ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4667 HJUD HB 139 - HB 140

. again on February
issued a calendaring
case to Judge Lewis.
Gieffels filed a peti-
s court from Judge
petition consists of
Moody's actions:
disqualify himself,
the alleged holding
, the lack of a war-
he refusal to consid-
s the indictment for
ise.

6, Judge Lewis held
f Petitioner Gieffels
rant and summons
otion to dismiss the
and denied. Fur-
er the arraignment
bail was reinstated.[1]

argues first that
to disqualify him-
t conducting of the
total disregard of
. *Bernhardt*, 451 P.
. Second, Gieffels
ior court disregard-
in *Gilbert v. State*,
1975), to the effect
in a criminal case.
that the judge disre-
(a), which petition-
hat a criminal de-
ht before the court
warrant or a sum-
fels contends that
in contempt in vio-
endment privileges,
se, Criminal Rule
defendant shall be
to declare his true
defendant shall be

ory opinions are to
hich do not consti-
ntroversies are not

assigned to another
The order also rein-
bail of $100,000.00.

erly considered. *Munroe v. City Council for the City of Anchorage*, 545 P. 165, 169–70 (Alaska 1976); *In re G.M.*, 483 P.2d 1006, 1008 (Alaska 1971). we were to reverse Judge Moody's order all grounds raised by petitioner, the re- would be for further proceedings in rdance with this court's opinion. Fur- proceedings have already occurred, ver, under Judge Lewis' supervision. subsequent proceedings have com- ely eliminated all grounds of petition- bjections,[2] and this raises the ques- s to whether the petition is moot.

[3] One exception to the mootness rine is where a matter is of grave pub- ncern that is recurring and capable of ing review. *Munroe v. City Council the City of Anchorage, supra*; *Doe v.* 487 P.2d 47, 53 (Alaska 1971); *ern Pacific Terminal Co. v. I.C.C.*, S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 30 (1911). The parameters of the damental right to an impartial judge certainly a matter of grave public con- Because here safeguards in Alaska's inal justice system resulted in achiev- the relief petitioner earlier sought, we some indication that the issue is capa- of escaping review. Further because the apparent confusion in this area, the n of a party's pre-emptive rights is to debate. For this reason, we grant ew solely on the issue of the effect of mption under AS 22.20.022 and Crimi- Rule 25(d).

dge Moody was timely pre-empted in ceedings under a prior, identical indict- When the second indictment was is- Judge Moody was assigned the case. Weidner, counsel for Gieffels, orally ted out the prior pre-emption to Judge Moody. Judge Moody did not recognize the pre-emption.

[4] In *McKinnon v. State*, 526 P.2d 18, 25 (Alaska 1974), we stated that where two proceedings involve the same defendant and the necessity of proving the same facts and issues, a judge who was pre-empted in the prior proceeding is automatically disqualified from presiding "at any proceeding against the defendant in which those same charges [are] at issue". Therefore, Judge Moody was automatically pre-empted in the second proceeding.

Even though Judge Moody was pre-empted, the question remains as to whether he could still perform some judicial functions concerning the case from which he was pre-empted.

There are two provisions which apply to peremptory challenges.

AS 22.20.022 reads in part:

> (a) If a party or his attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath that he believes that he cannot obtain a fair and impartial trial, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay.

Criminal Rule 25(d), promulgated by Supreme Court Order No. 185, effective July 1, 1974, reads in part:

> (d) *Change of Judge as a Matter of Right.* In all courts of the state where a master calendar system has been adopt-

[1] Although Judge Moody refused to disqualify himself at the time of the arraignment, he transferred the case to Judge Lewis afterwards, and this court stayed all of the rulings entered at the arraignment. No formal order of contempt was issued by Judge Moody, who ordered that Gieffels be held without bail until he answered the question as to his name. Bail was reinstated the following day, February 12, 1976, by supreme court order. On February 13, 1976, Judge Lewis issued a warrant and summons and denied Gieffels' motion to dismiss the indictment.

ed, a judge may be peremptorily challenged as follows:

(1) *Entitlement.* In any criminal case in superior or district court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge. When multiple defendants are unable to agree upon the judge to hear the case, the trial judge may, in the interest of justice, give them more than one change as a matter of right; the prosecutor shall be entitled to the same number of changes as all the defendants combined.

(2) *Procedure.* At the time required for filing the omnibus hearing form, or within 5 days after a judge is assigned the case for the first time, a party may exercise his right to change of judge by noting the request on the omnibus hearing form or by filing a "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. A judge may honor a timely informal request for change of judge, entering upon the record the date of the request and the name of the party requesting it.

(3) *Re-Assignment.* When a request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury before the action can be transferred to another judge. *However, if the named judge is the presiding judge, he shall continue to perform the functions of the presiding judge.* (emphasis added)

In *Channel Flying, Inc. v. Bernhardt, supra*, decided before the promulgation of Criminal Rule 25(d), we stated that the following effect resulted from a successful pre-emption of a judge under the procedures set forth in AS 22.20.022:

> The only meaning that can be given to the requirement that the matter be assigned "at once and without requiring proof" to another judge, is that when a timely and proper affidavit is filed the judge concerned is at once disqualified from acting as a judge in the particular action or proceeding. When he is disqualified he no longer possesses the qualities necessary to act as a judge, i. e., the qualities of power, capacity, fitness or competency to proceed further. In short, when a proper affidavit has been timely filed, the judge involved is without power or jurisdiction to take any further action in the proceeding. If this were not the intent and effect of the statute, then it would be meaningless and ineffective. 451 P.2d at 574 (footnote omitted).

The common-law rule is that pre-empted judges can perform formal, non-discretionary (or "ministerial") acts.[3] Gieffels argues, however, that since the functions

3. Generally, courts have held that a disqualified judge may still perform a purely ministerial or non-discretionary action. *See, e. g., Driver v. State*, 46 So.2d 718, 721–22 (Fla.1950); *People v. Pate*, 53 Ill.2d 485, 292 N.E.2d 387, 398 (1973); *Hass v. Leverton*, 128 Iowa 79, 102 N.W. 811, 812 (1905); *Menifee County Board of Education v. Fiscal Court*, 320 S.W.2d 46, 48 (Ky.1959). Courts have variously defined the allowable actions of a pre-empted judge as follows: as allowing purely ministerial acts in no way connected with the trial [*Hass v. Leverton, supra*]; acts which are purely formal in character and where the judge is only discharging his ministerial duties [*Menifee County Board of Education v. Fiscal Court, supra*,]; mere formal acts [*State v. Compton*, 57 N.M. 227, 257 P.2d 915, 923 (1953)]; formal orders of a routine nature not affecting merits of the cause [*Prather v. Prather*, 263 S.W.2d 57, 59 (Mo.App.1954)]; and that powers are suspended only so far as discretionary action in the case is concerned [46 Am.Jur. 2d "Judges" § 230 at 252].
Examples of actions that have been stated to be permissible when performed by a disqualified judge are: signing certificates seeking testimony and attendance of non-resident witnesses [*State v. James*, 70 N.M. 370, 415 P.2d 350, 355 (196)]; drawing jurors' names from a box, issuing venire, returning venire, discharging from jury duty a man above age for duty [*Driver v. State, supra*]; certification of a transcript to another court [*Hass v. Leverton, supra*]; and

allowable at common law must still be performed by a judge, and since *Channel Flying, Inc.* states that a statutory preemption immediately destroys all judicial attributes, the common-law rule cannot be applied in Alaska.

Even if Gieffels is correct in his reading of *Channel Flying, Inc.*, its authority on that point has been substantially weakened by the subsequent promulgation of Criminal Rule 25(d).

[5] Art. IV, sec. 15 of the Alaska Constitution provides that the legislature may only amend or change rules regulating judicial procedure in the courts of the state; the supreme court is given sole authority to promulgate those rules. We have consistently affirmed our power to regulate procedural and administrative matters in Alaska courts. For example, in *Silverton v. Marler*, 389 P.2d 3, 5–6 (Alaska 1964), we struck down a statute which prescribed how a civil action was to be commenced because it "attempt[ed] to regulate a matter of procedure which is within the province of this court . . . ." Similarly, a statute which provided for automatic continuance of all court proceedings when a party, attorney of record or a principal witness was a member of the legislature was struck down in *City of Valdez v. Valdez Development Co.*, 506 P.2d 1279 (Alaska 1973), because it conflicted with Civil Rule 40(f) which allowed continuance only "for cause shown".[4]

[6] AS 22.20.022 encompasses both procedural and substantive matters. In *Channel Flying, Inc. v. Bernhardt, supra*, 451 P.2d at 576, we held that:

> AS 22.20.022 is not invalid as an attempt to usurp the rule-making powers of this court *insofar as it provides for a peremptory disqualification of a judge.* (emphasis added)

The procedure to be followed in implementing the substantive right created by AS 22.20.022, however, is subject to the rule-making powers of the court.

[7–9] In *Roberts v. State*, 458 P.2d 340, 346 n. 17 (Alaska 1969), we implied that perhaps not all of AS 22.20.022 was a valid exercise of legislative power:

> *In certain respects* AS 22.20.022 was sustained as a valid exercise of legislative power in *Channel Flying, Inc. v. Bernhardt* . . . . (emphasis added)

Although the legislature has the power to create the right to a fair trial before an unbiased judge, and the right to pre-empt a judge without requiring actual proof of bias or interest, it has very limited power to provide for the means by which that pre-emption right may be exercised. Until the legislature validly changes Criminal Rule 25(d),[5] that rule is the sole provision which may be consulted in determining whether the pre-emptive right was properly exercised and the effect of the pre-emption on the procedural and administrative functions of the court system. Therefore, insofar as Rule 25(d) regulates only the procedural aspects of the peremptory right created by AS 22.20.022, and to the extent

carrying out an order of remand from a higher court [*Stahl v. Board of Sup'rs of Ringgold County*, 187 Iowa 1342, 175 N.W. 772, 776 (1920)]. Examples of impermissible acts are fixing of bail [*State v. Nagel*, 185 Or. 486, 202 P.2d 640, 646 (1949), *cert. denied*, 338 U.S. 818, 70 S.Ct. 60, 94 L.Ed. 495, 496 (1949)] and revoking probation [*Vaughn v. State*, 226 So.2d 443 (Fla.App.1969)].

4. *See also Liberty Nat. Ins. Co. v. Eberhart*, 398 P.2d 997, 999 (Alaska 1965); *Leege v. Martin*, 379 P.2d 447, 448–51 (Alaska 1963); *cf. Winegardner v. Greater Anchorage Area Borough Bd. of Equalization*, 534 P.2d 541, 545–47 (Alaska 1975).

5. Under Alaska's tripartite form of government, the legislature may not impose a rule which would interfere with the proper functioning of the judicial system. Under the inherent power of the judicial branch of government, a presiding judge must be given minimal authority to accomplish the work of the court by conducting the preliminary steps for arraignment; calendaring, including assigning of cases to particular judges; and other acts necessary to the proper functioning of the courts. *See Continental Ins. Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 408–11 (Alaska 1976).

that the rule does not infringe upon the substantive right created by statute, the provisions of Rule 25(d) supersede the legislative enactment.

