  
3 other remuneration under a contract of hire, written or oral, express or im-  
4 plied. Employee includes a person employed by the state or a political sub-  
5 division of the state except state classified civil service.

6 (2) "Employer" means a person who has one or more employees.  
7 Employer includes an agent of an employer and the state or a political sub-  
8 division of the state.

9 (3) "Person" means an individual, sole proprietorship, partnership,  
10 corporation, association, or any other legal entity.

11 (4) "Public body" means all of the following:

12 (i) A state officer, employee, agency, department, division, bureau,  
13 board, commission, council, authority, or other body in the executive  
14 branch of state government.

15 (ii) An agency, board, commission, council, member, or employee  
16 of the legislative branch of state government.

17 (iii) A county, city, township, village, intercounty, intercity, or  
18 regional governing body, a council, school district, special district, or  
19 municipal corporation, or a board, department, commission, council, agen-  
20 cy, or any member or employee thereof.

21 (iv) Any other body which is created by state or local authority or  
22 which is primarily funded by or through state or local authority, or any  
23 member or employee or that body.

24 (v) A law enforcement agency or any member or employee of a law  
25 enforcement agency.

26 (vi) The judiciary and any member or employee of the judiciary.

1 Section 3. [Protection.] An employee shall not discharge, threaten, or  
2 otherwise discriminate against an employee regarding the employee's com-

3 pension, terms, conditions, location, or privileges of employment because  
 4 the employee, or a person acting on behalf of the employee, reports or is  
 5 about to report, verbally or in writing, a violation or a suspected violation  
 6 of a law or regulation or rule promulgated under the law of this state, a  
 7 political subdivision of this state, or the United States to a public body,  
 8 unless the employee knows that the report is false, or because an employee  
 9 is requested by a public body to participate in an investigation, hearing, or  
 10 inquiry held by that public body, or a court action.

1 Section 4. [*Relief and Damages.*]

2 (a) A person who alleges a violation of this act may bring a civil action  
 3 for appropriate injunctive relief, or actual damages, or both within 90 days  
 4 after the occurrence of the alleged violation of this act.

5 (b) An action commenced pursuant to Section 4 (a) may be brought in  
 6 the circuit court for the county where the alleged violation occurred, the  
 7 county where the complainant resides, or the county where the person  
 8 against whom the civil complaint is filed resides or has their principal place  
 9 of business.

10 (c) As used in Section 4 (a), "damages" means damages for injury or  
 11 loss caused by each violation of this act, including reasonable attorney fees.

12 (d) Employees shall show by clear and convincing evidence that they or  
 13 a person acting on their behalf were about to report, verbally or in writing,  
 14 a violation or a suspected violation of a law of this state, a political subdivi-  
 15 sion of this state, or the United States to a public body.

1 Section 5. [*Reinstatement.*] A court, in rendering a judgment in an action  
 2 brought under this act, shall order, as the court considers appropriate,  
 3 reinstatement of the employee, the payment of back wages, full reinstatement  
 4 of fringe benefits and seniority rights, actual damages, or any combination  
 5 of these remedies. A court may also award the complainant all or a  
 6 portion of the costs of litigation, including reasonable attorney fees and  
 7 witness fees, if the court determines that the award is appropriate.

1 Section 6. [*Fines.*]

2 (a) A person who violates this act shall be liable for a civil fine of not  
 3 more than [amount].

4 (b) A civil fine which is ordered under this act shall be submitted to the  
 5 state treasurer for deposit in the general fund.

1 Section 7. [*Collective Bargaining.*] This act shall not be construed to  
 2 diminish or impair the rights of a person under any collective bargaining  
 3 agreement.

1 Section 8. [*Exemption.*] This act shall not be construed to require an  
 2 employer to compensate an employee for participation in an investigation,

3 hearing or in  
 4 act.

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Protection of Public Employees

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Protection of Public Employees

3 hearing or inquiry held by a public body in accordance with Section 3 of this  
4 act.

1 Section 9. [*Notices Posted.*] An employer shall post notices and use other  
2 appropriate means to keep his or her employees informed of their protec-  
3 tions and obligations under this act.

1 Section 10. [*Severability.*] [Insert severability clause.]

1 Section 11. [*Repeal.*] [Insert repealer clause.]

1 Section 12. [*Effective Date.*] [Insert effective date.]

## ODEN CHRONOLOGY

JANUARY 25, 1985

Mike Oden testified to the House HESS Committee about the need for state-certification of asbestos workers. He described to the committee gross mishandling of asbestos removal projects in the Fairbanks North Star Borough School District. (A verbatim transcript is in the packets.)

JANUARY 28, 1985

FNSB School officials denied what Oden said. School officials claimed there was no asbestos in Old Main School.

FEBRUARY 11, 1985

Both Mike Oden and his supervisor Barney Mulligan were fired by Fairbanks North Star Borough Director of Administration, Myrt Charney. Official statements said Oden "had destroyed the relationship he had with the school district," and Mulligan was "not providing the direction necessary for Oden". There was some question about the possibility of Mulligan's altering Oden's safety reports. It appeared possible that Mulligan had deleted Oden's descriptions of the mishandling of asbestos in the school removal projects.

FEBRUARY 15, 1985

Representative Koponen responded with his concern and began to investigate the need for "whistleblower legislation" for Alaska.

FEBRUARY 18, 1985

In an APRN radio interview, Fairbanks North Star Borough Mayor Bill Allen made it clear that Oden's testimony before the House HESS Committee was a factor in his firing.

EARLY MARCH, 1985

A sample taken from the Old Main School furnace room proved to contain asbestos.

MID MARCH, 1985

Michael Oden arranged for Fairbanks labor attorney Will Schendel to represent him. The Fairbanks North Star Borough Assembly voted to give Myrt Charney \$6000 for legal fees.

MARCH 24, 1985

Mike Oden was reinstated in his job. The out of court settlement provided that

- 1) Oden be reinstated with back pay
- 2) The Borough acknowledge that Oden's safety reports were substantially correct as written
- 3) Oden agree to testify in any dispute over the firing of his supervisor, Mulligan

AT PRESENT

Mike Oden is back at work as Fairbanks North Star Borough safety inspector. Mulligan has not been reinstated.

**Fired in asbestos issue**

FNM 3/26/85

# Borough official back on job

By SUSAN FISHER  
Staff Writer

A borough safety coordinator is back on the job today, but his former supervisor has not been reinstated and that position, risk management, could be revamped in the future.

James Michael Oden returned to work as safety coordinator today,

without loss of pay and with all legal costs paid. Oden sued the borough after he and Risk Manager Barney Mulligan were fired Feb. 8. On Friday, Oden's attorney, William Schendel, negotiated a settlement with borough attorneys.

Mulligan has not filed suit nor has he been reinstated.

In a related matter, a sample

Oden claimed contained friable (airborne) asbestos from Main Building has proved to contain no asbestos following analysis by a private Anchorage laboratory.

Oden's firing revolved around several issues, including controversial testimony he gave to a legislative committee earlier this year. Oden said then that asbestos removal from local schools had been mismanaged. He later corrected some of his statements, but stood firm on Main Building, saying it contained asbestos material dangerous to workers.

School officials have conceded that an abandoned boiler room in Main does have friable asbestos, but is not a hazard and did not require special precautions to encase the insulating material.

Oden in late January took a sample in the boiler room and sent it to Chemical and Geological Laboratories of Alaska Inc. An analysis showed no asbestos in that sample.

Oden's only comment about that finding today was, "After they admitted there was asbestos there, that proved my point."

Main is one of 11 school buildings where removal of all asbestos is scheduled by late 1986. Officials say in all cases, identified asbestos has been checked for encasing, if necessary, to prevent fibers from

becoming airborne.

Minute asbestos fibers, if inhaled, can years later lead to lung damage or cancer.

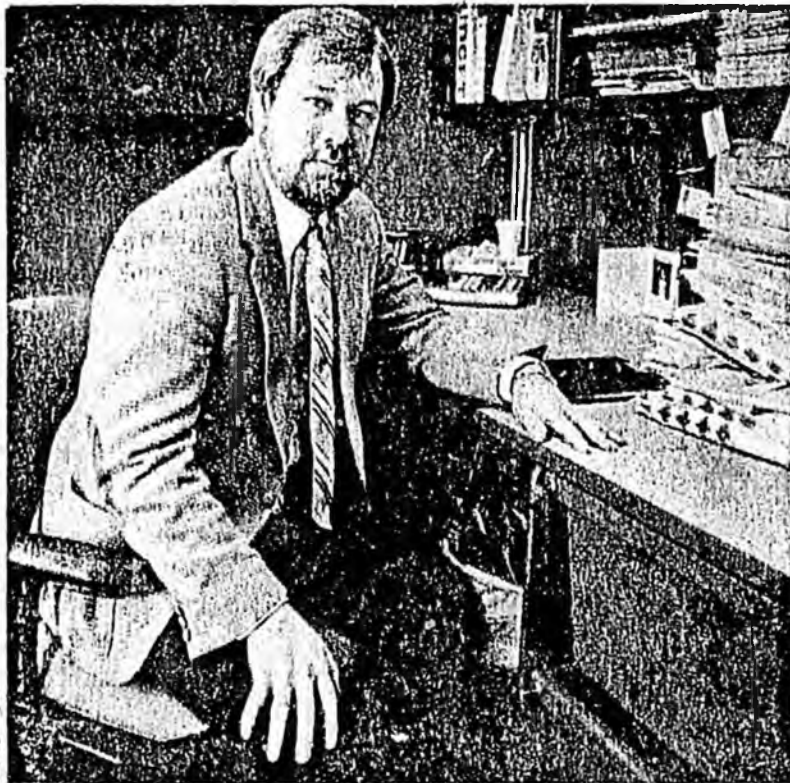
This morning, Myrt Charney, borough director of administrative services, said Oden will continue reporting to him in the immediate future. Charney fired Oden and Mulligan with the support of Mayor Bill Allen.