Criminal Rule 25(d) regulates the means or method by which a party's peremptory challenge takes effect. The major changes found in Rule 25(d) provide for different time limitations,[6] do away with the need for the filing of an affidavit alleging the inability to obtain a fair and impartial trial and specify the procedure to be followed when a presiding judge is challenged. These changes, for the most part, in no way impair the substantive right to a fair trial before an unbiased judge created by AS 22.20.022; in fact, Rule 25(d) generally liberalizes the method by which a party may exercise a peremptory challenge.[7]

[10] At the time of the February 11, 1976 appearance of Gieffels, Judge Moody was the Presiding Judge of the Anchorage superior court and conducted all arraignments as part of his special duties. Criminal Rule 25(d)(3) provides:

> *Re-Assignment.* When a request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury before the action can be transferred to another judge. *However, if the named judge is the presiding judge, he shall continue to perform the functions of the presiding judge.* (emphasis added)

Although the means or method by which a peremptory challenge is to be raised and recognized in the course of judicial proceedings is usually a procedural matter solely within the rule-making powers of this court, such procedural regulations cannot be the basis of any action which would interfere with the substantive right created by legislative enactment. Therefore, it is necessary to analyze the duties of a presiding judge in light of the substantive right created by AS 22.20.022.[8]

In *Channel Flying, Inc. v. Bernhardt, supra,* 451 P.2d at 575, 576, we stated that the right created and defined by AS 22.20.022 is that:

> [a] litigant is entitled to a fair hearing before a tribunal which is disinterested, impartial and unbiased . . . . The statute does nothing more than provide a reasonable method for assuring a fair trial for all litigants.
>
> . . . . . .
>
> The statute rather creates and defines a right—the right to have a fair trial before an unbiased and impartial judge. (footnotes omitted) [9]

Furthermore, the statute regulates that right by allowing a challenge to be effective without requiring actual proof of bias or interest.

[11] If a procedural or administrative action taken by a disqualified judge under the provisions of Criminal Rule 25(d)(3) could not possibly interfere with a defendant's right to a fair disposition of his case because of bias or interest on the part of the disqualified judge, then the substantive right created by AS 22.20.022 would not be affected. Only if the administrative or procedural action interferes with the sub-

6. In *Kvasnikoff v. State,* 535 P.2d 434, 466 n. 5 (Alaska 1975), we noted the apparent conflict between the rule and the statute: Facially, AS 22.20.022 and Crim.R. 25(d)(2) appear to set forth different time requirements. However, since petitioner's peremptory challenge is untimely under both provisions, we need not resolve the apparent conflict at this time.

7. For example, a notice of change of judge can be filed at the omnibus hearing under Criminal Rule 25(d), which in many cases may be beyond the time limitations imposed by AS 22.20.022(c). Furthermore, not only is an affidavit not required (simple notation on the omnibus hearing form signed by the attorney being sufficient under the rule), but also informal requests are allowed under the rule.

8. The functions of a presiding judge which are particularly relevant to a peremptory challenge include making calendaring orders, arraigning defendants, taking pleas, setting bail and ruling on pre-trial motions.

9. *See also In re G. K.,* 497 P.2d 914, 915 (Alaska 1972); *Roberts v. State, supra,* 458 P.2d at 345–46.

antive part of AS 22.20.022 would an action by a disqualified judge be impermissible. With this in mind, we turn to the functions of a judge at an arraignment to see if there are any actions which could interfere with the right of a defendant to a fair disposition of his case.

[12] Normally, calendaring orders and other procedural matters regarding the master calendar do not directly affect the ultimate disposition of the case. On the other hand, rulings on points of law regarding such matters as search and seizure, sufficiency of the indictment and other pre-trial legal decisions could be affected by bias or interest and would have a direct effect on the ultimate disposition of a defendant's case.

[13, 14] A more difficult problem concerns the taking of a plea. Until the defendant pleads guilty or nolo contendere, Criminal Rule 10 and 11, governing the arraignment, do not permit a judge any discretion. There is thus no possibility of bias that would interfere with the subsequent ability of a defendant to receive a fair disposition of his case. The judge must read the indictment or state the substance of the charge. He must hand a copy of the indictment or information to the defendant before the plea. He must inform the defendant of the name on the indictment and give the defendant the opportunity to declare his true name.[10] Finally, if a defendant has waived counsel, the judge must inform him of his right to a peremptory challenge.

[15, 16] If the defendant pleads "not guilty", then the case is set for trial and subsequent pre-trial hearings. Even if the judge were actually biased, these calendaring actions normally would not have an effect on the ultimate fair disposition of a defendant's case, and thus in the absence of a specific objection, they may be performed by a pre-empted presiding judge. Calendaring, however, under some circumstances may affect substantial rights such as where a defendant or counsel contends he will not be ready for trial on a specified date. Therefore, if calendaring becomes a disputed issue, it should be immediately referred to another judicial officer.

[17] If the defendant pleads "guilty" or "nolo contendere", however, then under Criminal Rule 11, the judge must determine if the plea is voluntary and has a reasonable basis; in addition, he must make inquiries not only of the defendant, but also of counsel for the defendant and the prosecuting attorney. This is an action that may be affected by bias which would interfere with the fair disposition of the defendant's case. At that point, the judge should proceed no further and immediately assign the case to another judge for determination of the voluntariness of the guilty plea.

[18] Another difficult problem, similar to calendaring, arises with the procedural means of setting bail. AS 22.20.022 creates and enforces the right to receive a fair disposition of a case and regulates that right by providing a means of assuring that it is not impinged upon by a biased or partial judge. Bail matters, however, do not affect the final disposition of a case; the resolution of bail questions generally have no bearing on the process that determines the guilt or innocence of a defendant. Therefore, in many cases, the right regulated and enforced by AS 22.20.022 is not impinged upon by allowing a pre-empted judge to hear matters pertaining to bail.

10. Below, Gieffels stood mute when asked his true name. Upon Gieffels' refusal to answer, Judge Moody revoked bail until Gieffels would answer his true name.
Criminal Rule 10(b)(2)(ii) provides:

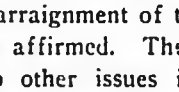
> If the defendant declares no other name to be his true name, the case against the defendant shall proceed under the name which appears in the indictment or information.

If the defendant stands mute, then the case automatically proceeds under the name in the indictment. A positive declaration by the defendant that no other name is his true name is not required. Thus the judge had no discretion to punish Gieffels for standing mute since the rules do not require the defendant to respond.

[19,20] On the other hand, we have consistently recognized the importance of matters concerning both bail [11] and any situation which could lead to the imprisonment, however temporary, of an individual.[12] Inability to meet bail requirements could cause incarceration interfering with a defendant's preparation of his defense. We also recognize that allowing a challenged judge to resolve disputed questions surrounding bail can possibly lead to an unjust temporary imprisonment of an individual. Therefore, if the amount of bail or the conditions thereunder are disputed issues, the setting of bail should be immediately referred to another judicial officer.[13] Furthermore, the defendant should be advised of his right to have bail heard by another judge.

[21] Insofar as Judge Moody as presiding judge refused to disqualify himself prior to the arraignment of the defendant, his action is affirmed. The petition for review as to other issues is denied for mootness.

AFFIRMED IN PART AND DISMISSED IN PART FOR MOOTNESS.



CHAMPION OIL COMPANY, INC., an Alaskan Corporation, Appellant,

v.

Charles F. HERBERT, Commissioner, et al., Appellees.

No. 2395.

Supreme Court of Alaska.

July 19, 1976.

The Superior Court, Third Judicial District, Anchorage, James K. Singleton and Edmond J. Burke, JJ., refu... refiling of suit and refused to ... and plaintiff appealed. The ... Court, Connor, J., held that ... missal after year's inaction by ... failure to prosecute was without ... in absence of indication that ... with prejudice.

Dismissal of refiled ... versed.

Boochever, C. J., filed ... ion.

1. Dismissal and Nonsuit ⇐75

In absence of indication ... dismissal was with prejudice, ... dismissal after over a year's ... want of prosecution was without ... Rules of Civil Procedure, rule 41(...

2. Appeal and Error ⇐905

Where, by virtue of timely ... its "Question of Fact," plaintiff ... dicated that it did not intend to ... motion for summary judgment ... taken, Supreme Court could ... that trial judge, who, inter alia, ... case for failure to prosecute ... granted summary dismissal based ... for summary judgment. Rules ... Procedure, rules 41(e), 56, 77(e).

3. Dismissal and Nonsuit ⇐75

Dismissal after year's ... want of prosecution, whether ... motion or not, is without prejudice ... trial court otherwise specifies. ... Civil Procedure, rule 41(e).

F. T. Wetzel, Salt Lake City, ... Ronald T. West, West & Wood, ... age, for appellant.

Thomas K. Williams, Asst. A... Anchorage, Avrum M. Gross, A... Juneau, for appellees.

11. *See, e. g., Martin v. State*, 517 P.2d 1389 (Alaska 1974); *Gilbert v. State*, 540 P.2d 485 (Alaska 1975).

12. *See, e. g., State v. Browder*, 486 P.2d 925, 933–40 (Alaska 1971); *Baker v. City of Fairbanks*, 471 P.2d 386, 401-... 1970).

13. *State v. Nagel*, 202 P.2d 640, ... 1949), *cert. denied*, 338 U.S. 81... 90, 94 L.Ed. 495, 496 (1949).

Charles R. TUNLEY et al., Appellants and Cross-Appellees,

v.

MUNICIPALITY OF ANCHORAGE SCHOOL DISTRICT et al., Appellees and Cross-Appellants.

Nos. 4796, 4797 and 4826.

Supreme Court of Alaska.

Sept. 12, 1980.

As Amended on Denial of Rehearing Jan. 29, 1981.

Suits by parents of school age children to prevent closure of elementary schools in district were consolidated. The Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, J., granted summary judgment in favor of school district and pa[illegible] appealed. The Supreme Court, Rabinowitz, J., held that: (1) peremptory challenge by one parent or judge was timely; (2) the parent did not, by his actions, waive his right to a peremptory challenge of judge; (3) municipal assembly was authorized to initially determine location of school buildings, but was not inferentially authorized to determine which schools were to discontinue operations; (4) authority to decide whether schools should be closed was vested in school board; (5) approval by the Department of Education was not required before closure action by school board; (6) municipality was required by charter to adopt a procedure for public notice of school board meeting; (7) municipality failed to fulfill requirement, but its failure was not critical to adoption by school board of closure plans; and (8) public notice of five days of school board's meeting concerning school closures was insufficient.

Affirmed in part, reversed in part, and remanded.

1. Judges ⇐51(3)

The principle of *Gieffels* that statute created substantive right to peremptory challenge but that rule of criminal procedure determined whether the right was properly exercised and the procedural effect of peremption applies with equal force to peremptory challenges of a judge in civil proceedings. AS 22.20.022; Rules of Civil Procedure, Rule 42(c).

2. Judges ⇐51(2)

Peremptory challenge to judge which was made by one plaintiff in consolidated cases on day after being notified that his case was effectively reassigned to that judge was "filed before commencement of trial and within five days after notice of that the case had been assigned to a specific judge" and was timely in that plaintiff had notice as to specific judge who would be hearing his case only when consolidation, which both he and other plaintiff opposed, and assignment to particular judge was ordered. AS 22.20.022; Rules of Civil Procedure, Rule 42(c).

3. Judges ⇐52

Plaintiff did not waive his right to a peremptory challenge of judge in school closure case by submitting an affidavit opposing consolidation of his case with another and appearing before judge in hearing on motion to consolidate in that plaintiff had no way of knowing, before judge decided consolidation motion, whether consolidation would be granted and, if so, whether that judge or another would preside over consolidated cases. AS 22.20.022; Rules of Civil Procedure, Rule 42(c)(4).

4. Judges ⇐52

Waiver of right to change a particular judge as a matter of right when one knowingly participates before that judge in any judicial proceeding which concerns merits of action can be found only where requisite participation occurs after party is informed that judge before whom he or she is appearing is judge permanently assigned to hear case or is assigned for trial. AS 22.20.022; Rules of Civil Procedure, Rule 42(c)(4).

5. Schools ⇐92(3)

The school board has an obligation to develop and submit to the municipal assembly a proposed budget for the next fiscal

year and a proposed six-year program for capital improvements and fiscal policies, but the assembly has no legislative power to make appropriations for specific items, programs or priorities provided for the school board's budget and, instead, may increase or decrease the budget of the school district only as to the total amount. AS 14.14.060(d), 14.14.065.

6. Schools ⇐11, 68

The municipal assembly, given the power to condemn property for use as a school site as well as the power to make a decision as to the plans and designs of schools to be constructed and all major rehabilitation, all construction and major repair of school buildings, is authorized to initially determine the location of school buildings, but the assembly is not inferentially authorized to determine which schools are to discontinue operations since the closure of a school does not involve the exercise of the municipality's eminent domain powers, nor does it involve major additional appropriations of municipal funds and in contrast to the municipal government's diminished fiscal and political interests, the school board has strong educational policy interests in deciding which schools are to be closed. AS 14.14.060(d), 14.14.065.