Allen is in Juneau today, and his chief executive director, Greg Strong, is attending a seminar in Anchorage.

Charney said Oden's duties will remain the same. Those principally are to conduct fire and safety inspections of local public schools.

As for the risk management position, Charney said he's had discussions with Corroon and Black Inc., the borough's insurance broker, on possibly restructuring that job. "We're getting some advice from other people," Charney said. "It may be I will downgrade that position," he said, but no decision has been made.

The risk manager, who supervised the safety coordinator, was responsible for overseeing insurance claims, lawsuits, workers compensation and taking corrective or preventive measures to reduce costs.



**JAMES ODEN**  
Safety coordinator back at work (Staff photo by Eric Muchling)

# Borough reinstates inspector

By TODD PARIS  
Correspondent

Less than six weeks after being fired for what borough officials called his "poor job performance" and "unauthorized testimony" before a House subcommittee, James Oden has been rehired as a borough safety inspector.

On Friday, attorneys for the borough and Oden agreed to an out-of-court settlement in a lawsuit filed by Oden. The agreement calls for Oden's reinstatement with no loss in pay or benefits and also for a letter to be placed in Oden's personnel file stating that his safety inspection reports contained "substantially accurate" information.

Those reports were cited by Borough Executive of Administrative Services Myrt Charney as one of the reasons Oden was fired.

A Fairbanks attorney who repre-

sented Oden in the case, said the firing violated Oden's rights to freedom of speech and to petition the government.

The testimony, before a House Health and Social Services Subcommittee, dealt with the need for a training program for employees involved with the removal of asbestos from area schools.

The agreement makes no judgment of liability in the case, but Oden's lawyer said the safety inspector got virtually everything he wanted from the lawsuit.

On Saturday, Oden said he hadn't seen a copy of the agreement, and was puzzled by its rapid settlement.

"I'm glad they reconsidered their decision to fire me," Oden said. "But I don't understand why they did it so soon. Maybe they found out that what I was saying

was true. Anyway, I'm just glad to be going back to work."

Oden's testimony charged that personnel working in the school district's asbestos removal and abatement program didn't know what they were doing and as a result had created more of a health hazard than had previously existed.

Charney, who was named as a defendant in the suit, said he too is pleased with the settlement and thinks it's in the best interests of the borough. When asked if he felt the agreement was a defeat for the borough, he had no comment.

Also included in the settlement agreement is the recognition by both parties of the need for a safety inspector to "maintain harmonious relations with the School District" and to "reduce the risk to those who

(See ODEN, page 3)

## ODEN . . .

(Continued from page 1)

use both school district and borough facilities."

Oden was primarily responsible for inspecting area schools on compliance with state building and fire codes. During the removal of asbestos from a number of schools during the past year, Oden reported that some sprinkler systems and fire alarms had been damaged. That prompted him to investigate safety procedures followed by those removing the hazardous insulating material, and led to his testimony.

The borough agreed to pay for court costs and Oden's legal fees.

Meanwhile in Juneau, Fairbanks Democrat Niilo Kopenon said Oden's firing led him to introduce a "whistleblower bill" in the Legislature last week. Kopenon said that piece of legislation is intended to protect public employees from possible punitive action resulting from potentially damaging testimony.

Oden will report for work to the Borough's Chief Executive Director Greg Strong on Tuesday.

Alaska

3-13-85 News Miner

# Alaska/Fairbank

**Renovation to resume**

## Asbestos from Hering tested

By SUSAN FISHER  
Staff Writer

Asbestos material uncovered by workers at Hering Auditorium is not the kind that can become easily airborne, according to lab results, but air samples were taken Tuesday as a precaution and work on the \$2.1 million renovation should resume next week.

The work site was officially ordered shut down Monday, and the balcony area has been enclosed with plastic coverings.

Meanwhile, the private contractor, TCI Ltd., is negotiating with local firms for removal of the asbestos before TCI's work resumes.

According to school district officials, a TCI worker late Friday afternoon removed a portion of what he suspected to be an asbestos material in the balcony. A sample was sent to Anchorage for testing, and found to contain one in 20 parts asbestos, but not in a friable state,

officials say. Friable means easy to crumble, thus asbestos fibers could become airborne.

Les Riedlinger, school facilities planner, said he unofficially told the contractor to stop work, and Monday the project architect, USKH Architects and Engineers, officially ordered the shut down.

Hering Auditorium in the Lathrop-Ryan school complex on Airport Way is undergoing renovation to its acoustical and electrical systems, with most work in the stage area.

The school district had not identified the auditorium as containing asbestos previously, although Lathrop High School, built in the 1950s, does contain large quantities. It is one of 11 district buildings slated for asbestos removal. All identified asbestos has been contained, school officials say.

A sample was sent to Anchorage Saturday morning for lab testing. Results were ready Monday.

Riedlinger said he and representatives of TCI and USKH met Tuesday morning with the borough engineering department and OceanTech, the firm that will oversee future school asbestos removal.

TCI has been authorized to negotiate with any of nine firms previously qualified for asbestos removal work, Riedlinger said. Most of those are local companies.

Because the asbestos overlay is very thin and apparently present in limited quantities, the work is not expected to be of such an amount as to require bidding, according to Riedlinger.

Asbestos, a mineral, is fire resistant and was popularly used in building construction years ago. Studies have shown, though, that asbestos fibers, if inhaled, can many years later cause permanent lung damage and possibly cancer. The body cannot dislodge the fibers from the lungs. Federal law now requires workers to wear protec-

tive clothing and proper respirators in working with asbestos that can be crumbled or crushed and become airborne.

Riedlinger and school physical plant director Michael Pinon said today that this particular asbestos is not friable. They assume the worker was not dangerously exposed since the worker had indicated to his supervisor he had worked with a similar product in the past.

Air samples were taken as a precaution to assure that asbestos levels in the auditorium do not exceed federal levels, Pinon and Riedlinger said.

The added cost for removing the asbestos will come from a borough-school district reserve account set aside for this work.

Riedlinger said the sprayed-on asbestos at Hering was a thin overlay over three-quarter inch plaster board, and was used for acoustical control.

# Borough firings concern Koponen

News-Miner Bureau

JUNEAU—Rep. Niilo Koponen says he's "deeply concerned" about the firing of Fairbanks North Star Borough safety officer Mike Oden and his supervisor, Barney Mulligan, after Oden testified to Koponen's committee on asbestos removal legislation.

Koponen, D-Fairbanks, co-chairs the the House Health, Education and Social Services Committee with Rep. Max Gruenberg, D-Anchorage. He said he has asked the Legislature's attorney to explore remedies avail-

able to Oden and the committee. "Although Myrt Charney provided me with information to the contrary, press accounts indicate that Oden and Mulligan were fired in part because of Oden's testimony before our committee," Koponen said.

Charney is the borough's director of administration.

Oden testified Jan. 25 on a bill establishing an asbestos health hazard abatement program. In part, it requires workers who remove asbestos from schools to be certified by the state.

Oden told the committee that during one of the school district asbestos removal jobs, workers had dragged asbestos material through the halls, making the problem worse than if it had not been removed at all.

Oden told the committee that the borough was liable for children being exposed to asbestos, and identified the school where the shoddy work was performed as Joy Elementary. A few days later, he corrected himself and said he had heard the reports about the Main Building.

"I sincerely hope Mr. Oden was not, in fact, fired because of his statements to our committee," Koponen

said. "That will require investigation. But, to protect the right of citizens to testify publically before the Legislature and to protect the legislative process itself, I have asked the Legislative Counsel to examine what remedies may be available to the committee and to Mr. Oden."

He said such actions could result in secret meetings of the committee.

"The public rightfully objects to closed meetings, but if people are to suffer for offering their insights and opinions, would we not be duty bound to close meetings to protect those who wish to testify?" Koponen said.

"Free government depends on free speech," he said.

# Allen defends two firings

By SUSAN FISHER  
Staff Writer

Borough Mayor Bill Allen says he supports department head Myrt Charney's firing Thursday of the risk manager and a safety officer, and that the assembly was informed that action would be taken.

The mayor said he was briefed by Charney on recent controversies involving Safety Officer Michael Oden, and he had talked with Charney and Schools Superintendent Kenneth Burnley before Charney made his decision.

Also fired was Oden's supervisor Risk Manager Barney Mulligan. Neither could be reached this morning for comment. Charney did not return a phone call for comment.

Oden's recent controversial testimony to a legislative committee was a large part, but not all, of the reason for his dismissal, officials indicated.

According to comments by Allen, Burnley and school district physical plant Director Michael Pinon, Oden's work on inspecting schools and writing up safety deficiencies also played a part.

Oden, a strong supporter of a bill to require workers removing asbestos to be certified, testified to a legislative committee. Oden later admitted to

(See FIRING, page 3)

## FIRING . . .

(Continued from page 1)

making mistakes in his testimony, but maintained that school workers were exposed to asbestos and that fibers had been released inside Main Building. Asbestos exposure can be deadly or cause permanent lung damage.

School district officials strongly denied most of Oden's assertions. Later, Oden identified an area in Main where asbestos insulation was not encased. That was in an abandoned boiler room, and school officials say the enclosed room poses no hazards to building users.

Oden's strained relations with school officials began shortly after his hiring in October, when he wrote a report critical of safety deficiencies at North Pole Middle School.

Allen said today that Mulligan had changed some of Oden's written reports. That, the mayor said, was unacceptable action.

Mulligan and Oden had visited separately with Burnley and Pinon regarding strained relations on the handling of school safety inspections and Oden's written reports before the legislative testimony.

"Our understanding was that Mike's (Oden's) job was supposed to be to assist us with any deficiencies that were known, so that we could take care of them before an outside agency came in. Kind of like bird-dogging problems, if we had any," said Pinon. Instead, he said, communications disintegrated.

Oden has said that school officials ignored the reports he's done, with the exception of the publicized North Pole school. Pinon denies that.

Burnley this morning declined to comment on the firings, but did say

the risk manager and safety officer are important positions.

"The priority is the health, safety and welfare of our students," he said.

Inspections must be done regularly and fairly, Burnley said, to assure the district's "meeting regulations and maintaining a safe environment.

That's what I want. I demand it. There can be no exceptions to that."

Burnley noted that the school district pays for the safety officer's position.

Allen said legislators hearing Oden's testimony would conclude that the borough and school district were handling asbestos materials haphazardly. "I don't think that's the case," he said.

Noting public sensitivity over asbestos, Allen said, "There's a written policy in this borough that we do not espouse the borough's position on anything unless we have the authority to do it. I've even self-imposed a rule on myself with the assembly, before I make any public announcement, to inform the assembly, just as a courtesy."

"We don't have a gag order here. All I insist on is people use reasonable intelligence and good judgment when they talk to the media or anyone else, as far as that's concerned, about borough business. On routine standard business, I don't have any problem with that. But if there's a problem, if there's a controversial position, I want to provide the position of the borough, not borough employees. I'm the guy that takes the heat," said Allen.

Oden also had taken a public position that the city of Fairbanks should not allow cement asbestos boards to be installed in the new South Fairbanks Community Center.

FBX MINOR 2-12-85

FNM 2/11/85

# Borough fires two after asbestos flap

By MARGARET NELSON  
Staff Writer

Two members of the borough's risk management department have been fired as the result of testimony one of them gave last month to legislators regarding asbestos in borough schools.

Borough Chief Executive Director Greg Strong said today that Mike Oden, who held the position of safety coordinator/inspector, and his supervisor, Barney Mulligan, the director of the risk management department, were discharged last week. Their last day was Thursday.

The risk management office, which handles safety inspections of borough buildings, has been under fire recently for its position on the removal of asbestos in borough schools and facilities.

Neither Mulligan or Oden could be reached today for comment.

Oden, who had been with the borough since October, was fired because "he had destroyed the relationship he had with the school district," Strong said. "It wasn't a workable relationship."

Strong said Mulligan was fired because he was "not providing the direction necessary for the safety inspector (Oden)."

The action leaves the borough's risk management office without any inspectors. The office is responsible for insurance, health care benefits and safety throughout the borough, including the school district.

Strong said the borough has hired

University of Alaska-Fairbanks Fire Chief Bill Shechter on a temporary basis to review nine reports of safety inspections of borough schools completed by the risk management office.

Oden's dismissal stemmed from testimony last month to the Legislative Health and Social Services Commission regarding asbestos in Fairbanks schools. He said asbestos was prevalent in Joy Elementary School. Later, he corrected his testimony to say he meant asbestos in the Main Building, not at Joy. He was testifying on House Bill 5, which would require any worker removing asbestos to have minimum formal training.

Local school district officials said Oden was wrong in his testimony regarding exposure to asbestos. They said the district has far exceeded federal requirements on protective measure for handling asbestos as well as in its intention to remove all asbestos from schools by the fall of 1986.

According to district officials, asbestos was removed at Joy School in December 1983, and all federal requirements for removal were followed.

Les Riedlinger, school facilities planner; said Main Building is one of 11 older buildings in the district where asbestos insulation has been "encapsulated" or encased until it can be removed. All 11 school district buildings are to be rid of asbestos by late 1986 at a cost of more than \$3 million, in addition to the \$1.26 million that has already been spent.

# A/FAIRBANKS

## Controversial question: is asbestos new or old?

1-29-85

By SUSAN FISHER  
Staff Writer

A sample taken at Main Building Monday may be asbestos, but school district officials say the asbestos was in an old boiler room and left alone at a consultant's recommendation.

That response came after Borough Safety Officer Mike Oden took a sample from an abandoned boiler room Monday.

The rift between Oden and school administrative staff has become more pronounced in this latest debate over safety hazards and job authorities. The opening round came after Oden joined the borough staff in October, and issued an exhaustive study citing of safety deficiencies at North Pole Middle School.

In this latest round, Oden's testimony to a legislative committee Friday drew fire from school officials irate over his implications of poor workmanship and asbestos exposure in schools. They say the district has gone beyond federal requirements in taking precautions, and plans are to remove all asbestos from local schools by 1986.

Oden has corrected some of his testimony, but not all of his conten-

tions. Monday morning he went to Main Building to take a sample of what he believes to be friable asbestos. Friable means easily crumbled or reduced to powder. Such asbestos can be become airborne and enter human lungs, where it may cause cancer and other diseases.

That same morning, school Facilities Planner Les Riedlinger said Oden would not find friable asbestos. But Riedlinger was assuming Oden was talking about areas where friable asbestos was encased at Main last summer. An Eielson work crew painted on five coats of a protective covering.

Old asbestos insulation was identified by an Anchorage consultant, said Michael Pinon, district physical plant director. The consultant did not recommend encasing insulation in the old boiler room, because the room is not used, it is enclosed, old ducts are closed off and it poses no dangers, Pinon and Riedlinger said.

By afternoon, Riedlinger learned Oden had been in the boiler room in the basement and may have taken a friable asbestos sample. Still, Riedlinger says that muslin coverings are intact and that asbestos there should pose no dangers.

Oden insists the area should have a posted warning. Riedlinger said today that has been done.

The boiler room was abandoned six or more years ago when Main Building converted to city steam heat. It contains an emergency generator.

Riedlinger says air samples taken at Main before and after the encasing work shows such negligible readings that experts could not identify if fibers were asbestos or not. He also says air samples weren't taken in the boiler room.

Pinon says Oden has never discussed the consultant's report or the district's work in encasing or removing asbestos. Riedlinger is even more rankled, saying Oden hasn't been working with the district.

Oden says school officials have ignored his school inspection safety reports.

"The whole point is I was testifying to try to get people certified" Oden said of Friday's hearing, on requiring worker training for asbestos removal. "It looks like I'm trying to put the district or the borough in a bad spot, and really I'm not," he said.

FNM 1/29/85  
**Official firm  
on asbestos  
allegations**

By SUSAN FISHER  
Staff Writer

A borough safety official whose testimony on asbestos in Fairbanks schools startled legislators Friday has corrected parts of his testimony, but contends workers at Main Building may have been exposed to airborne asbestos.

Local school district officials are furious over Safety Officer Mike Oden's testimony Friday to the House Health, Education and Social Services Committee as well as Oden's continued assertions.

Oden told legislators that workers had swept up crumbled insulation material and dust and carried it in open containers through hallways at Joy Elementary School. He now says he meant to refer in his testimony to Main Building, not Joy Elementary, but he still maintains that debris contained asbestos.

School officials say Oden is wrong, and the district has far exceeded federal requirements on protective measures as well as intentions of totally removing all asbestos in schools by fall 1986.

Oden, though, has not backed down, and this morning said he took samples at Main Building where insulation material has crumbled. He believes it may contain asbestos and says he will have it examined.

Les Riedlinger, school facilities planner, said Oden will not find asbestos. "This school (Main) has a tremendous amount of Fiberglas and calcite insulation" in areas where asbestos was not installed, Riedlinger said.

The furor erupted over the weekend when schools Superintendent Kenneth Burnley and Riedlinger heard of Oden's testimony to HESS as legislators considered House Bill 5, to require any worker removing asbestos to have minimum formal training. His testimony implied Joy school.

Oden, who strongly supports that bill, says he was called 15 minutes before the teleconference hearing began and walked into the Fairbanks Legislative Information Office as the hearing was in progress. He had little preparation time before giving testimony and answering legislators' questions without much preparation time.

Asbestos was removed at Joy School in December 1983, and Riedlinger says procedures were in strict accordance with federal requirements. Main Building is one of 11 older buildings in the district where asbestos insulation has been "encapsulated," or encased, until removal can be accomplished. All 11 buildings are to be rid of asbestos by late 1986 at a cost of \$3,017,000, in addition to \$1.26 million already spent on removal.

The incident at Main that Oden refers to occurred last summer after pipes were encased.

Oden joined the borough staff in October. On the strength of interviews with a school worker, Oden believes the work crew doing the encapsulating left the area with dust and

(See ASBESTOS, page 3)

## ASBESTOS . . .

(Continued from page 1)

crumbled insulating debris.

Riedlinger denies that. He said he personally inspected that area and found it to be clean. The crew came from Eielson Air Force Base and was experienced in encapsulating pipes, says Riedlinger.

Riedlinger says an expert firm took samples at schools prior to beginning any encapsulation or removal. All of the results showed fiber levels so negligible that experts could not distinguish asbestos from non-asbestos fibers. Nonetheless, the district administration is moving ahead to have all asbestos removed, even though federal regulation would not require it, he said.

Asbestos fibers, if inhaled, can lead to permanent lung damage or cancer many years after exposure.

Oden concedes that it won't be proven that asbestos is in the dust at Main Building until lab results are known, but he is adamant in pursuing it.

During Friday's hearing, referring to school workers at Main Building, Oden told legislators that the workers were not told asbestos was present in the building, and might be in the dust and debris they were sweeping. "They were told to carry the material out of the building and put it into a barrel. They did, and at one time they were outside playing with it, throwing it up in the air," Oden said.

"When this type of shoddy work-

manship occurs, we increase our exposure. What the workers did was inexcusable. We must now advise our children they have been exposed to asbestos," he testified.

Main Building is occupied by school administrative offices and Fairbanks Alternative High School.

Both Riedlinger and Burnley said the district has followed federal regulations not only to the letter, but gone beyond some of the requirements to assure safety to workers and total protection at school buildings.

Firms here have had to "prequalify" by offering 20 hours of training to their workers in order to even bid the work, Riedlinger said. "They are absolutely required to make available medical examinations of each worker at the conclusion of the jobs," he added.