7. Schools ⇐11

The decision as to school closure involves questions of student assignment and attendance areas, which are certainly within the scope of school board authority, rather than that of the municipal assembly. AS 14.12.020(b), 14.14.110, 14.14.120.

8. Schools ⇐154

Pupil assignment and attendance area determinations may be made by a school board as part of its "management and control" authority, subject to statutory and constitutional restrictions. AS 14.12.020(b), 14.14.110, 14.14.120.

9. Schools ⇐11

The assignment power of a school board extended to its logical conclusion, the closing of a school by not assigning any students to a particular school, provides an independent basis for the school board's closure authority. AS 14.12.020(b), 14.14.110, 14.14.120.

10. Schools ⇐11

Given the broad managerial mandate of the school board, and the limited authority of the municipal assembly in educational policy matters, it is the school board which has the authority to decide whether schools should be closed. AS 14.14.060(d), 14.14.065.

11. Schools ⇐11

Requirement in regulation of state approval prior to "discontinuation of schools" is directed only at local, predominantly rural schools. Const. Art. 7, § 1; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

See publication Words and Phrases for other judicial constructions and definitions.

12. Schools ⇐11

Closure action taken by school board with respect to elementary school in school district did not require approval by the Department of Education where the closure did not interfere with the stated purpose of the governing regulations of providing local education. Const. Art. 7, § 1; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

13. Schools ⇐57

Provision of municipal charter that the assembly was to adopt procedures for maximum reasonable public notice of "all meetings" of the school board was inclusive rather than exclusive since the opportunity for public hearing was intended to apply to every public body.

See publication Words and Phrases for other judicial constructions and definitions.

14. Schools ⇐57

The municipal assembly was required by ordinance, requiring the assembly to adopt procedures for maximum reasonable public notice of "all meetings," to adopt a procedure for public notice of the school board meeting with respect to the closure of elementary school within the municipality.

15. Schools ⇐57

Ordinance whereby the municipal assembly gave the school board power to formulate policy for the operation of schools did not fulfill requirement for adoption of public notice procedures mandated by charter for meeting with respect to the closure of elementary schools in municipality where ordinance did not spec[illegible] any procedure for public notice.

16. Schools ⇐11

Failure of municipal assembly to pass required ordinance with respect to public notice procedures was not fatal to validity of elementary school closures where school board did in fact establish detailed meeting times for board meetings and where school closure date and decision was accompanied with extensive publicity and media coverage. Const. Art. 7, § 1; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

17. Schools ⇐11

Any closure decision by school board with respect to elementary schools in districts, in light of impact decision would have on both childrens' and parents' interests in maintenance of neighborhood schools, should have been preceded by a public school board meeting at which those potentially affected were given sufficient notice in order to enable adequate preparation and presentation of their views. Const. Art. 7, § 1; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

18. Schools ⇐11

While school board had given notice that it would consider at its next meeting possible closure of elementary schools in district and that specific recommendations were to be made by administration at that time, where only five days' notice was given to interested residents and parents of exactly which schools were strongly recommended for closure by administration, requirement of ordinance that maximum reasonable public notice be given of closure was not fulfilled. Const. Art. 7, § 11; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

Charles R. Tunley, pro se, Anchorage, for appellant and cross-appellee Tunley.

Joe P. Josephson, Josephson, Trickey & Lorensen, Inc., Anchorage, for appellant and cross-appellee Niebert.

Peter C. Partnow, Hellen & Partnow, Anchorage, for appellees and cross-appellants.

Before RABINOWITZ, C. J., and CONNOR, BURKE and MATTHEWS, JJ.

OPINION AS AMENDED ON REHEARING

RABINOWITZ, Chief Justice.

The school age population of Anchorage is currently about 1,250 students less than it was at peak enrollment in 1976. Although it is debatable whether the decline in student population will continue, it is undisputed that at this time, Anchorage has a surplus of available classrooms, including eighty elementary school rooms. Because it is economically inefficient to operate schools at less than capacity, the Anchorage school administration in their draft Capital Improvement Plan for 1979–85 included school closure as a possible method of dealing with the surplus classroom space.

The Anchorage School Board considered the various options presented in the Capital Improvement Plan, and in a public board meeting on February 15, 1979, decided to close two elementary schools for the 1979–80 school year. The Anchorage school district administration was directed to prepare recommendations on schools amenable to closure.

The district administration decided on its recommendations for closure by ranking all elementary schools in the district according to criteria developed by the administration. The administration ultimately recommended that Woodland Park and Government Hill elementary schools be closed, and their recommendation was adopted by the Anchorage School Board on March 12, 1979. There were no public hearings held before the school board reached its closure decisions, although the school board meetings were open to the public. Government Hill

is leased by the Anchorage Municipality from the Department of the Air Force, and because the lease is limited to school purposes only, the school site may revert to the Air Force if the elementary school is closed.

In a joint meeting of the Anchorage School Board and Municipal Assembly on March 5, 1979, both bodies adopted a resolution returning to the school board any funds obtained from disposal of the sites of the two schools. The municipal assembly did not attempt to assert control over which schools the board would be allowed to close.

Plaintiffs Tunley and Niebert are both the parents of school-aged children who attend Woodland Park and Government Hill elementary schools, respectively. Both parents filed lawsuits to prevent the closure of the schools; the suits were consolidated. The Anchorage School District filed a motion for summary judgment, and plaintiffs responded with a statement of genuine issues and their own motion for summary judgment. Summary judgment was granted in favor of defendants and this appeal followed.

I. *DID THE SUPERIOR COURT ERR IN DENYING NIEBERT'S PEREMPTORY CHALLENGE OF JUDGE RIPLEY?*

Tunley's complaint was filed on March 19, 1979, and Niebert's complaint was filed three weeks later on April 9, 1979. The Tunley case was assigned to Superior Court Judge Ripley, and the Niebert case was assigned to superior Court Judge Singleton. The defendants, the Anchorage School Board and School District Superintendent, John Peper, moved to consolidate these cases and for a hearing on shortened time on the consolidation question. These motions were granted.[1]

On April 13, 1979, the day after the motion to consolidate was granted, Niebert filed a notice of change of judge, in which he "exercise[d] his right to [a peremptory] challenge [of] the Honorable Justin Ripley, Superior Court Judge presently assigned to the action by his Order of April 12, 1979." The defendants subsequently filed a memorandum opposing the requested change of judge, which argued that Niebert had waived his right to a peremptory challenge of Judge Ripley since Niebert had "participated in a Motion to Consolidate the captioned case before Honorable Justin Ripley." The defendants' memorandum further stated:

> At that time, affidavits submitted by both Plaintiffs [opposing consolidation] were before the Court. In addition, the decision on consolidation concerned the merits of the captioned cases in that the Judge had to determine whether or not the cases were sufficiently similar so as to require consolidation.

The presiding judge denied Niebert's peremptory challenge without any statement of reasons, and no indication appears in the record on appeal that any hearing was had on the question.

[1] Peremptory challenge rights are granted litigants by AS 22.20.022.[2] This

1. On April 12, 1979, a hearing was held on this motion before Judge Ripley. Tunley and Niebert voiced their opposition to consolidation on several grounds, chief among which was the existence of different factual and legal issues as to the closing of each school, the concern with the difficulties in coordinating the presentation of their respective cases, and the concern expressed by Niebert's attorney that the expedited pretrial schedule already established in the Tunley case would not allow him adequate preparation time. Judge Ripley decided that consolidation was appropriate in light of the several legal issues common to both cases, though expressly leaving open the possibility of severance at a later time prior to trial on any unresolved factual issues. At the end of the hearing, Judge Ripley said: "The order has been signed consolidating the cases, and they will be assigned to myself."

2. AS 22.20.022 provides:

> *Peremptory disqualification of a superior court judge.* (a) If a party or his attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath that he believes that he cannot obtain a fair and impartial trial, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the

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statute creates peremptory challenge rights in both criminal and civil proceedings. In *Gieffels v. State*, 552 P.2d 661, 667 (Alaska 1976), this court held that AS 22.20.022 created the "substantive right" to a peremptory challenge, but that Alaska Criminal Rule 25(d) is the sole provision which may be consulted in determining whether the peremptory right was properly exercised and in determining the effect of the peremption on the procedural and administrative functions of the court system.[3] The civil rule counterpart to Alaska Rule of Criminal Procedure 25(d) is Alaska Rule of Civil Procedure 42(c), also promulgated by this court in 1974. While the question has not been directly addressed by this court, it seems apparent that the principle of *Gieffels* applies with equal force to peremptory challenges in civil proceedings,[4] and that Alaska Rule of Civil Procedure controls the procedure and scope of such challenges.[5]

hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay.

(b) No judge or court may punish a person for contempt for making, filing or presenting the affidavit provided for in this section, or a motion founded on the affidavit.

(c) The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, which ver event occurs later, unless good cause is shown for the failure to file it within that time.

(d) No party or his attorney may file more than one affidavit under this section in an action and no more than two affidavits in an action.

For an excellent discussion of the development of peremptory challenges in Alaska, *see* Note, *Peremptory Challenges of Judges in the Alaska Courts*, 6 U.C.L.A.—Alaska L.Rev. 269, 271–77 (1977). For a comprehensive review of state peremption statutes generally, *see* Note, *Disqualification of Judges for Prejudice or Bias—Common Law, Evolution, Current Status and the Oregon Experience*, 48 Or.L.Rev. 311 (1969).

3. Alaska R.Crim.P. 25(d), therefore, "regulates only the procedural aspects of the peremptory right created by AS 22.20.022, and to the extent that the rule does not infringe upon the substantive right created by statute, the provisions of Rule 25(d) supersede the legislative enactment." *Gieffels v. State*, 552 P.2d 661, 667–68 (Alaska 1976). *See also Padie v. State*, 566 P.2d 1024, 1029–30 (Alaska 1977).

4. In several civil appeals since *Gieffels*, this court has discussed the validity of peremptory challenges in terms of the requirements of Alaska R.Civ.P. 42(c). *See Priest v. Lindig*, 591 P.2d 1299, 1301 (Alaska 1979); *Esch v. Superior Court of Third Judicial Dist.*, 577 P.2d 1039 1041–42 (Alaska 1978); *Veazey v. Veazey*, 560 P.2d 382, 384 (Alaska 1977). One commentator, discussing the meaning of *Gieffels*, has stated:

> whether the statute or the rules of court govern the Alaska peremptory challenge provisions. The holding concedes to the legislature the power to grant the right to challenge a judge, but not the right to devise a method to effectuate that challenge. Because *Gieffels* was a criminal case, the decision purported to decide only the status of Criminal Rule 25(d). However, because its companion rule, Civil Rule 42(c), provides nearly identical provisions, the rationale for the court's views in *Gieffels* should apply with equal force to a civil case, and there appears to be no reason why the *Gieffels* holding should not be extended to civil cases as well. Indeed, it may be argued that the court has probably accomplished such an extension sub silentio. Therefore, it can be concluded that AS 22.20.022 provides only the *right* to preempt a judge. Insofar as it attempts to set forth any procedural guidelines, it has been thoroughly discredited.

Note, *Peremptory Challenges of Judges in the Alaska Courts*, 6 U.C.L.A.—Alaska L.Rev. 269, 277 (1977) (footnote omitted) (emphasis in original).