# Legislators turn to asbestos removal

By DAN JOLING  
News-Miner Bureau

**JUNEAU**—Legislation to remove asbestos from schools died in the House Health, Education and Social Services Committee last session. This year, after it became a campaign issue in Anchorage, it's one of the first orders of business.

In a joint hearing with the House Labor and Commerce Committee Tuesday, and with several senators sitting in, the HESS Committee took testimony from Fairbanks, Anchorage and Ketchikan on HB 5, a bill establishing an asbestos health hazard abatement program in state schools.

The committees also considered HB 57, which would appropriate \$26 million to the Department of Education for removing or negating asbestos hazards in schools, plus \$300,000 for the Department of Labor to administer the abatement program.

According to the National Cancer Institute, between 1.6 and 2.1 million American workers will die from exposure to cancer-causing asbestos. Another 3 million may suffer non-cancerous, but fatal, asbestosis.

Gov. Bill Sheffield has included \$11 million for asbestos removal in schools in his proposed budget. That amount, however, could be used by schools in Anchorage alone, said Sen.

Joe Josephson, D-Anchorage, the sponsor of similar legislation last year.

The bill drew general support from speakers in Anchorage and Fairbanks except for one provision: a requirement for the Department of Labor to certify that workers who remove or seal asbestos are adequately trained, and that contractors submit a plan for removal to the department.

Freshman Rep. Max Gruenberg, D-Anchorage, co-chairman of the HESS Committee, is prime sponsor of both bills. Gruenberg defeated incumbent Mae Tischer in November. The campaign focused in part on Tischer's chairing of the HESS Committee, the graveyard for a similar asbestos bill.

The Legislature approved \$11 million for asbestos removal at Bartlett High School in Anchorage last session, reportedly the largest asbestos removal project in the country. The federal government approved another \$6 million.

Fairbanks received \$1.4 million for school asbestos identification and removal last year and the work is 20 percent complete, according to the borough's capital improvement project booklet. No money has been requested for Fairbanks this session.

William Schneider, a spokesman for Alaska's Associated General Contractors, said he agrees with the in-

tent of the bills but that certification unnecessarily duplicates existing safety regulations.

He said the law already has provisions for dealing with numerous hazardous substances. "Asbestos should not be treated any differently than those substances," he said.

He said part of the AGC's objection was because of uncertainties in the bill. Schneider said the state may be liable if its certification is inadequate and a hazard remains. He also questioned whether \$300,000 was enough to run the certification and training programs for two years.

Adding up the true costs of running a program, he said, would lead to the question of whether the expense would provide something that's not being done now.

"The answer is nothing," Schneider said.

But most other speakers favored including the certification process, not only because of the danger involved but because of hazards that may remain if asbestos is removed improperly.

Josephson said he was confident of the ability of Anchorage contractors removing asbestos because of the availability of competing contractors and the Anchorage school district's sophistication in contract management.

"I am not equally confident about other areas of the state," Josephson said. "Last year, your committee heard eyewitness testimony that Alaska workers handling asbestos on the job site have been observed using careless methods reflecting a want of training. We are concerned for the safe working place. We are also concerned about the thoroughness and completeness of the asbestos removal job itself."

Fairbanksan Mick Hotrum, safety representative for the Alaska District Council of Laborers, echoed Josephson, as did representatives for the Alaska Environmental Lobby, the Anchorage School District, the Anchorage Education Association, and the Alaska Health Project, a group of occupational health activists.

The bill requires the state Department of Labor to inspect schools that have not required federal regulations regarding school inspections.

The bill also permits schools to meet for 150 days rather than 180 if the shorter term is necessary for abating the asbestos hazard. The attorney general has already rendered an opinion that the Education Department can waive the 180-day requirement for Bartlett High School in Anchorage so contractors can get a jump on removing asbestos.

\*280-393 Verbatim testimony of Mike Oden, Safety Coordinator of the Fairbanks North Star Borough & the Borough School District. 1/25/85

Gruenberg - Mr. Oden, are you there?

Oden - Can you hear me now?

Gruenberg - Please give us your name, the spelling of your last name, and the group you represent.

Oden - My name is Mike Oden, O-D-E-N. I am the Safety Coordinator, Safety Inspector, for the Fairbanks North Star Borough and Fairbanks North Star Borough School District. I would like to address the committee concerning the choice that you must make on HB 5, whether or not asbestos workers must be skilled or certified. The Fairbanks North Star Borough has spent several thousand dollars on its buildings and schools both studying asbestos, and in the actual removal of asbestos from the schools. During one of the recent asbestos removals that we had contracted, several complaints were filed to this department because of dust in the air. The dust was tested and found to contain asbestos. The investigation revealed, in

the removals, the workers were not experienced or had not had any certification in asbestos removal. At one point, they were actually dragging the material through the schools and the hallways. They were taking, making the situation a more severe problem. Instead of dormant asbestos, we now have asbestos dust and fibers in our hallways of schools. Not in all of the schools, but in some. Untrained and uncertified persons can make a dormant situation a more hazardous situation. Interviews with the contractors and the workers at the time I talked to them, and they indicated to me they had no idea what they were doing, they were told to carry the material out of the building and put it into a barrel. They did. At one time, they were outside playing with it, throwing it up in the air. When this type of shoddy workmanship occurs, we increase our exposure. What the workers did was unexcusable. We must now advise our children they have been exposed to asbestos. The unskilled worker isn't responsible, the Fairbanks North Star Borough is responsible. We are now liable for that. Asbestos is a problem. However, when it becomes disturbed or is \_\_\_\_\_, by unknowing workers it changes from hazardous to deadly. A certification program for workers, asbestos workers is a must. We must require persons handling this material to know what they're doing. We cannot let anyone handle this without a certification or training. Why should we increase the hazard? Thank you.

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Gruenberg - Mr. Oden, I'm going to start off some of the questioning from you. I think that your testimony is extremely important, and I'm going to ask you some specifics about the people throwing the asbestos up in the air and playing with it. Was this children or adults who was, were doing this?

Oden - This was the workers that actually removed the asbestos.

Gruenberg - When and where did this occur?

Oden - I didn't bring the papers with me. It is available.

Gruenberg - I would like you to transmit that information immediately to Miss Bennett. Can you tell me...was it in one or more schools, or where was it?

Oden - It was only in one school that I know of at this time, only one incident at this time.

Gruenberg - Do you recall the name of the school, sir?

Oden - I believe it was Joy Elementary School.

Gruenberg - And approximately when did this occur?

Oden - Last year.

Gruenberg - I see. Were there any protective measures taken afterwards, to make sure that that, for example, the barrel of asbestos was removed, or done something with to make it safe?

Oden - I do not know what happened to the barrel. The area was swept and cleaned with dustmops in the hallways and that's all the precautions that have been taken.

Gruenberg - I see. Are there questions? Representative Koponen.

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Koponen - Yes, that hits rather home because I was teaching at that school at the time the asbestos was initially sprayed there. That's a nice thought. I was wondering what subsequent measures have been taken to check for airborne asbestos and whether any other removal procedures might be necessary if there is still asbestos dust around.

Oden - The schools we're testing again the last month, and I haven't received the results of the tests since then.

Gruenberg - When you do receive those tests, could you please transmit them to the committee via Miss Bennett?

Oden - Yes I can.

Gruenberg - Representative Koponen says he has no further questions, Representative Hanley?

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Hanley - Yes. Mr. Oden, I do have a question. Even though certification has not been required, there are toxic and hazardous substance laws which are in existence which cover employee safety programs, and also cover asbestos removal. As a safety coordinator for the Fairbanks Borough and School District, were you aware of any of those laws and regulations?

Oden - Not completely.

Hanley - So there was no compliance, or no attempt to take any precautions in removing the asbestos from that particular school. Is that correct?

(Pause)

Gruenberg - Mr. Oden, can you hear us?

Oden - It's breaking up, could you repeat please?

Hanley - My question was, were there any precautions or any particular procedures that the workers used in removing the asbestos?

Oden - No.

Hanley - That was the only question I had.

*GRUENBERG - THANK YOU VERY MUCH MR. ODEN*

*ODEN - THANK YOU*

STATEMENT TO PRESS  
REP. NILO KOPONEN 2/14/85

I sincerely hope that Mr. Oden was not fired because of his statements to the House Health Education and Social Services Commission teleconference on the subject of asbestos in the Fairbanks schools. Whether his statements were partially or wholly incorrect, they should have been considered as a citizen's use of his right of free speech. Free public input is perhaps the most important part of the legislative process. Even if errors or misstatements are made, the very fact that the discussion is open and public allows correction of errors of fact and for presentation of varying opinions and alternative proposals.

The legislature is not and must not attempt to be a court of law, finding fault and assessing blame. Our job is to craft laws that guide future actions and to determine what public resources are to be used to meet what public needs in the immediate future.

When the legislature is attempting to ascertain those needs and to craft those laws any person should be free to state his or her views, opinions and observations - just as any other citizen should be free to contradict them. The legislator's task is to refrain from 'rushing to judgement' but to weigh everything with care and arrive at the best future course of action given the resources available.

Even when I had reason to believe Mr. Oden's comments were correct in relation to Joy School, I did not feel the schools district, the borough or the contractor were culpable. In the situation described people were acting in the light of the information available to them. The entire point of the certification portion of the proposed legislation is to assure that a carcinogenic material such as asbestos is handled by contractors and workers who are aware of the dangers to themselves and to the public and therefore use the best available techniques in the most responsible manner possible.

To protect the right of citizens to testify publically before the legislature and to protect the legislative process itself I have asked the Legislative Council to examine what remedies are available to the committee and to Mr. Odom, and what protections, if any, need to be afforded in the future.

The public rightfully objects to closed committee meetings - but if people are to suffer for offering their insights and opinions - would we not be duty-bound to close meetings to protect those who wish to testify? And in that case would we not further compound the evil? Free government must depend upon free speech.