5. Alaska R.Civ.P. 42(c) provides, in part:

> *Change of Judge as a Matter of Right.* In all courts of the state, a judge or master may be peremptorily challenged as follows:
>
> (1) *Nature of Proceeding.* In an action pending in the Superior or District Courts, each side is entitled as a matter of right to a change of one judge and of one master. Two or more parties aligned on the same side of an action, whether or not consolidated, shall be treated as one side for purposes of the right to a change of judge, but the presiding judge may allow an additional change of judge to a party whose interests in the action are hostile or adverse to the interests of another party on the same side. A party wishing to exercise his right to change of judge shall file a pleading entitled "Notice of Change of Judge." The notice may be signed by an attorney, it shall state the name of the judge to be changed, and it shall neither specify grounds nor be accompanied by an affidavit. A judge may honor an informal request for change of judge. When he does so, he shall enter upon the record the date of the request and the name of the party or parties requesting change of judge. Such

[2] Since Niebert filed his peremptory challenge of Judge Ripley the day after being notified that his case was effectively reassigned to Judge Ripley,[6] there is no question but that that challenge was timely under Civil Rule 42(c)(3), which provides that a notice of change of judge is timely "if filed before commencement of trial and within five days after notice that the case has been assigned to a specific judge."[7] Niebert had notice as to the specific judge who would be hearing his case only when consolidation, which both he and Tunley opposed, and assignment to Judge Ripley were ordered. Thus, we conclude that Niebert's challenge was timely.[8]

Appellees' opposition to the notice of change of judge was based on the argument that Niebert had waived his right to such a change pursuant to the waiver provisions of Civil Rule 42(c)(4)(i). That section of Rule 42 provides:

> (4) *Waiver.* A party waives his right to change a particular judge as a matter of right when he knowingly participates before that judge in:
>
> (i) Any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or of affidavits; . . .

More particularly, appellees argued that Niebert waived his right to a peremptory challenge by submitted an affidavit opposing consolidation and appearing before Judge Ripley in the hearing on the motion to consolidate.

[3, 4] These actions cannot be said to be a waiver under Alaska Rule of Civil Procedure 42(c)(4) for the following reasons. First, as Niebert's supplemental brief ar

> action shall constitute an exercise of the requesting party's right to change of judge.
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> . . . .
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> (3) *Timeliness.* Failure to file a timely notice precludes change of judge as a matter of right. Notice of change of judge is timely if filed before commencement of trial and within five days after notice that the case has been assigned to a specific judge. . . . Where a party enters an action after the case has been assigned to a specific judge, a notice of change of judge shall also be timely if filed by the party before the commencement of trial and within five days after he appears or files a pleading in the action.
>
> (4) *Waiver.* A party waives his right to change a particular judge as a matter of right when he knowingly participates before that judge in:
>
> (i) Any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or of affidavits; or
>
> (ii) A pretrial conference; or
>
> (iii) The commencement of trial; or
>
> (iv) If the parties agree upon a judge to whom the case is to be assigned. Such waiver is to apply only to the agreed-upon judge.

6. Judge Ripley intended that the actions brought by Tunley and Niebert retain their separate identity, as he expressly left open the possibility that they might be severed should trial become necessary. In this analytical context, Judge Ripley's consolidation of these cases and assignment of himself as trial judge was, as he recognized, tantamount to a reassignment of Niebert's case from Judge Singleton to himself.

7. *See Hartford Accident & Indem. Co. v. State*, 498 P.2d 274 (Alas[illegible] 1972), where we stated that "an action is not 'assigned to a judge' within the meaning of AS 22.20.022(c) until it has been assigned to a particular judge and a reasonable attempt has been made to notify the parties before the court of that assignment." *Id.* at 276 (footnote omitted) (emphasis in original). *See also Pope v. State*, 478 P.2d 801, 803–04 (Alaska 1970), *reh. denied*, 480 P.2d 697 (Alaska 1971); *Roberts v. State*, 458 P.2d 340, 346 (Alaska 1969).

8. This conclusion effi[illegible]ates the purpose of Civil Rule 42(c)(3) and preserves the separate identity of the Niebert lawsuit. *See Roberts v. State*, 458 P.2d 340, 346 (Alaska 1969) (discussing the purpose of time requirements under AS 22.20.022); *Pope v. State*, 478 P.2d 801, 804 (Alaska 1970), *reh. denied*, 480 P.2d 697 (Alaska 1971), in which we stated:

> Appellant correctly points out that the granting of the five-day period is to allow a party or his attorney an opportunity to investigate the judge to whom the case is assigned and if necessary file the requisite affidavit for disqualification, thus avoiding the waste of judicial time which would result if an affidavit or disqualification were not filed until the date of trial because this would mean that the case would have to be continued until another judge could be assigned and the disqualified judge would not be ready at that time to start the trial of another action. [footnote omitted]

See also McCracken v. State, 521 P.2d 499, 510–11 (Alaska 1974); 5 Moore's Federal Practice § 42.02, at 42–21 to 42–22 (1979).

gues, the section requires that a party "knowingly" participate before the challenged judge. Niebert's supplemental brief states:

> Niebert appeared before Judge Ripley, too whom the Tunley case had been assigned, *solely* to oppose defendants' motion to consolidate the two cases. Niebert had no way of knowing, before Judge Ripley decided the consolidation motion, whether consolidation would be granted, and, if so, whether Judge Singleton or Judge Ripley would preside over the consolidated cases.

This requirement of a knowing waiver requires that waiver can be found only where the requisite participation occurs after the party is informed that the judge before whom he or she is appearing is the judge permanently assigned to hear the case or is assigned for trial. Any other interpretation would be inconsistent with the apparent reason for this scienter requirement[9] and with the due process right to a fair and impartial trial judge which Alaska's peremptory challenge provisions are designed to liberally ensure.[10] In this sense, Niebert cannot be said to have "knowingly" participated before Judge Ripley in this case and to have waived his peremptory challenge rights.[11] The superior court's erroneous denial of Niebert's notice of change of judge must be reversed and Niebert's action remanded with directions that Niebert's case be considered by a superior court judge other than Judge Ripley.[12] However, this

9. One commentator has suggested the following as the origin of the requirement of knowing participation in Alaska R.Civ.P. 42(c)(4):

> The element of scienter in the waiver derives from the practice of the Fourth Judicial District (Fairbanks) not to assign judges to specific cases until the actual hearing date, which makes timely challenge impossible. The court has implored the Fourth Judicial District to change its policy in three different cases: *Hartford Accident & Indem. Co. v. State*, 498 P.2d 274, 275–76 n.5 (Alaska 1972); *Pope v. State*, 478 P.2d 801, 803, *reh. denied*, 480 P.2d 697 (Alaska 1971); and *Roberts v. State*, 458 P.2d 340, 346 (Alaska 1969).

Note, *supra* note 4, at 288 n.119. If this explanation is correct, then knowing participation requires knowledge that the judge before whom one is participating is the one to whom the case is permanently assigned or assigned for trial.

In *Riley v. State*, 608 P.2d 27, 29 (Alaska 1980), we held that knowing waiver requires that the party have the opportunity to consult with counsel before the time to exercise his challenge has expired.

10. While due process certainly does not require the essentially automatic disqualification right provided in AS 22.20.022 and Alaska R.Civ.P. 42(c), this court has recognized the due process values embodied in these provisions. *See, e. g., Kvasnikoff v. State*, 535 P.2d 464, 465 & n.3 (Alaska 1975); *In re G.K.*, 497 P.2d 914, 915 (Alaska 1972) (both cases discussing AS 22.20.-022).

11. Implicit in our holding is the conclusion that Niebert had the right to a peremptory challenge, since the consolidation here should not serve to deprive him of this substantive right. In *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977), this court recognized peremptory challenge rights in favor of a guardian ad litem appointed to represent a child in child custody proceedings. In *Veazey*, we held that the guardian ad litem had the same rights in that respect as the original parties in the action and that those rights attached when an order was entered formally appointing him guardian. *Id.* at 385. *See also* Annot., *Intervenor's Right to Disqualify Judge*, 92 A.L.R.2d 1110, 1112 (1963), which states:

> Once an application for leave to intervene has been granted, the intervenors are parties to the litigation and as such entitled to all rights enjoyed by parties to the record in the original action, including, according to the doctrine upheld by several decisions, the right to apply for disqualification of the judge.

Similarly, we have recognized the right to a peremptory challenge of a judge to whom one's case is reassigned. *See Priest v. Lindig*, 591 P.2d 1299, 1301 n.4 (Alaska 1979) (dicta). Niebert's status in this case cannot be fairly distinguished from these other contexts.

12. Alaska R.Civ.P. 42(c)(5) provides, in part:

> *Assignment of Action.* After a notice of change of judge is timely filed, the presiding judge shall immediately assign the matter to a new judge within that judicial district.

Therefore, if the notice of change of judge is timely and otherwise proper, the presiding judge has no discretion and must reassign the case to another judge. *See, e. g., Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570, 574 & n.9 (Alaska 1969) where we described the effect of a timely peremptory challenge under AS 22.20.022:

> [T]he judge concerned is at once disqualified from acting as a judge in the particular action or proceeding. When he is disqualified

does not allow us to avoid reaching the merits of the case, since Tunley's status, under these circumstances, is not affected by our remand of Niebert's case due to the superior court's erroneous denial of Niebert's notice of change of judge.[13] We therefore turn to the substantive aspects of this appeal.

II. *DID THE ANCHORAGE SCHOOL BOARD HAVE THE AUTHORITY TO CLOSE THE WOODLAND PARK ELEMENTARY SCHOOL?*

Tunley argued in his summary judgment memorandum that, pursuant to AS 14.14.060(d) and AS 14.14.065, the Anchorage Municipal Assembly was the only local authority which had the power to close Woodland Park Elementary School. The superior court, in its conclusions of law, ruled in part that:

> The decision to cease sending students to a particular elementary school site does not require action by a Municipal Assembly pursuant to AS 14.14.060(d) as made applicable to a municipality by AS 14.14.065, or through any other provision of state law or municipal charter or ordinance. To the contrary, the closures involved in the instant case involve essentially a decision relative to student assignment and reassignment which decisions are committed by state statute and the Alaska Constitution to the local school boards through delegation by the legislature.

Tunley has specified this ruling as error. AS 14.14.060(d) provides:

> The borough assembly shall determine the location of school buildings with due consideration to the recommendations of the borough school board.

As the superior court noted, this provision is also made applicable to the home rule Municipality of Anchorage in its relationship with the Anchorage School Board by AS 14.14.065.[14]

Tunley argues that if the municipal assembly is given the duty to "determine the location" of schools, it must be implied that this includes "the exclusive power to close" and "abandon" schools. Enumerating the other subject areas in which the municipal assembly has been given authority over the school board by the legislature,[15] Tunley concludes that the school board has no power to close schools and that the power is implied in the assembly's power to establish schools. We think that an explanation of the general Alaska scheme allocating edu-

> he no longer possesses the qualities necessary to act as a judge, i. e., the qualities of power, capacity, fitness or competency to proceed further. In short, when a proper affidavit has been timely filed, the judge involved is without power or jurisdiction to take any further action in the proceeding. If this were not the intent and effect of the statute, then it would be meaningless and ineffective.

Id. at 574 (footnote omitted). *See also Hartford Accident & Indem. Co. v. State*, 498 P.2d 274, 275 (Alaska 1972); *Pope v. State*, 478 P.2d 801, 804 (Alaska 1970), *reh. denied*, 480 P.2d 697 (Alaska 1971). After the promulgation of Alaska R.Civ.P. 42(c) and Alaska R.Crim.P. 25(d), this court recognized the common law rule that a judge removed by a peremptory challenge can perform nondiscretionary or ministerial acts. *Gieffels v. State*, 552 P.2d 661, 666 (Alaska 1976). *Gieffels* modified the rule of *Channel Flying, Inc.* to allow a disqualified judge to take procedural or administrative action which does not interfere with the substantive rights of a defendant, thus upholding that part of Alaska R.Crim.P. 25(d) which provides that a disqualified presiding judge may continue to perform the functions of the presiding judge. 552 P.2d at 666–69. *See also Padie v. State*, 566 P.2d 1025, 1029–30 (Alaska 1977).

13. Tunley did not join in Niebert's application for change of judge, nor did he claim the issue as error on appeal. At oral argument, he admitted his time to challenge Judge Ripley had already passed. As to the issues raised in the municipality's cross-appeal, we need not address these because of the remand we have ordered.

14. That statutory section provides as follows:

> *Relationship between city school district and city.* The relationships between the school board of a city school district and the city council and executive or administrator are governed in the same manner as provided in § 60 of this chapter for the school board of a borough school district and the borough assembly and executive or administrator.

15. See the provisions of AS 14.14.060, which is made applicable to the Municipality of Anchorage by AS 14.14.065, *supra* note 14.

cational authority suggests that the conclusion urged by appellees, and accepted by the superior court, is preferable.[16]

The Anchorage School Board was created by the authority of the state legislature, and is the delegated state authority to govern its school district and manage the operations of the schools within that district.[17] The number of members on the Anchorage School Board,[18] its powers and duties,[19] and its relationship with the municipal government[20] are typical matters resolved by Alaska statutes. While the school board is elected by the same voters as is the municipal assembly, and is also a part of the Municipality of Anchorage, it is a legislative body with legal responsibilities which in important respects are distinct from those exercised by the assembly.[21]

[5] Nowhere is the independent status of the Anchorage School Board more apparent than in school system budgetary matters. The Anchorage Municipal Assembly and the School Board are required to hold joint conferences "at least four (4) times yearly in public session to discuss and coordinate financial planning, capital improvement needs, the comprehensive plan, and other matters of mutual concern." Anch. Mun.Charter § 6.04; Anch.Mun.Code § 29.-20.010. However, while the school board has an obligation to develop and submit to the municipal assembly a "proposed budget for the next fiscal year and a proposed six-year program for capital improvements and fiscal policies," Anch.Mun.Code § 29.-20.020, the assembly has no legislative power to make appropriations for specific items,

16. We are not concerned here with an actual effort by the municipality by ordinance or charter to control aspects of education other than as specifically authorized by the legislature. Accordingly, we are not confronted with an issue involving the extent of home rule powers under Alaska Const. Art. X, § 11, by which a home rule municipality "may exercise all legislative powers not prohibited by law or by charter." The school board does argue that § 17.05 of the Anchorage Municipal Charter (see sections IV and V, *infra*) could potentially be used by the assembly to unauthorizedly control such areas of education, an argument in which we see no merit for the reasons discussed in n.33, *infra*.

17. *See Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971). This delegation of authority is common:

> Historically, Americans have considered schools to be an extension of the local community. Thus, although state legislatures possess plenary power over the educational system, local initiative with respect to education is so highly regarded that most states have delegated extensive authority over the actual administration of the schools to local institutions. States have divided their territory into "school districts" that perform the sole function of establishing and maintaining the public schools. Boards of education, commonly referred to as school boards, have been created as the governing body of the school district and are typically responsible for the day-to-day operation of the public schools.

Project, *Education and the Law: State Interests and Individual Rights*, 74 Mich.L.Rev. 1373, 1380 (1976) (footnotes omitted). *See also* 3A C. Antieau, Local Government Law § 30Q:5.01, at 30Q–44 to 30Q–46 (1979).

18. *See* AS 14.12.030(b) ("city school district with an average daily membership exceeding 5,000 has a school board of seven members"); Anch.Mun.Charter § 6.01 (seven person school board). *See also* AS 29.23.310 (providing basic requirements for election of school board members "unless a different election date or interval of years is provided by ordinance"). "Composition of the local school boards and their manner of election or appointment are regularly governed by statute." 3A C. Antieau, *supra* note 17, at 30Q–45. *See* AS 14.12.050 (school board terms); AS 14.12.070 (vacancies on school board); AS 14.12.090 (oath required of members).

19. *See, e. g.*, AS 14.14.090 (additional duties of school board).

20. *See* AS 14.14.060; AS 14.14.065.

21. The Anchorage School Board's plenary educational authority is recognized by the Anch. Mun.Charter § 6.03:

> *Powers of the School Board.* The School Board has the powers provided by law, including but not limited to, the power to:
>
> (1) formulate policy for the operation of the schools;
>
> (2) appoint and provide for suspension and removal of school personnel, including the superintendent;
>
> (3) serve as a board of personnel appeals;
>
> (4) generally supervise School District fiscal affairs, including preparation and submission of the annual budget and six-year plan.

See also Anch.Mun.Code § 29.10.040 (reiterating these school board powers).

programs or priorities provided for by the school board's budget. Instead, "[t]he Assembly may increase or decrease the budget of the School District only as to total amount." Anch.Mun.Charter § 6.05(b); Anch.Mun.Code § 29.20.030.

This general absence of municipal assembly legislative appropriations power is particularly striking in light of the large proportion of municipal revenues devoted to the school system budget. *See* Anch.Mun. Code § 21.05.075A ("Nearly 70% of the local tax dollar now goes to elementary and secondary educational programs."). It is this budgetary and political reality which in all likelihood prompted the state legislature to give municipal assemblies certain powers with regard to school board budgetary and accounting processes in AS 14.14.060(a)–(c), and with regard to certain major capital expenditures for the design, construction, and repair of schools in AS 14.14.060(d)–(f). Among the latter areas of authority allowed, the assembly has the power, provided in AS 14.14.060(d), the breadth of which is in dispute in the case at bar, to determine the location of school buildings with due consideration to the recommendations of the . . . school board."

[6] If seen in this perspective, the school board's argument in this case that AS 14.14.060(d) only gives the municipal assembly the authority to initially determine the location of school buildings makes a great deal of sense. Since, as the school board concedes, the municipality, and not the school board, has the power to condemn property for use as a school site, the municipal assembly has a strong interest in and reason for making the decision as to school site selection. This is consistent with the municipality's exercise of eminent domain powers and its obligation to compensate the owners of property condemned for school purposes.[22] To allow the municipal assembly to determine the site of schools to be built in AS 14.14.060(d) is also consistent with the succeeding subsections (e) and (f) of that statute, which grant the assembly decision-making power with respect to the plans and designs of schools to be constructed and "all major rehabilitation, all construction and major repair of school buildings."

This statutory consistency is not furthered by also inferring assembly power to determine which schools are to discontinue operations. The closure of a school does not involve the exercise of the municipality's eminent domain powers, nor does it involve major additional appropriations of municipal funds. Furthermore, in contrast to the municipal government's diminished fiscal and political interests, the school board has strong educational policy interests in deciding which schools are to be closed. This decision effectively determines the size, the design, and therefore the nature of the educational programs of the schools which remain open.

[7–9] Similarly, as the school board argues, the closure decision involves questions of student assignment and attendance areas, which are certainly within the scope of school board authority, rather than that of the municipal assembly. In this regard, AS 14.12.020(b) provides:

> Each borough or city school district shall be operated on a district-wide basis under the management and control of a school board.

It is clear that pupil assignment and attendance area determinations may be made by a school board as a part of its "management and control" authority, subject to statutory and constitutional restrictions.[23] This as-

22. *See* AS 29.73.020 ("A home rule or general law municipality may exercise the powers of eminent domain . . . ."); AS 09.55.240(a)(3) (right of eminent domain may be exercised for "public buildings and grounds for the use of . . . [a] school district"). The procedures for exercising eminent domain powers are detailed in AS 09.55.290 to AS 09.55.460. *See also* Alaska R.Civ.P. 72. Article I, § 18 of the Alaska Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." *See Greater Anchorage Area Borough v. 10 Acres*, 563 P.2d 269 (Alaska 1977).

23. *See, e. g., Older v. Board of Educ.*, 27 N.Y.2d 333, 318 N.Y.S.2d 129, 266 N.E.2d 312, 813 (N.Y.1971) ("It cannot be denied that the power

signment power extended to its logical conclusion—the closing of a school by not assigning any students to the particular school—provides an independent basis for the school board's closure authority in the case at bar.[24]

[10] Given the broad managerial mandate of the school board, and the limited authority of the municipal assembly in educational policy matters, we think that it is the school board which has the authority to decide whether schools should be closed.

III. *DID THE ANCHORAGE SCHOOL BOARD HAVE THE AUTHORITY TO CLOSE WOODLAND PARK ELEMENTARY SCHOOL WITHOUT COMPLYING WITH 4 AAC 05.090?*

In the superior court, Tunley argued that 4 AAC 05.090 required the school board to obtain the approval of the Alaska Department of Education before closing these schools. The superior court ruled that "[t]he school closures involved in this case did not require the prior approval of the Department of Education pursuant to 4 AAC 05.090 or otherwise."

The Alaska Constitution,[25] as interpreted by this court, provides a clear "mandate for pervasive state authority in the field of education."[26] The state agency which has been delegated the state's general authority in this regard is the Department of Education.[27] The governing body of this state department is the state Board of Education, which is empowered to promulgate any regulations which are necessary to carry out the state's educational mandate.[28]

It was pursuant to this regulatory power that the Department of Education promulgated 4 AAC 05.090, which provides:

> *DISCONTINUATION OF SCHOOLS.* Once provision of a school in a community has been initiated by undertaking major renovation of an existing facility or construction of a new facility, that school may only be discontinued through action of the governing body of the district. Plans for discontinuation of a school under this section must be submitted to the department for approval and may not be executed until they are approved. Plans will be considered approved if the department does not disapprove them within 90 days after submission.

The flaw in Tunley's position is apparent when one examines the general scheme of the regulatory chapter of which 4 AAC 05.090 is a part. Chapter 05 of the Department of Education's regulations is entitled "LOCAL EDUCATION," and was promulgated with an effective date of September 3, 1976, to implement the state's policies, which were developed as a part of litigation on settlement in the *Hootch* case, on local education in rural communities. *See Hootch v. Alaska State-Operated School System*, 536 P.2d 793 (Alaska 1975). *See also Tobeluk v. Lind*, 589 P.2d 873, 875 (Alaska 1979). The purpose of chapter 05 is stated as follows:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State ....

to assign pupils to sc' ols within the district is a power that is 'rea nably necessary' to the management and con rol of the educational affairs of the district."). *also* AS 14.14.110; AS 14.14.120.

24. *See Wells v. Board of Educ.*, 289 S.W.2d 492, 494 (Ky.App.1956) (authority to transfer children to other subdistricts interpreted to allow discontinuance in school). *See also* 2 E. Yokley, Municipal Corporations § 388, at 313 (1957) (where authorized by statute, board may abandon and close a school and order students to transfer to another school).

25. Alaska Const. Art. VII, § 1 provides, in part:

26. *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971). *See* AS 14.03.010 (establishing "in the state a system of public schools to be administered and maintained as provided in this title").

27. *See* AS 14.07.010; AS 14.07.020.

28. *See* AS 14.07.075 (creating Board of Education consisting of seven members); AS 14.07.060 (requiring Board of Education to promulgate regulations "necessary" to implement state educational policy). *See also* AS 14.07.020 (duties of Department of Education).

4 AAC 05.010. *PURPOSE.* (a) The purpose of this chapter is to ensure that, consistent with the desires of parents and of local communities, the school-age children in the State of Alaska have the opportunity to attend an elementary or secondary school in the local communities in which they reside.

(b) Nothing in this chapter is intended to require the construction of a new facility in which to conduct a school established pursuant to this chapter, if there exists in the community a suitable facility in which the school may be conducted.

While "community" is broadly defined to include "a home-rule city, city of any class, and incorporated and unincorporated villages," 4 AAC 05.020, the apparent focus of these regulations is on the provision of local schools in rural Alaska based on the following principle:

4 AAC 05.030. *LOCAL EDUCATION.* (a) Every child of school age has the right to a public education in the local community in which he resides.

(b) Neither the department nor the district may require a child to live away from the local community in which he resides to obtain an education.

Accordingly, the regulations of the chapter are addressed to: establishing schools or school programs in communities in which a threshold number of children available to attend such schools resides; delineating the power of local school committees and school district governing boards in the process by which local schools are to be established: providing time requirements and exceptions thereto for this process of establishing local schools; and setting standards and procedures on such matters as program planning and evaluation, school curriculum, and personnel.