(39) [Terminates July 1, 1984] Alaska Agricultural Action Com. (AS 44.33.450).

(40) Board of Fisheries (AS 16.05.221(a));

(41) Board of Game (AS 16.05.221(b));

(42) Board of Trustees and executive director of the Alaska Permanent Fund Corporation (AS 37.13.040);

(43) Alaska Energy Center (AS 46.12). (Initiative Proposal No. § 1, effective Dec. 11, 1974; am §§ 18, 19 ch 25 SLA 1975; am § 3 ch 79 SLA 1975; am § 2 ch 170, SLA 1975; am § 18 ch 263 SLA 1976; am § 2 ch 67 SLA 1977; am § 2 ch 141 SLA 1978; am § 2 ch 158 SLA 1978; am § 9 ch 167 SLA 1978; am § 2 ch 66 SLA 1979; am § 3 ch 75 SLA 1979; am § 37 ch 3 SLA 1980; am § 28 ch 12 SLA 1980; am § 8 ch 15 SLA 1980; am §§ 39-43 ch 94 SLA 1980; am § 5 ch 148 SLA 1980; Executive Order No. 44 § 2 (1980))

**Revisor's note.** — Under the authority of AS 01.05.031(b), this section was rearranged for clarity in 1980. The list of state boards and commissions formerly found at AS 39.50.200(9) has been placed in AS 39.50.200(b).

**Effect of amendments.** — The 1977, 1978, and 1979 amendments added paragraphs (34)-(39) of present subsection (b). The second 1979 amendment, which added paragraph (39), terminates July 1, 1984.

The first 1980 amendment repealed a former subparagraph to present paragraph (b), which read: "Alaska Salary Commission (AS 39.23)."

The second 1980 amendment inserted "court of appeals" following "a judge to the" near the middle of subparagraph (2) of paragraph (a).

The third 1980 amendment added subparagraph (42) in present paragraph (b).

The fourth 1980 amendment, in present paragraph (b), repealed former paragraphs, which read: "Board of Fish and Game (AS 16.05.220)," "State Section of Joint Federal-State Land Use Planning Commission (AS 41.40.020)," "Board of Directors, State-Operated Schools (AS

14.08.030)," and "Alaska Salary Commission (AS 39.23)," respectively substituted "Workers" for "Workmen" in subparagraph (31), and subparagraphs (40) and (41).

The fifth 1980 amendment repealed subparagraph (43) in present paragraph (b).

Section 2, Executive Order No. 44 substituted "(AS 44.27.040)" for "(AS 44.19.900)" at the end of subparagraph (3) of present paragraph (b).

**Purpose of the Conflict of Interest law** is to bring to light all conflicts, actual and potential. *Falcon v. Alaska Pub. Offices Comm'n*, Sup. Ct. Op. No. 1512 (File No. 3220), 570 P.2d 469 (1977).

**Patient of a physician is a client** of medical services and falls within the scope of this chapter. *Falcon v. Alaska Pub. Offices Comm'n*, Sup. Ct. Op. No. 1512 (File No. 3220), 570 P.2d 469 (1977).

**And source of income.** — The Conflict of Interest law encompasses a physician's individual patients as sources of income. *Falcon v. Alaska Pub. Offices Comm'n*, Sup. Ct. Op. No. 1512 (File No. 3220), 570 P.2d 469 (1977).

**Sec. 39.51.010. Misuse of confidential information.**

Repealed by § 21 ch 166 SLA 1978.

**Cross reference.** — For present provisions covering the subject matter of the repealed section, see AS 11.56.860. **Editor's note.** — The repealed section derived from § 1, ch. 105, SLA 1975.

**Sec. 39.51.020. Obstruction of access to public information.** (a) A public employee may be dismissed, demoted or suspended, laid off or otherwise made subject to any disciplinary action for communicating matters of public record or information under AS 09.25.110 and 09.25.120.

(b) As used in this section, "public employee" means any employee receiving compensation for services provided to the state (including the University of Alaska) or any political subdivision of the state.

(c) A violation of this section is a misdemeanor. (§ 1 ch 151 SLA 1977)

**Chapter 51. Abuse of Power by Public Officers and Employees.**

**Section**

10. [Repealed]

20. Obstruction of access to public information

TO: Representative Koponen  
FROM: Deborah Niedermeyer, Aide to House HESS Committee  
RE: Whistleblower bill  
DATE: 25 March, 1985

This bill strengthens and clarifies the existing law forbidding retaliation against public employees who provide information which is a matter of public record, or who testify before a legislative committee. Specifically, the bill

- 1) Clarifies that public employees must provide to the Legislature information concerning matters of public record
- 2) Increases the penalty for harrassment of an employee who does provide public information from "a misdemeanor" to a "class A misdemeanor"
- 3) Clarifies a public employee's right to request a legislative investigation if she or he is harrassed at work because of testimony before the Legislature
- 4) Requires an employer to comply with a legislative request for information if the employer has disciplined an employee within 90 after an employee has testified before a legislative committee
- 5) Clarifies the employee's right to sue for reinstatement, back wages, damages, and attorney's fees if he or she is disciplined for testifying before a legislative committee
- 6) Makes it a class A misdemanor to discipline an employee for testifying before a legislative committee

...specifying any objection the person may have to the money, instrument, or property, or the person waives it. If the objection is to the amount of money, the terms of the instrument, or the amount or kind of property, the person shall specify the amount, terms, or kind which the person requires, or is precluded from objecting later. This section shall not be construed to modify or change in any manner corresponding provisions of the Uniform Commercial Code (AS 45.01 — 45.09). (§ 3.20 ch 101 SLA 1962)

#### NOTES TO DECISIONS

It is not necessary to tender cash. constitute a proper tender. Ward v. Miller, 13 Alaska 752 (1952).  
And a check, unobjected to, would Miller, 13 Alaska 752 (1952).

**Sec. 09.25.100. Disposition of tax information.** Information in the possession of the Department of Revenue which discloses the particulars of the business or affairs of a taxpayer or other person is not a matter of public record, except for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, or prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information which may assist in the collection of delinquent taxes. (§ 3.21 ch 101 SLA 1962)

**Collateral references.** — Validity, construction, and effect of state laws requiring state officials to protect confidentiality of income tax returns and information, 1 ALR4th 959.

**Sec. 09.25.110. Inspection and copies of public records.** Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records and are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of costs a certified copy of the public record. (§ 3.22 ch 101 SLA 1962)

**Cross references.** For proof of public records, see Evid. R. 1005; for management and preservation of public records, see AS 40.21.

For discussion of the history of this section, see *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

**Broad policy.** — This section and AS 09.25.120 articulate a broad policy of open records. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

The "agencies and departments" language used in this section must be read as referring to the agencies and departments of the governments to which the statute applies, but that language itself does not define what the applicable level of government is. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

The word "public" as used in this section and AS 09.25.120 with "officer" refers both to state and local officials. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

**Application to municipalities.** — The provisions of this section are applicable to municipalities. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

In light of the common law rule, legislative history, and the court's reading of the

sections, the state supreme court will construe this section and AS 09.25.120 as that court would have construed them prior to 1957, which is as a strong legislative declaration that records in the possession of municipalities shall be available for public inspection, subject to exceptions based on need. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

**Disclosure of applications for public posts.** — Strong public interest in the disclosure of the affairs of government generally, and in an open selection process for high public officials in particular, requires public disclosure and inspection of applications for posts having substantial discretionary authority. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

**University of Alaska.** — The legislature intended to include the University of Alaska within the scope of state agencies subject to the public records statute. *Carter v. Alaska Pub. Employees Ass'n*, Sup. Ct. Op. No. 2657 (File No. 6586), P.2d (1983).

The president of the University of Alaska is a public officer for purposes of this section. *Carter v. Alaska Pub. Employees Ass'n*, Sup. Ct. Op. No. 2657 (File No. 6586), P.2d (1983).

**Collateral references.** — Finding of draft board as evidence of physical condition of one registered, 16 ALR 247.

Admissibility of report of public officer

or employee on cause of or responsibility for injury to person or damage to property, 153 ALR 163; 69 ALR2d 1148.

**Sec. 09.25.120. Inspection and copying of public records.** Every person has a right to inspect a public writing or record in the state, including public writings and records in recorders' offices except (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS 18.50; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by a federal law or regulation or by state law. Every public officer having the custody of records not included in the exceptions shall permit the inspection, and give on demand and on payment of the legal fees therefor a certified copy of the writing or record, and the copy shall in all cases be evidence of the

original. Recorders shall permit memoranda, transcripts, and copies of the public writings and records in their offices to be made by photography or otherwise for the purpose of examining titles to real estate described in the public writings and records, making abstracts of title or guaranteeing or insuring the titles of the real estate, or building and maintaining title and abstract plants; and shall furnish proper and reasonable facilities to persons having lawful occasion for access to the public writings and records for those purposes, subject to reasonable rules and regulations, in conformity to the direction of the court, as are necessary for the protection of the writings and records and to prevent interference with the regular discharge of the duties of the recorders and their employees. (§ 3.23 ch 101 SLA 1962)

NOTES TO DECISIONS

For discussion of the history of this section, see *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

**Broad policy.** — AS 09.25.110 and this section articulate a broad policy of open records. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

**Effect of "in the state" language.** — When the legislature chose to say "in the state," and not "of the state" in the first sentence of this section, they were conscious of the fact that they were defining scope and had it been intended to limit the application of this section to state agencies and departments, it could easily and clearly have done so. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

The word "public" as used in AS 09.25.110 and this section with "officer" refers both to state and local officials. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

**Application to municipalities.** — The provisions of AS 09.25.110 and this section are applicable to municipalities. *City of Kenai v. Kenai Peninsula Newspapers,*

**Collateral references.** — 66 Am.Jur.2d, Records and Recording Laws, §§ 12-31.

76 C.J.S., Records, §§ 34-41.

*Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

In light of the common law rule, legislative history, and the court's reading of the sections, the state supreme court will construe AS 09.25.110 and this section as that court would have construed them prior to 1957, which is as a strong legislative declaration that records in the possession of municipalities shall be available for public inspection, subject to exceptions based on need. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, Sup. Ct. Op. No. 2479 (File Nos. 4954, 5433), 642 P.2d 1316 (1982).