[11, 12] Read in the context of this chapter's sole purpose of establishing local, rural community school services, the requirement of state approval prior to "discontinuation of schools" of 4 AAC 05.090 would seem to be imposed on a more narrow class of schools than Tunley suggests; it would seem to be directed only at local, predominantly rural schools established pursuant to the regulatory chapter of which it is a part. We find this is the most sensible interpretation and apparently is the interpretation placed on 4 AAC 05.090 by the state Department of Education,[29] which makes this case a most appropriate one for adhering to the oft-stated rule that a reviewing court will give deference to an agency's interpretation of its own regulations.[30] Since the closure of the Woodland Park Elementary School did not interfere with the stated purpose of chapter 05 of providing local education, *see* 4 AAC 05.030, we hold that 4 AAC 05.090 does not require State Department of Education approval of that closure action by the Anchorage School Board. Thus, we conclude that the superior court did not err in so deciding this issue.

29. In an April 16, 1979, letter from Anchorage School Superintendent John Peper to State Commissioner of Education Marshall Lind, Peper inquired whether 4 AAC 05.090 applied "to the closure of locally constructed schools built by a city or borough school district prior to the adoption of 4 AAC 05.090 in 1976." Lind replied in a letter dated April 20, 1979:

> The department is not prepared to address the retroactive effect, if any, of 4 AAC 05.090. Nevertheless, it is my view, concurred in by the Department of Law, that 4 AAC 05.090 is inapplicable to the closures of Woodland Park Elementary School and the Government Hill Elementary School since 4 AAC Chapter 5 requires prior approval of the department only where closure necessitates a child attending the school subject to closure to live away from the local community in which he or she resides in order to obtain an education.

30. *See, e. g., Department of Highways v. Green*, 586 P.2d 595, 602 n.21 (Alaska 1978), in which we stated:

> An administrative agency's interpretation of its own regulation is normally given effect unless plainly erroneous or inconsistent with the regulation. 1A C. Sands, Sutherland Statutory Construction § 31.06, at 362 (4th ed. 1972). *See Udall v. Tallman*, 380 U.S. 1, 4, 85 S.Ct. 792, 795, 13 L.Ed.2d 616, 619 (1965); *Burglin v. Morton*, 527 F.2d 486, 490 (9th Cir. 1975), *cert. denied*, 425 U.S. 973, 96 S.Ct. 2171, 48 L.Ed.2d 796 (1976).

IV. *WAS THE ASSEMBLY OF THE MUNICIPALITY OF ANCHORAGE REQUIRED BY SECTION 17.05 OF THE ANCHORAGE MUNICIPAL CHARTER TO ADOPT A PROCEDURE FOR PUBLIC NOTICE OF THE SCHOOL BOARD MEETING?*

The next issue is whether the superior court erred in not holding that Section 17.05 of the Anchorage Municipal Charter required the assembly to adopt procedures for reasonable public notice of school board meetings, and that the adoption of school closure recommendations was invalid in the absence of such regulations.[31] The full text of section 17.05 is:

> (a) All meetings of the Assembly, the School Board and other boards and commissions shall be public. The Assembly by ordinance shall adopt procedures for maximum reasonable public notice of all meetings. At each such meeting the public shall have reasonable opportunity to be heard. An executive session may be held to discuss pending litigation or any matter the immediate public knowledge of which would tend to affect adversely the finances of the municipality or to defame or prejudice the character or reputation of any person. The general matter for consideration in executive session shall be expressed in the motion calling for the session. No official action may be taken in executive session.
>
> (b) Except in emergency, the Assembly, School Board, and all municipal boards and commissions may take no official action between the hours of twelve midnight and 7:00 o'clock a. m., actual time. Action taken in violation of this paragraph is void.[32]

Both Tunley and the school board rely on only the first two sentences of part (a). Tunley argues that the requirement that the assembly adopt procedures for public notice for "all meetings" in the second sentence applies to the "assembly, the School Board, and other boards and commissions" mentioned in the first sentence of the statute. The school board argues that, on the contrary, the requirement of adoption of an ordinance for public notice applies only to the assembly's meetings, and not to those of the school board and other commissions.

The first sentence of Section 17.05 clearly establishes that all meetings of the assembly, school board, and other commissions shall be public. However, the "all meetings" clause in the second sentence is ambiguous; it could reasonably require the assembly to adopt an ordinance for public notice of every board's or commission's meeting or only those of the assembly.

[13, 14] Section 17.05 of the Anchorage Municipal Charter applies to all public meetings, not just those of the assembly. The "all meetings" in the first sentence clearly applies to meetings of the school board. The normal construction of the "all meetings" in the second sentence, considered in the context of the entire section on public meetings, would include the school board and other commissions in its procedural requirement of proper notice. If only the assembly was to be governed by the sentence, this could have been made clear by use of the word "its" rather than "all." The more comprehensive interpretation is strengthened by the third sentence, which reads, "[a]t each such meeting the public shall have reasonable opportunity to be heard." If the school board's interpretation of the statute is accepted, then "each such meeting" would logically apply only to assembly meetings. We think that the opportunity for public hearing was intended to apply to every public body, including the school board, and this requires that "all meetings" in the second sentence be inclu-

31. Although this issue was originally raised by Niebert, we note that Tunley did object to the conclusions of law of the superior court judge on this point. Since the cases were consolidated, since both the judge below and appellee on appeal had a chance to address the issue due to Niebert's raising it, and since we regard § 17.05 as a preferable ground of decision to the due process argument raised by Tunley, we choose to address the point here.

32. This identical provision is in § 1.25.010 of the Anchorage Municipal Code.

sive rather than exclusive. Thus, we conclude that Tunley's interpretation of Section 17.05 of the Charter is the more reasonable one.

[15] The school board argues, in the alternative, that the assembly fulfilled its responsibility to enact an ordinance for notice of school board meetings by enacting Municipal Code § 29.10.040, which provides in part:

> The School Board has the powers provided by law, including but not limited to, the power to:
>
> A. Formulate policy for the operation of the schools.

However, this ordinance does not specify any procedure for public notice and thus does not fulfill the requirement for adoption of public notice procedures mandated by Section 17.05 of the Charter.

[16] Since we have found that the assembly had the duty to enact an ordinance for public notice of school board meetings, and failed to do so, the issue is whether the assembly's failure is critical to the adoption by the Anchorage School Board of the closure plan. The Anchorage School Board did in fact establish detailed meeting times for board meetings, and the school closure debate and decision was accompanied by extensive publicity and media coverage. If in fact ample notice was given by the school board, the failure of the assembly to pass the required ordinance would not be fatal to the validity of the school closure.[33] In that event the underlying purposes of § 17.05 of the charter—ensuring "maximum reasonable public notice" of all meetings and affording the public a "reasonable opportunity to be heard"—will have been satisfied. We turn next to the question of whether such notice was given.

V. *WAS APPROPRIATE PUBLIC NOTICE OF SCHOOL BOARD'S MEETING CONCERNING THE SCHOOL CLOSURES GIVEN?*

The relevant facts pertaining to this question are as follows. The issue of school closure first arose in December 1978, when the administration submitted to the Anchorage School Board a draft Capital Improvement Plan for 1979 through 1985. School closure was mentioned as one option, because of excess classroom capacity and budgetary pressures. The Capital Improvement Plan was considered by the school board on January 17, 1979, at a work session. On February 15, 1979, in a public meeting, the school board voted to close two elementary schools for the 1979–80 school year. On February 15, there existed a list of schools which might be closed, but no definite recommendations had been made. This list included Woodland Park Elementary School and Government Hill. In its regular February 19 meeting, the school board directed the administration to prepare recommendations on specific schools amenable to closure by March 12, 1979. This decision was widely reported in the local media. The schools recommended to be closed, Woodland Park and Government Hill, were publicly disclosed on March 7, 1979, five days before the school board's March 12 meeting, and were published in local papers. The agenda for the March 12 meeting, which indicated that consideration of the closure recommendations would occur at that time, was also publicized. At the public meeting of March 12, the Anchorage

33. The school board argues that, under appellant's interpretation of § 17.05, the assembly could, by refraining from adopting an appropriate ordinance, totally frustrate the school board's ability to take action on any subject, in violation of state law. *See Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971). However, implicit in our discussion of the reasonableness of the five-day notice actually given by the school board is the premise that, were the actual notice given sufficiently detailed and timely in relation to the meeting, the purposes of § 17.05 would be served whether or not the assembly actually passed the ordinance. As such, any party would be unable to show the requisite prejudice stemming from the assembly's failure to pass an ordinance, and thus the board's actions would not be invalid on that ground. We thus reject the suggestion that the assembly could effectively paralyze the board by refusing to pass the required statute.

School Board adopted the administration's recommendation of closing Woodland Park and Government Hill.[34] Thus, there was a five-day period between the announcement of the probable closure of the Woodland Park and Government Hill schools and the final adoption of the closure plan.

Determination of this last remaining issue depends on whether the five day notice provided by the school board fulfills the expressed purposes of § 17.05 of the charter in the context of this case.

[17] In light of the impact any closure decision would have on both the child's and parent's interests in the maintenance of neighborhood schools, any closure decision should have been preceded by a public school board meeting at which those potentially affected were given sufficient notice in order to enable adequate preparation and presentation of their views. While the school board, at its February 15 meeting had given notice that it would consider at its next meeting on March 12 the possible closure of schools and that specific recommendations were to be made by the administration at that time, there was only five days notice to interested residents and parents of exactly which schools were strongly recommended for closure by the administration.

[18] Five days is not sufficient time for appropriate preparation of opposition concerning an issue of this complexity and importance. Further, such short notice lessens the likelihood of a fair hearing before the school board and of the school board reaching a reasoned administrative decision. For these reasons we conclude that the five-day notice given did not satisfy the purposes of § 17.05 of the charter.[35]

Since our holding is that the five-day notice was insufficient, this case is remanded to the superior court with directions to remand to the school board to conduct the public hearing after adequate notice.[36]

As to Tunley, we Affirm in part, Reverse in part, and Remand for further proceedings in conformity with the foregoing.

As to Niebert, the superior court's grant of summary judgment is Reversed and Vacated and the matter Remanded to the superior court for further proceedings and reassignment to a different superior court judge.

BOOCHEVER, J., not participating.

34. In summary, the timing of the process was:

1.	December, 1978	Submission to board of draft Capital Improvement Plan
2.	January 17, 1979	Special board work session to consider plan
	(29 days)	
3.	February 15, 1979	Board voted to close two elementary schools for 79–80 year
	(4 days)	
4.	February 19, 1979	Board directed administration to prepare recommendations on closure
	(16 days)	
5.	March 7, 1979	Closure recommendations made public
	(5 days)	
6.	March 12, 1979	Closure recommendations for Woodland Park and Government Hill adopted by the school board

35. Implicit in this is our conclusion that the notice required by Section 17.05 includes reasonable notice of the subject of each meeting. Without such a requirement the public can hardly be said t have been afforded "a reasonable opportunity to be heard" as required by the charter. As Antieau states:

> It is the general rule that a required notice of meeting should unambiguously set forth reasonable information concerning the subject matter of the meeting to the end that adequate warning be given to all persons whose rights and interests may be affected by action of the local governing body.

1 C. Antieau, Municipal Corporation Law § 4.02 at 4–7 (1980).

36. We have examined Tunley's claim of discrimination against his child because of race and have concluded that this claim is without merit. Similarly, we are of the view that Tunley's assertion that there existed genuine issues of material fact which prevented entry of summary judgment is also lacking in merit.

5-0116A
Ford
2/3/87

IN THE HOUSE BY GRUENBERG

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the jurisdiction of the superior and district courts, judicial disqualification and impeachment, the procedure for judicial retirement due to incapacity or disability, and proceedings before magistrates."

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

* Section 1. AS 09.30.200 is amended to read:

Sec. 09.30.200. FILING AND STATUS OF FOREIGN JUDGMENTS. A copy of a foreign judgment authenticated in accordance with the Act of Congress or the laws of this state may be filed in the office of the clerk of the [SUPERIOR] court <u>with jurisdiction in</u> [OF] this state. The clerk shall treat the foreign judgment in the same manner as a <u>domestic</u> judgment [OF THE SUPERIOR COURT]. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a <u>domestic</u> judgment [OF THE SUPERIOR COURT] and may be enforced or satisfied in like manner.

* Sec. 2. AS 09.30.220 is amended to read:

Sec. 09.30.220. STAY. (a) If the judgment debtor shows the [SUPERIOR] court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has

furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the [SUPERIOR] court any ground upon which enforcement of a judgment of the [SUPERIOR] court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment that [WHICH] is required in this state.

* Sec. 3. AS 09.30.230 is amended to read:

Sec. 09.30.230. FEES. A person filing a foreign judgment shall pay to the clerk of court the fee prescribed for the filing of an action. Fees for docketing, transcription, or other enforcement proceedings shall be as provided for domestic judgments [OF THE SUPERIOR COURT OF THIS STATE].

* Sec. 4. AS 09.43.170 is amended to read:

Sec. 09.43.170. COURT, JURISDICTION. In AS 09.43.010 - 09.43.180, the term "court" means the [SUPERIOR] court with jurisdiction in [OF] this state. The making of an agreement described in AS 09.43.010 providing for arbitration in this state confers jurisdiction on the [SUPERIOR] court to enforce the agreement under AS 09.43.010 - 09.43.180 and to enter judgment on an award under the agreement.

* Sec. 5. AS 22.07 is amended by adding a new section to read:

Sec. 22.07.075. IMPEACHMENT. A judge of the court of appeals is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court

shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in a court on the same or related charges.

* Sec. 6. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $35,000 [$25,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $35,000 [$25,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $35,000 [$25,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value [OF THE PROPERTY OR] of the arrears and damage to the property does not exceed $35,000 [$25,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed $35,000 [$25,000];

(8) for the recovery of money or damages in motor vehicle

tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $35,000 [$25,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020.

* Sec. 7. AS 22.15.120 is amended to read:

Sec. 22.15.120. LIMITATIONS ON PROCEEDINGS WHICH MAGISTRATE MAY HEAR. A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows,

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed $5,000;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $5,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $5,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try and enter judgments in all cases involving

infractions under AS 28, violations under AS 11, and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70.

* Sec. 8. AS 22.15 is amended by adding a new section to read:

Sec. 22.15.205. IMPEACHMENT. A district judge is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in the courts on the same or related charges.

* Sec. 9. AS 22.20.020(a) is repealed and reenacted to read:

(a) A judicial officer may not act in a matter in which

(1) the judicial officer is a party;

(2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;

(3) the judicial officer is a material witness;

(4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;

(5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;

(6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;

(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;

(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;

(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

* Sec. 10. AS 22.20.020(b) is repealed and reenacted to read:

(b) The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.

* Sec. 11. AS 22.25.010(b) is amended to read:

(b) A justice or judge may be retired for incapacity as provided <u>in this section</u> [BY LAW]. A justice or judge is eligible for retirement pay with two or more years of service at the time of retirement for incapacity. The effective date of retirement under this subsection is the first day of the month coinciding with or after the date <u>that</u> [UPON WHICH] the governor [WITH RESPECT TO A JUSTICE, OR THE SUPREME COURT WITH RESPECT TO A JUDGE] files <u>written notice</u> with the commissioner of administration [A WRITTEN DECLARATION TO THE EFFECT] that a designated justice or judge was retired for incapacity. A duplicate copy of the <u>notice</u> [DECLARATION] shall be filed with the

Judicial Council.

* Sec. 12. AS 22.30.070(c) is amended to read:

(c) On recommendation of the commission or after an appeal under AS 22.30.011(e), the supreme court may (1) retire a judge for disability that seriously interferes with the performance of duties and that is or may become permanent, and (2) publicly or privately censure or remove a judge for action occurring not more than six years before the commencement of the judge's current term which constitutes wilful misconduct in the office, wilful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice, or conduct that brings the judicial office into disrepute. The effective date of retirement under (1) of this subsection is the first day of the month coinciding with or after the date that the supreme court files written notice with the commissioner of administration that the judge was retired for disability. A duplicate copy of the notice shall be filed with the Judicial Council.

5-0116B

Error on 798

Original sponsors: Gruenberg, Sund, Pettyjohn, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 139 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the jurisdiction of the superior and district courts; judicial disqualification, disciplinary actions, and impeachment; the procedure for judicial retirement due to incapacity or disability; proceedings before magistrates; and amending Rule 16(a), Alaska District Court Rules of Civil Procedure."

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

* Section 1. AS 09.30.200 is amended to read:

Sec. 09.30.200. FILING AND STATUS OF FOREIGN JUDGMENTS. A copy of a foreign judgment authenticated in accordance with the Act of Congress or the laws of this state may be filed in the office of the clerk of the [SUPERIOR] court with jurisdiction in [OF] this state. The clerk shall treat the foreign judgment in the same manner as a domestic judgment [OF THE SUPERIOR COURT]. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a domestic judgment [OF THE SUPERIOR COURT] and may be enforced or satisfied in like manner.

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Sec. 09.30.220. STAY. (a) If the judgment debtor shows the [SUPERIOR] court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal

is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the [SUPERIOR] court any ground upon which enforcement of a judgment of the [SUPERIOR] court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment that [WHICH] is required in this state.

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Sec. 09.43.170. COURT, JURISDICTION. In AS 09.43.010 - 09.43.180, the term "court" means the [SUPERIOR] court with jurisdiction in [OF] this state. The making of an agreement described in AS 09.43.070 providing for arbitration in this state confers jurisdiction on the [SUPERIOR] court to enforce the agreement under AS 09.43.010 - 09.43.180 and to enter judgment on an award under the agreement.

* Sec. 5. AS 15.58.050 is amended to read:

Sec. 15.58.050. INFORMATION AND RECOMMENDATIONS ON JUDICIAL OFFICERS. No later than August 7 of the year in which the state general election will be held, the judicial council shall file with the lieutenant governor a statement including information about each supreme court justice, court of appeals judge, superior court judge,

and district court judge who will be subject to a retention election. The statement shall reflect the evaluation of each justice or judge conducted by the judicial council according to law and shall contain a brief statement describing each public reprimand, public censure, or suspension received by the judge under AS 22.30.011(d)(3) or (4) during the period covered in the evaluation. A statement may not exceed 600 words.

* Sec. 6. AS 22.07 is amended by adding a new section to read:

Sec. 22.07.075. IMPEACHMENT. A judge of the court of appeals is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in a court on the same or related charges.

* Sec. 7. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $35,000 [$25,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $35,000 [$25,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $35,000 [$25,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value [OF THE PROPERTY OR] of the arrears and damage to the property does not exceed $35,000 [$25,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed $35,000 [$25,000];

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $35,000 [$25,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.30.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020.

* Sec. 3. AS 22.15.120 is amended to read:

Sec. 22.15.120. LIMITATIONS ON PROCEEDINGS WHICH MAGISTRATE MAY HEAR. A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows,

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed $5,000;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $5,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $5,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try and enter judgments in all cases involving infractions under AS 28, violations under AS 11, and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70.

* Sec. 9. AS 22.15 is amended by adding a new section to read:

Sec. 22.15.205. IMPEACHMENT. A district judge is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not

extend beyond removal from office, but does not prevent proceedings in the courts on the same or related charges.

* Sec. 10. AS 22.20.020(a) is repealed and reenacted to read:

(a) A judicial officer may not act in a matter in which

(1) the judicial officer is a party;

(2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;

(3) the judicial officer is a material witness;

(4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;

(5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;

(6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;

(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;

(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;

(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

* Sec. 11. AS 22.20.020(b) is repealed and reenacted to read:

(b) The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.

* Sec. 12. AS 22.25.010(b) is amended to read:

(b) A justice or judge may be retired for incapacity as provided in this section [BY LAW]. A justice or judge is eligible for retirement pay with two or more years of service at the time of retirement for incapacity. The effective date of retirement under this subsection is the first day of the month coinciding with or after the date that [UPON WHICH] the governor [WITH RESPECT TO A JUSTICE, OR THE SUPREME COURT WITH RESPECT TO A JUDGE] files written notice with the commissioner of administration [A WRITTEN DECLARATION TO THE EFFECT] that a designated justice or judge was retired for incapacity. A duplicate copy of the notice [DECLARATION] shall be filed with the Judicial Council.

* Sec. 13. AS 22.30.011 is amended by adding a new subsection to read:

(b) If a judge has been publicly reprimanded, suspended, or publicly censured under this section and the judge has filed a declaration of candidacy for retention in office, the commission shall report to the judicial council for inclusion in the statement filed by the judicial council under AS 15.58.050 each public reprimand, suspension, or public censure received by the judge

(1) since appointment; or

(2) if the judge has been retained by election, since the last retention election of the judge.

* Sec. 14. AS 22.30.070(c) is amended to read:

(c) On recommendation of the commission or after an appeal under AS 22.30.011(e), the supreme court may (1) retire a judge for

disability that seriously interferes with the performance of duties and that is or may become permanent, and (2) publicly or privately censure or remove a judge for action occurring not more than six years before the commencement of the judge's current term which constitutes wilful misconduct in the office, wilful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice, or conduct that brings the judicial office into disrepute. The effective date of retirement under (1) of this subsection is the first day of the month coinciding with or after the date that the supreme court files written notice with the commissioner of administration that the judge was retired for disability. A duplicate copy of the notice shall be filed with the Judicial Council.

* Sec. 15. Rule 16(a) of the Alaska District Court Rules of Civil Procedure is amended to read:

(a) All small claims actions shall be tried by the court without a jury. A judge may [NOT] be peremptorily challenged [EITHER] under Civil Rule 42(c) [OR AS 22.20.022].


HB
140

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	3-26-87	1:30 p.m.
H. JUD.	3-25-87	1:30 p.m.

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/11/87

FURTHER REFERRALS: Finance

DATE: 3-26-87

The Judiciary Committee has considered HB 140

"An Act relating to parole."

RECOMMENDS:

[✓] replace with CS HB 140 (Judiciary) [ ] the same title

[ ] attached amendment(s) [✓] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[✓] same as previous zero fiscal note published 3/11/87

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

Adopted

5-0584L
Lev
3/26/87

Original sponsors: Swackhammer, Gruenberg, Navarre, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 140 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to mandatory and discretionary parole and residual probation."

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

* Section 1. AS 33.16.010(a, is amended to read:

(a) A prisoner who is serving a term or terms of two years or more [AT LEAST 181 DAYS] is eligible for [EITHER DISCRETIONARY OR] mandatory parole.

* Sec. 2. AS 33.16.010 (c) is amended to read:

(c) A prisoner who is not eligible for discretionary parole, or who is not released on discretionary parole, shall be released on mandatory parole for the term of good time deductions credited under AS 33.20, if the term or terms of imprisonment are two years or more [EXCEED 180 DAYS].

* Sec. 3. AS 33.16.100(d) is amended to read:

(d) A prisoner who is sentenced for a term under AS 12.55.-125(a), [OR] (b), (c), or (i) may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a), [OR] (b), (c), or (i), at least one-third of the period of confinement imposed, or any minimum term set under AS 12.-55.115 at sentencing, whichever is greater.

* Sec. 4. AS 33.16.210 is amended to read:

Sec. 33.16.210. DISCHARGE OF PAROLEE. The board may unconditionally discharge a parolee from the jurisdiction and custody of the board after the parolee has completed two years of parole [, IF THE

SENTENCE OF THE PAROLEE DOES NOT INCLUDE A RESIDUAL PERIOD OF PROBATION]. A discretionary parolee with a residual period of probation may, after two years of parole, be discharged by the board to immediately begin serving the residual period of probation.

* Sec. 5. AS 33.16.210 is amended by adding a new subsection to read:

(b) Notwithstanding (a) of this section, the board may unconditionally discharge a mandatory parolee before the parolee has completed two years of parole if the parolee is serving a concurrent period of residual probation under AS 33.20.040(c), and the period of residual probation and the period of suspended imprisonment each equal or exceed the period of mandatory parole.