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**University of Alaska.** — The legislature intended to include the University of Alaska within the scope of state agencies subject to the public records statute. *Carter v. Alaska Pub. Employees Ass'n*, Sup. Ct. Op. No. 2657 (File No. 6586), P.2d (1983).

Validity, construction, and application of statutes making public proceedings open to the public, 38 ALR3d 1070.

Confidentiality of records...

ients of public welfare, 54 ALR3d 768.

Validity, construction, and application of statutory provisions relating to public access to police records, 82 ALR3d 19.

Restricting access to judicial records of state courts, 84 ALR3d 598.

Payroll records of individual government employees as subject to disclosure to public, 100 ALR3d 699.

**Sec. 09.25.121. Copies of public records for veterans.** When a copy of a public record is required by the division of veterans' affairs, Department of Commerce and Economic Development or by the United States Veterans' Administration to be used in determining the eligibility of a person to participate in benefits, the official custodian of the public record shall, without charge, provide the applicant for the benefits, a person acting on behalf of the applicant, or an authorized representative of the division of veterans' affairs or the United States Veterans' Administration with a certified copy of the record. (§ 1 ch 35 SLA 1981)

**Revisor's notes.** — Enacted as AS 09.25.123. Renumbered in 1981.

veterans of the armed forces, see AS 26.10.070.

**Cross references.** — As to records of

**Sec. 09.25.125. Enforcement: Injunctive relief.** A person having custody or control of a public record who obstructs or attempts to obstruct, or a person not having custody or control who aids or abets another person in obstructing or attempting to obstruct, the inspection of a public record subject to inspection under AS 09.25.110 or 09.25.120 may be enjoined by the superior court from obstructing, or attempting to obstruct, the inspection of public records subject to inspection under AS 09.25.110 or 09.25.120. (§ 1 ch 74 SLA 1975)

**Sec. 09.25.130. Effect of private seals and scrolls.** Private seals and scrolls as a substitute for seals are abolished. They are not required to an instrument, but when used their effect remains unchanged. (§ 3.10 ch 101 SLA 1962)

**Sec. 09.25.150. Claiming of privilege by public official or reporter.** Except as provided in AS 09.25.150 — 09.25.220, no public official or reporter may be compelled to disclose the source of information procured or obtained while acting in the course of duties as a public official or reporter. (§ 1 ch 115 SLA 1967)

**Cross references.** — For court rule recognizing statutory privileges, see Evid. R. 501.

**Collateral references.** — 81 Am.Jur.2d, Witnesses, §§ 141-147, 287-302.

98 C.J.S., Witnesses, §§ 432-440, 450-457.

tion between others, 2 ALR2d 645. Admissibility of recordings in evidence as affected by privileged nature of communications, 58 ALR2d 1037.

Construction of statute creating privilege against disclosure of communications made to stenographer or confidential clerk, 96 ALR2d 159.



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

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

June 25, 1983

MEMORANDUM

TO: Representative Jerry Ward

FROM: Betty Barton  
Legislative Analyst

RE: Employee Protection Laws  
Research Request No. 83-163

You have asked for information about state and federal statutes that provide protection to employees who disclose information regarding an employer's violation of federal, state, or local laws. During the 1970s, there was growing public concern regarding the need for improved ethical and professional standards, including support for public disclosure of any unethical or illegal practices of governmental and private organizations. Individuals increasingly called for measures which would ensure the protection from reprisal of those employees, known as "whistle blowers," who publicly criticize their organizations for perceived wrongdoing.

Legal Background

American case law traditionally has provided some limited protections from administrative punishment to whistle blowers in public employment. According to a report prepared by the Congressional Research Service, the law generally was shaped in 1892 by Judge Wendell Holmes who ruled in McAuliffe v. Mayor of New Bedford (155 Mass. 216; 29 N.E. 519) that while there is a constitutional right to free speech, there is no constitutional right to public employment.<sup>1</sup> This position was modified in 1968 in Pickering v. Bd. of Ed. (391 U.S. 563) when the U.S. Supreme Court held that a public worker cannot be deprived of his or her constitutional rights as a condition of employment.

Some statutory protections are also found at the federal level. For example, federal employees may testify before Congress about the agencies in which they work. The right to petition Congress is established in 5 U.S.C. 7102; and 18 U.S.C. 1505 prohibits interfering with a worker who is giving testimony to Congress. However, the law does not extend to employees who disclose information to bodies other than Congress.

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<sup>1</sup> Judith H. Parris, Government Division, Congressional Research Service, The Library of Congress, Major Issues System, " 'Whistle Blowers' in the Executive Branch," Issue Brief Number IB78006, January 26, 1978.

There are also several notable limitations placed on an employee's freedom to disclose information. Federal officials, for example, may not disclose classified data unless specifically authorized by the Freedom of Information Act or other U.S. statutes.

#### Federal Legislation Establishing Employee Protection

In 1978, Senate Bill 2640 was enacted.<sup>2</sup> This bill, which was the culmination of President Carter's Personnel Management Project, provided an extensive reorganization of the U.S. Civil Service Commission. Included in the bill was an employee protection provision; the primary purpose of which was to "safeguard employees, tenured and nontenured, who 'blew the whistle' on illegal or improper official conduct."

As the bill was initially introduced, it prohibited Civil Service employers from dispensing any sanctions against employees who publicly disclosed a violation of a law, rule, or regulation (assuming that the disclosure in itself did not constitute a violation of the law). The bill was subsequently broadened so that an employee would be protected in disclosing any information that reflected significant mismanagement, flagrant waste of funds, abuse of authority, or a substantial and specific danger to the health and safety of the public.<sup>3</sup> The bill was also modified so that agencies would not be encouraged to establish unwarranted internal "rules or regulations" against disclosure. As amended, only those disclosures that are specifically exempted by statute, e.g., substantive data pertaining to national intelligence, are prohibited.

Under the statute, the head of each executive branch agency has responsibility for overseeing compliance with relevant civil service laws.

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<sup>2</sup> Public Law 95-454. A copy of the statute is located in Appendix A.

<sup>3</sup> According to the legislative history of the bill, the intent of Congress was to limit protection to specific and significant impairment of public safety. As an example, the legislative history states that a general criticism by an employee that the Environmental Protection Agency is inadequately protecting the environment would not be protected under the statute; however, an employee's disclosure regarding the unsafe design of the cooling system of a Nuclear Regulatory Commission reactor would presumably be protected.

### State Legislation Protecting Whistle Blowers

Essentially, there are two approaches available for states in establishing protection for whistle blowers: 1) through administrative rules and procedures -- as exemplified in the federal statute -- and 2) through the courts.

Professional opinion is divided as to whether or not a state statute is necessary if an administrative approach is utilized. By some interpretations, administrative protections can be effectively established through executive orders or regulations. Several administrative mechanisms are available for processing whistle blowing grievances, including establishing an independent personnel board to review employee grievances and establishing an inspector general or ombudsman. In addition, the federal government and some states have considered establishing incentives for employees who produce innovative or noteworthy work as well as penalties for those responsible for inefficiency or unfavorable practices.

To establish remedies through the court system, there are also several available options that have been considered at both the state and federal level. Of these, the most commonly utilized approach is to provide for civil penalties against an agency when an employer has unduly retaliated against an employee. However, legislation can also be drafted to impose civil penalties on the individual who was responsible for the retaliation. Another option, which was presented for congressional consideration, is to establish a legal defense fund to be made available to employees with alleged grievances.

Colorado has enacted legislation that provides for protection through the administrative approach, while Michigan has established remedies through the courts.

Colorado State Employee Protection Law - Colorado enacted a whistleblower protection law in the fall of 1979.<sup>4</sup> Included in the statute's legislative declaration is the following statement:

The general assembly...declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve [this and other objectives], the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official.

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<sup>4</sup> A copy of the Colorado statute is in Appendix B.

As enacted, the statute prohibits a state employer or supervisor from initiating a disciplinary action against an employee due to his or her disclosure of information. However, protection does not extend to an employee who knowingly discloses false information or who discloses information that is legally required to be held confidential. Under the provisions of the statute, an employee "who wishes to disclose information" is obligated to "make a good faith effort" to provide the employer or the general assembly with the information to be disclosed prior to the time of its disclosure.

The law enables any employee in the state personnel system to file a written complaint with the state personnel board if an alleged retaliatory measure has been directed against him. If upon review the charges appear to have a reasonable basis, the state personnel director is required to notify the employer of the findings. The employer may then petition the board for a hearing on the matter.

If the board determines that a violation against an employee has occurred, the board is required to order compensation to the employee for any costs incurred in the proceeding. The board also is required to order relief including, but not limited to, reinstatement, back pay, restoration of any loss in credited service, and expungement of any damaging personnel records of the employee. If a specific employer or supervisor is found to have personally initiated the retaliation initiated against the employee, a description of the offense is to be placed within the employer's personnel records.

The administrative approach is generally established in order to provide a means of resolving disputes internally. Under the Colorado law, an employer or employee who is dissatisfied with the findings of the board may take the case to district court.

According to Marilyn Heckel, who administers the employee protection law in Colorado, the statute has been used infrequently since its enactment. Only three or four cases have been filed since the program's inception in 1979. While this may be attributable in part to an absence of complaints, Ms. Heckel observed that there are also some weaknesses in the statute that may be deterring employees from utilizing it.

Ms. Heckel noted that the most significant problem is that the review and hearing process is not timely. The first case filed under the law took almost three years for a determination to be made. The board ruled against the employee, and the employee then filed a complaint in the district court. The judge dismissed the case on a technicality. According to Ms. Heckel, the employee, who presumably believed enough in the legitimacy of his complaint to pursue it for three years, was left with no available recourse and abundant legal bills.

Ms. Heckel also noted that several provisions of the statute were drafted with overly broad potential applications. As an example, Ms. Heckel noted that there is no statute of limitations included within the law. Conceivably, an employee could choose to disclose information pertaining to a violation that occurred ten years ago.

According to Ms. Heckel, staff have discussed the need for revision of the law, but the need is viewed to be a relatively low priority.

Michigan Whistleblowers' Protection Act - No state law offers as extensive protection to employees as that afforded through the Michigan statute.<sup>5</sup> Enacted in 1980, this law may apply to any employee, including individuals within both the public and private sectors of employment. Under the law's provisions, an employer shall not "discharge, threaten, or otherwise discriminate against an employee" for reporting a violation, or suspected violation, of a law, rule, or regulation.

Unlike the Colorado law, the Michigan statute establishes civil action for injunctive relief or damages in the county circuit court as the first measure of recourse for employees who have experienced an alleged violation. The burden of proof is placed on an employee to "show by clear and convincing evidence" that at the time of conflict with his employer, the employee was about to report a suspected violation.

The statute also establishes remedies to be ordered as the judge considers appropriate. In rendering a judgment, a court shall order the reinstatement of the employee, the payment in the employee's favor of back wages, full reinstatement of fringe benefits and seniority, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including both attorney and witness fees.

According to Lee Schwartz, a legislative aide to Michigan Senator James Barcia who was instrumental in the law's enactment, a determination was made to use the court approach in order to make certain that employee protection was not used "frivolously" and would only be used for serious and significant cases.

Mr. Schwartz stated that there have been 10 known cases filed since the law was passed. Of these, the majority have been filed against public agencies; however, several pertain to private sector employers. According to Mr. Schwartz, his office has found no means of evaluating the effectiveness of the law or determining the extent to which the statute is being utilized. All cases are initially filed within Michigan circuit courts, which have no available system of tracking specific categories of cases.

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<sup>5</sup> A copy of the Michigan statute is located in Appendix C.

Representative Ward  
June 25, 1983  
Page 6

The U.S. Supreme Court recently ruled on a naval case pertaining to whistle blowing. To date, our research sources have been unable to obtain detailed information regarding the implications of the decision. When we are provided this information, we will transmit it to your office.

We hope this information has assisted you. Please do not hesitate to contact us if you have additional research questions.

bb

Attachments

Attachment A:  
Civil Service Reform Act of 1978  
(excerpted portions pertaining to whistle blowing)

under an administrative interpretative regulation approved by the district court as reasonable and not challenged on appeal, it did not constitute "active duty" within the meaning of this section, defining who is a "preference eligible" veteran. *Houssard v. U. S. Postal Service*, C.A. Tex. 1982, 671 F.2d 1103.

### § 2100. Air traffic controller; Secretary

For the purpose of this title--

(1) "air traffic controller" or "controller" means an employee of the Department of Transportation or the Department of Defense who, as determined under regulations prescribed by the Secretary, is actively engaged in the separation and control of air traffic, or is the immediate supervisor of an employee actively engaged in the separation and control of air traffic, in an air traffic control facility; and

(2) "Secretary", when used in connection with "air traffic controller" or "controller", means the Secretary of Transportation with respect to controllers in the Department of Transportation, and the Secretary of Defense with respect to controllers in the Department of Defense.

As amended Pub.L. 96-347, § 1(a), Sept. 12, 1980, 94 Stat. 1150.

1980 Amendment. Pub.L. 96-347 substituted "1" in section caption "controller; Secretary" for "controller" and in section included employees of the Department of Defense within the meaning of air traffic controller or controller and defined the term "Secretary" to mean Secretary of Transportation with respect to controllers in the Department of Transportation and Secretary of Defense with respect to controllers in the Department of Defense. Effective Date of 1980 Amendment. Section 3 of Pub.L. 96-347 provided that:

"This Act [amending sections 2100, 2302, 2304 to 2308, and § 335 of this title and enacting a provision] and as a note under section 8325 of this title shall take effect on the later of--

"(1) October 1, 1980, or  
"(2) the thirtieth day after the date of the enactment of this Act [Sept. 12, 1980]."

Legislative History. For legislative history and purpose of Pub.L. 96-347, see 1980 U.S. Code Cong. and Adm. News, p. 2714.

## CHAPTER 23--MERIT SYSTEM PRINCIPLES

Sec.	Sec.
2301. Merit system principles.	2301. Responsibility of the General Accounting Office.
2302. Prohibited personnel practices.	2305. Coordination with certain other provisions of law.
2303. Prohibited personnel practices in the Federal Bureau of Investigation.	

### § 2301. Merit system principles

(a) This section shall apply to--

- (1) an Executive agency;
- (2) the Administrative Office of the United States Courts; and
- (3) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be--

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter--

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

Added Pub.L. 95-454, Title I, § 101(a), Oct. 13, 1978, 92 Stat. 1113.

Effective Date. Section effective on day after Oct. 13, 1978, see section 407 of Pub.L. 95-454, set out as a note under section 1101 of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-454, see 98 U.S. Code Cong. and Adm. News, p. 221.

#### Cross References

Principles included in personnel management system of General Accounting Office, see section 732 of Title 31, Money and Finance.

#### Library References

Officers 2311.  
United States 2306.  
C.J.S. Officers and Public Employees 44 40 to 51, 53 to 55.  
C.J.S. United States §§ 30, 37, 62 to 61.

#### Purpose

Primary purpose of this chapter was to safeguard employees, tenured and non-tenured, who "blow the whistle" on illegal or improper official conduct. *Wren v. Merit Systems Protection Bd.*, C.A.D.C. 1982, 681 F.2d 867.

### § 2302. Prohibited personnel practices

(a) (1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section--

(A) "personnel action" means--

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

- (VI) a reemployment;
- (VII) a performance evaluation under chapter 43 of title;
- (ix) a decision concerning pay, benefits, or awards, or concerning rotation or training if the education or training reason is expected to lead to an appointment, promotion, performance evaluation, or other action described in this paragraph; and
- (s) any other significant change in duties or responsibility which is inconsistent with the employee's salary or grade with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointed position in the Senior Executive Service, or a position in the excepted service, but does not include--

- (I) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
- (II) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

(C) "agency" means an Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, but does not include--

- (I) a Government corporation;
- (II) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or
- (III) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(1) discriminate for or against any employee or applicant for employment--

- (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
- (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (42 U.S.C. 631, 633a);
- (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));
- (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or
- (E) on the basis of marital status or political affiliation, if prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of--

- (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
- (B) an evaluation of the character, loyalty, or suitability

(1) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service, or take any action which is a reprisal for the exercise of any political contribution or service;

(2) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(3) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(4) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(5) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(6) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(7) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(8) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(9) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(10) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(11) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(12) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(13) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(14) take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any political contribution or service;

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under--

- (1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;
- (2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;
- (3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;
- (4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition;
- (5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

Added Pub.L. 95-454, Title I, § 101(a), Oct. 13, 1978, 92 Stat. 1114.

**References in Text.** Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), referred to in subsections (b) and (d), is classified to section 2000e-16 of Title 42, The Public Health and Welfare.

Sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), referred to in subsections (b) and (d), are classified to sections 631 and 633a of Title 29, Labor.

Section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), referred to in subsections (b) and (d), is classified to section 206(d) of Title 29.

Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), referred to in subsections (b) and (d), is classified to section 791 of Title 29.

The civil service laws, referred to in subsection (c), are set out in this title. See, particularly, section 3301 et seq. of this title.

**Effective Date.** Section effective 90 days after Oct. 13, 1978, see section 907 of Pub.L. 95-454, set out as a note under section 1101 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 95-454, see 1978 U.S. Code Cong. and Adm. News, p. 2723.

**Cross References**

Personnel practices prohibited by personnel management system of General Accounting Office, see section 732 of Title 31, Money and Finance.

**Index to Notes**

- Retaliation 1
- Right of action 5
- Standards 2
- Whistle-blowing protections
  - Generally 3
  - Disclosure of protected information 4

**1. Retaliation**

In proceeding concerning job demotion of employee of Veterans Administration, see *United States Merit Systems Protection*

to prove by a preponderance of the evidence that the demotion was a reprisal for "whistleblowing." *Alley v. Veterans Admin. Medical Center*, C.A.S. 1982, 890 F.2d 153.

In case in which special counsel contended in effect that four deputy marshals' transfers to different duty stations were in retaliation for engaging in protected activities, Board, which upheld transfers of three deputies, had not violated principle that knowledge of employees' protected activities on part of one with ultimate responsibility for a personnel action could support inference of retaliatory intent where Board had determined that those who effected the transfers had no knowledge of the protected activities and that those with knowledge had no effect. *Frazier v. Merit Systems Protection Bd.*, 1982, 672 F.2d 159, 217 U.S.App.D.C. 297.

**2. Standards**

To establish that agency action utilizing unapproved performance criteria was "based on" a prohibited personnel practice, petitioners would have to show that their performance, while falling the "unacceptable performance" standard, was satisfactory under other applicable statutory standards. *Darby v. Internal Revenue Service*, 1982, 672 F.2d 192, 217 U.S.App.D.C. 339.

**3. Whistle-blowing protections—General**

"Whistleblowing" provisions of this chapter work only as a defense to disciplinary action. *Martin v. Lauer*, C.A.D.C. 1982, 690 F.2d 24.

**4. Disclosure of protected information**

In regard to a government employee deciding whether to "blow the whistle" on government fraud, waste, abuse or illegal activity, the legal question of whether disclosure is prohibited by law is of critical importance to the whistleblower, and he must be allowed to consult his attorney for an answer to that question absent some strong governmental interest in limiting such communications. *Martin*

**5. Right of action**

In amending this section Congress did not take away from probationary employees their preexisting right to seek redress of constitutional violations in district court actions, and that of statutory remedy provided probationary employees governing adverse personnel action based on "whistleblowing" does not preclude resort to independent action alleging violation of rights under U.S.C.A. Const. Amend. 1 in adverse personnel action based on criticism of agency practices and/or procedures. *Bozell v. U. S. In-*

tern Communications Agency, C.A.D.C. 1982, 682 F.2d 191.

A purported whistle-blower has no private right of action under (c) section prohibiting an official from taking adverse personnel action against an employee as reprisal for "whistleblowing" on official violations of law, waste and abuse of authority, and in case of probationary employees, the office of special counsel is the exclusive avenue of relief for alleged prohibited personnel practices under this section. Id.

**§ 2303. Prohibited personnel practices in the Federal Bureau of Investigation**

(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences--

- (1) a violation of any law, rule, or regulation, or
- (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

For the purpose of this subsection, "personnel action" means any action described in clauses (1) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policy-making, or policy-advocating character).

(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

(c) The President shall provide for the enforcement of this section in a manner consistent with the provisions of section 1206 of this title.

Added Pub.L. 95-454, Title I, § 101(a), Oct. 13, 1978, 92 Stat. 1117.

**Effective Date.** Section effective 90 days after Oct. 13, 1978, see section 907 of Pub.L. 95-454, set out as a note under section 1101 of this title.

**§ 2304. Responsibility of the General Accounting Office**

(a) If requested by either House of the Congress (or any committee thereof), or if considered necessary by the Comptroller General, the General Accounting Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the executive branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management.

(b) The General Accounting Office shall prepare and submit an annual report to the President and the Congress on the activities of the Merit Systems Protection Board and the Office of Personnel Management. The report shall include a description of--

- (1) significant actions taken by the Board to carry out its functions under this title; and
- (2) significant actions of the Office of Personnel Management, including an analysis of whether or not the actions of the Office are in accord with merit system principles and free from prohibited personnel practices.

Added Pub.L. 95-454, Title I, § 101(a), Oct. 13, 1978, 92 Stat. 1118.

<sup>1</sup>So in original.

**Effective Date.** Section effective 90 days after Oct. 13, 1978, see section 907 of history and purpose of Pub.L. 95-454, set out as a note under section 1101 of this title.

Attachment B:

Colorado Employee Protection Law

same or until an examination  
is held.

1963, § 26-2-2; L. 73, p. 426.

er the termination of his self-chosen  
career, to return to state employment  
and be awarded all the rights and privileges  
he would have accrued if he had never left  
civilian employment. State Civil Serv.  
Comm'n v. Fleming, 183 Colo. 71, 514 P.2d  
733, cert. denied, 415 U.S. 977, 94 S.  
39 L. Ed. 2d 873 (1974).

Reinstatement contingent upon returning  
to work after service. Reinstatement is con-  
ditional upon the employee returning to state  
employment within one year after the period  
of service or additional service imposed.  
State Civil Serv. Comm'n v. Fleming,  
183 Colo. 71, 514 P.2d 1135 (1973), cert.  
denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed.  
2d 873 (1974).

national guard. (1) The provisions  
governing the payment by this state  
of the compensation of any  
employee as provided in this part 3  
shall apply to any employee who retains his status after

service who was a member of the  
armed forces of the United  
States or compensation from the  
armed forces for a period of time  
not exceeding fifteen days.

1963, § 26-2-3.

This part 3 shall apply to any  
employee who entered the armed  
forces in service engaged in national

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## OFFICE HOURS

State offices in the executive and  
legislative branches shall be and remain open for

business daily, except on Saturdays, Sundays, and legal holidays, from the  
hour of 8:30 a.m. until the hour of 5:00 p.m.; except that nothing in this  
section shall affect the validity of any act performed by either of said depart-  
ments before or after the hours specified in this section.

(2) Notwithstanding the provisions of subsection (1) of this section, when  
a city or city and county and the suburban area within a ten-mile radius of  
the boundaries thereof have a population in excess of fifty thousand inhabi-  
tants, the offices of any executive department of the state government locat-  
ed therein may vary its business hours from those indicated in subsection  
(1) of this section whenever the executive director of the principal depart-  
ment, with the approval of the governor, determines that such adjustment  
of hours will help alleviate peak traffic conditions and provide a more even  
flow of traffic for the purpose of creating safer highway conditions.

(3) Written notice of the variance permitted under subsection (2) of this  
section shall be given to the local news media of such cities or cities and  
counties not less than two weeks preceding the effective date of such vari-  
ance.

Source: R & RE, L. 72, p. 180, § 1; C.R.S. 1963, § 26-3-1.

24-50-402. Appointment by outgoing officers prohibited. No state, county,  
or city appointive office, the term of which expires on or after the time fixed  
by law for the qualification of the officer having the authority to make such  
appointment, shall be filled by the outgoing appointing officer.

Source: R & RE, L. 72, p. 180, § 1; C.R.S. 1963, § 26-3-2.

## ARTICLE 50.5

### State Employee Protection

24-50.5-101.	Legislative declaration.	24-50.5-105.	Civil action.
24-50.5-102.	Definitions.	24-50.5-106.	Notice to state auditor.
24-50.5-103.	Retaliation prohibited.	24-50.5-107.	Reports to general assembly and governor.
24-50.5-104.	Complaints by state personnel system employees.		

24-50.5-101. Legislative declaration. The general assembly hereby declares  
that the people of Colorado are entitled to information about the workings  
of state government in order to reduce the waste and mismanagement of  
public funds, to reduce abuses in government authority, and to prevent illegal  
and unethical practices. The general assembly further declares that employees  
of the state of Colorado are citizens first and have a right and a responsibility  
to behave as good citizens in our common efforts to provide sound manage-  
ment of governmental affairs. To help achieve these objectives, the general  
assembly declares that state employees should be encouraged to disclose  
information on actions of state agencies that are not in the public interest

24-50.5-107. Reports to general assembly and governor. The state personnel board shall report annually to the general assembly and the governor concerning the complaints filed, hearings held, and actions taken pursuant to this article.

Source: L. 79, p. 967, § 1.

## PUBLIC EMPLOYEES' RETIREMENT SYSTEMS

### ARTICLE 51

#### Public Employees' Retirement Systems

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##### PART 7

##### PUBLIC EMPLOYEES' SOCIAL SECURITY

and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official.

Source: L. 79, p. 965, § 1.

**24-50.5-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Disciplinary action" means any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty.

(2) "Disclosure of information" means the written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.

(3) "Employee" means any person employed by a state agency.

(4) "State agency" means any board, commission, department, division, section, or other agency of the executive, legislative, or judicial branch of state government.

(5) "Supervisor" means any board, commission, department head, division head, or other person who supervises or is responsible for the work of one or more employees.

Source: L. 79, p. 965, § 1.

**24-50.5-103. Retaliation prohibited.** (1) Except as provided in subsection (2) of this section, no appointing authority or supervisor shall initiate or administer any disciplinary action against an employee on account of the employee's disclosure of information. This section shall not apply to:

(a) An employee who discloses information that he knows to be false or who discloses information with disregard for the truth or falsity thereof;

(b) An employee who discloses information from public records which are closed to public inspection pursuant to section 24-72-204;

(c) An employee who discloses information which is confidential under any other provision of law.

(2) It shall be the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure.

Source: L. 79, p. 966, § 1.

**24-50.5-104. Complaints by state personnel system employees.** (1) Any employee in the state personnel system may file a written complaint with the state personnel board alleging a violation of section 24-50.5-103 if the employee demonstrates that reasonable communication to his supervisor,

appointing authority, or member of the general assembly has occurred in regard to the alleged violation. The state personnel board shall cause an investigation of the charges to be made by the state personnel director. If the investigation establishes that there is a reasonable basis for the charges, the appointing authority or supervisor shall be given written notice thereof. Within ten days after he receives such notice, the appointing authority or supervisor may petition the board for a hearing on the matter, and the board shall grant such hearing.

(2) If the state personnel board after hearing determines that a violation of section 24-50.5-103 has occurred, or if the investigation establishes a reasonable basis for the charges and no hearing is requested, the board shall order the appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, and expungement of the records of the employee who disclosed information, and, in addition, the state personnel board shall order that the employee filing the complaint be reimbursed for any costs incurred in the proceeding. Such reimbursement shall be made out of moneys appropriated to the agency which employs such employee. Judicial review of any determination by the state personnel board under this subsection (2) may be had in accordance with section 24-4-106.

(3) It shall be a defense in any disciplinary proceeding against an employee under section 24-50-125 that such proceeding was initiated in violation of section 24-50.5-103, and the issue of the violation of section 24-50.5-103 shall be determined by the state personnel board as a part of the disciplinary proceeding.

(4) Whenever the state personnel board determines that an appointing authority or supervisor has violated section 24-50.5-103, it shall cause an entry to that effect to be made in the supervisor's personnel records.

Source: L. 79, p. 966, § 1.

**24-50.5-105. Civil action.** Any employee not in the state personnel system, or any employee in the state personnel system who has filed a complaint under section 24-50.5-104 (1) but no reasonable basis was found for the charges, may bring a civil action in the district court alleging a violation of section 24-50.5-103. If the employee prevails, the employee may recover damages, together with court costs, and the court may order such other relief as it deems appropriate.

Source: L. 79, p. 967, § 1.

**24-50.5-106. Notice to state auditor.** Whenever the state personnel board finds that a violation of section 24-50.5-103 involving the disclosure of information concerning waste of public funds or mismanagement of a state agency has occurred, it shall transmit a copy of the investigation report to the state auditor, who shall proceed in accordance with section 2-3-101 (3) (c), C.R.S. 1973.

Source: L. 79, p. 967, § 1.