* Sec. 6. AS 33.16.900(7) is amended to read:

(7) "mandatory parole" means the release of a prisoner who was sentenced to one or more terms of imprisonment of two years or more [EXCEEDING 180 DAYS], for the period of good time credited under AS 33.20, subject to conditions imposed by the board and subject to its custody and jurisdiction;

* Sec. 7. AS 33.16.900(8) is amended to read:

(8) "parolee" means a prisoner, sentenced to one or more terms of imprisonment exceeding 180 days in the case of discretionary parole and of two years or more in the case of mandatory parole, released by the board or by operation of law before the expiration of the term, subject to the custody and jurisdiction of the board;

* Sec. 8. AS 33.20.040(a) is amended to read:

(a) Except as provided in (c) of this section, a [A] prisoner released under AS 33.20.030 shall be released on mandatory parole to the custody and jurisdiction of the parole board under AS 33.16, until the expiration of the maximum term to which the prisoner was sentenced, if the term or terms of imprisonment are two years or more

[EXCEEDED 180 DAYS]. However, a prisoner released on mandatory parole may be discharged under AS 33.16.210 before the expiration of the term. A prisoner who was sentenced to a term or terms of [AN] imprisonment of less than two years [180 DAYS OR LESS] shall be unconditionally discharged from mandatory parole [, EXCEPT AS PROVIDED IN (c) OF THIS SECTION].

* Sec. 9. AS 33.20.040(c) is amended to read:

(c) If a prisoner's sentence includes a residual period of probation, the probationary period shall run concurrently with a period of mandatory parole for that sentence and the prisoner shall be under the concurrent jurisdiction of the court and the parole board. Nothing in this section precludes both the court and the parole board from revoking the prisoner's probation and mandatory parole for the same conduct. A period of imprisonment resulting from the revocation of probation or mandatory parole may be imposed consecutively in the discretion of the court or the parole board [A PRISONER RELEASED UNDER AS 33.20.030 SHALL IMMEDIATELY BEGIN SERVING THE RESIDUAL PROBATIONARY PERIOD, EXCEPT THAT IF MANDATORY PAROLE IS REQUIRED UNDER (a) OF THIS SECTION, SERVING THE PROBATIONARY PERIOD SHALL IMMEDIATELY FOLLOW DISCHARGE FROM PAROLE].

Proposed Amendment to CS for HB 140 (HESS)

Page 2 line 9: after "probation" and before "is", add the following language, "and any period of suspended imprisonment"

Offered: 3/11/87
Referred: Judiciary and Finance

5-0584B

Original sponsors: Swackhammer, Gruenberg, Navarre, et al.

IN THE HOUSE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 140 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to parole."

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

* Section 1. AS 33.16.010(a) is amended to read:

(a) A prisoner who is serving a term or terms of <u>two years or more</u> [AT LEAST 181 DAYS] is eligible for [EITHER DISCRETIONARY OR] mandatory parole.

* Sec. 2. AS 33.16.010 (c) is amended to read:

(c) A prisoner who is not eligible for discretionary parole, or who is not released on discretionary parole, shall be released on mandatory parole for the term of good time deductions credited under AS 33.20, if the term or terms of imprisonment <u>are two years or more</u> [EXCEED 180 DAYS].

* Sec. 3. AS 33.16.100(d) is amended to read:

(d) A prisoner who is sentenced for a term under AS 12.55.-125(a), [OR] (b), <u>(c), or (i)</u> may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a), [OR] (b), <u>(c), or (i),</u> at least one-third of the period of confinement imposed, or any minimum term set under AS 12.-55.115 at sentencing, whichever is greater.

* Sec. 4. AS 33.16.210 is amended to read:

Sec. 33.16.210. DISCHARGE OF PAROLEE. The board may unconditionally discharge a parolee from the jurisdiction and custody of the board after the parolee has completed two years of parole [, IF THE SENTENCE OF THE PAROLEE DOES NOT INCLUDE A RESIDUAL PERIOD OF

may be discharged under AS 33.16.210 before the expiration of the term. A prisoner who was sentenced to a term or terms of [AN] imprisonment of less than two years [180 DAYS OR LESS] shall be unconditionally discharged from mandatory parole [, EXCEPT AS PROVIDED IN (c) OF THIS SECTION].

* Sec. 9. AS 33.20.040(c) is amended to read:

(c) If a prisoner's sentence includes a residual period of probation, the probationary period shall run concurrently with a period of mandatory parole for that sentence and the prisoner shall be under the concurrent jurisdiction of the court and the parole board. Nothing in this section precludes both the court and the parole board from revoking the prisoner's probation and mandatory parole for the same conduct. A period of imprisonment resulting from the revocation of probation or mandatory parole may be imposed consecutively in the discretion of the court or the parole board [A PRISONER RELEASED UNDER AS 33.20.030 SHALL IMMEDIATELY BEGIN SERVING THE RESIDUAL PROBATIONARY PERIOD, EXCEPT THAT IF MANDATORY PAROLE IS REQUIRED UNDER (a) OF THIS SECTION, SERVING THE PROBATIONARY PERIOD SHALL IMMEDIATELY FOLLOW DISCHARGE FROM PAROLE].

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Offered: 3/11/87
Referred: Judiciary and Finance

5-0584B

Original sponsors: Swackhammer, Gruenberg, Navarre, et al.

IN THE HOUSE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 140 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to parole."

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

* Section 1. AS 33.16.010(a) is amended to read:

(a) A prisoner who is serving a term or terms of two years or more [AT LEAST 181 DAYS] is eligible for [EITHER DISCRETIONARY OR] mandatory parole.

* Sec. 2. AS 33.16.010 (c) is amended to read:

(c) A prisoner who is not eligible for discretionary parole, or who is not released on discretionary parole, shall be released on mandatory parole for the term of good time deductions credited under AS 33.20, if the term or terms of imprisonment are two years or more [EXCEED 180 DAYS].

* Sec. 3. AS 33.16.100(d) is amended to read:

(d) A prisoner who is sentenced for a term under AS 12.55.-125(a), [OR] (b), (c), or (i) may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a), [OR] (b), (c), or (i), at least one-third of the period of confinement imposed, or any minimum term set under AS 12.-55.115 at sentencing, whichever is greater.

* Sec. 4. AS 33.16.210 is amended to read:

Sec. 33.16.210. DISCHARGE OF PAROLEE. The board may unconditionally discharge a parolee from the jurisdiction and custody of the board after the parolee has completed two years of parole [, IF THE SENTENCE OF THE PAROLEE DOES NOT INCLUDE A RESIDUAL PERIOD OF

PROBATION]. A discretionary parolee with a residual period of probation may, after two years of parole, be discharged by the board to immediately begin serving the residual period of probation.

* Sec. 5. AS 33.16.210 is amended by adding a new subsection to read:

(b) Notwithstanding (a) of this section, the board may unconditionall, discharge a mandatory parolee before the parolee has completed two years of parole if the parolee is serving a concurrent period of residual probation under AS 33.20.040(c), and the period of residual probation is equal to or exceeds the period of mandatory parole.

* Sec. 6. AS 33.16.900(7) is amended to read:

(7) "mandatory parole" means the release of a prisoner who was sentenced to one or more terms of imprisonment of two years or more [EXCEEDING 180 DAYS], for the period of good time credited under AS 33.20, subject to conditions imposed by the board and subject to its custody and jurisdiction;

* Sec. 7. AS 33.16.900(8) is amended to read:

(8) "parolee" means a prisoner, sentenced to one or more terms of imprisonment exceeding 180 days in the case of discretionary parole and of two years or more in the case of mandatory parole, released by the board or by operation of law before the expiration of the term, subject to the custody and jurisdiction of the board;

* Sec. 8. AS 33.20.040(a) is amended to read:

(a) Except as provided in (c) of this section, a [A] prisoner released under AS 33.20.030 shall be released on mandatory parole to the custody and jurisdiction of the parole board under AS 33.16, until the expiration of the maximum term to which the prisoner was sentenced, if the term or terms of imprisonment are two years or more [EXCEEDED 180 DAYS]. However, a prisoner released on mandatory parole

may be discharged under AS 33.16.210 before the expiration of the term. A prisoner who was sentenced to a term or terms of [AN] imprisonment of less than two years [180 DAYS OR LESS] shall be unconditionally discharged from mandatory parole [, EXCEPT AS PROVIDED IN (c) OF THIS SECTION].

* Sec. 9. AS 33.20.040(c) is amended to read:

(c) If a prisoner's sentence includes a residual period of probation, the probationary period shall run concurrently with a period of mandatory parole for that sentence and the prisoner shall be under the concurrent jurisdiction of the court and the parole board. Nothing in this section precludes both the court and the parole board from revoking the prisoner's probation and mandatory parole for the same conduct. A period of imprisonment resulting from the revocation of probation or mandatory parole may be imposed consecutively in the discretion of the court or the parole board [A PRISONER RELEASED UNDER AS 33.20.030 SHALL IMMEDIATELY BEGIN SERVING THE RESIDUAL PROBATIONARY PERIOD, EXCEPT THAT IF MANDATORY PAROLE IS REQUIRED UNDER (a) OF THIS SECTION, SERVING THE PROBATIONARY PERIOD SHALL IMMEDIATELY FOLLOW DISCHARGE FROM PAROLE].

Adopted

Mike Stark
3428

Proposed Amendment to CS for HB 140 (HESS) #1

Page 2 line 9: after "probation" and before "is", add the following language, "and ~~any~~ the period of suspended imprisonment" ~~[illegible]~~

~~Pg 2, L8 after "[illegible]" [illegible]~~

~~L9 change "is" to "are"~~

~~L9 "exceeds" to "exceed"~~

POSITION PAPER

DPARTMENT OF CORRECTIONS

BILL: H.B. 140

DATE: March 9, 1987

TITLE: "An Act relating to Parole"

CONTACT: Samuel H. Trivette
Executive Director
Parole Board

This Administration supports House Bill #140. The primary purpose of the bill is to adjust the parole statutes to eliminate duplication and ensure the supervision of more serious prisoners upon release from jail.

Since statehood, prisoners sentenced to serve two years or longer have been placed on mandatory parole supervision. The prisoners must follow standard and special parole conditions the same as prisoners released on parole by the Parole Board. Rehabilitative and other counseling services are made available and behavior is monitored by parole officers. Most other states and the federal government have mandatory parole laws similar to this law.

This bill would eliminate supervision only on misdemeanants and short-term felony offenders. A great majority of these short-term felony offenders will be on probation supervision. This allows the Parole Board and parole officers to concentrate resources on the more serious offenders. Therefore, this bill will result in very few prisoners being release without supervision. Most would be misdemeanants. And clearly 99% of the presumptively-sentenced offenders would be on mandatory parole supervsion, taking care of the more serious cases.

The bill allows the merging of mandatory parole and probation cases when the probation period exceeds the mandatory parole period. Again, the purpose is to minimize the duplication of Parole Board and Correction's staff time spent on supervising the same offender for the court system and Parole Board.

Finally, the bill clarifies parole eligibility on class A felons. When House Bill 141 passed in 1985, the commentary at page four was contradictory on whether eligibility would be at one-third or one-fourth of the sentence. The testimony in committee and on the House floor was eligibility would be one-fourth only for class B felony, class C felony and misdemeanants. This bill conforms to that intent.

Susan Humphrey-Barnett

Susan Humphrey-Barnett
Commissioner

POSITION PAPER

HB 140

The Alaska Public Defender Agency and the Office of Public Advocacy are totally reactive agencies which provide representation to indigent persons when appointed by the court. These agencies do not make policy nor do they initiate litigation. Only proposed legislation with fiscal or program ramifications for these agencies can be said to have a direct agency impact. Thus, the Public Defender Agency and Office of Public Advocacy submit position papers for legislation which will affect these agencies fiscally or programatically or will require these agencies to litigate constitutional issues raised by the legislation.

Fiscal impact:	X None	See attached fiscal note	
Program impact:	X None	See analysis below	
Constitutional impact:	X None	See analysis below	
Other: Legislative request		See analysis below	X

This bill will streamline the current system of mandatory parole, particularly by clarifying that a probationary period may run concurrently with a period of mandatory parole. Judges often set precise conditions of probation which they expect an offender to follow once he or she is released from prison. Under current law, most prisoners serve a period of mandatory release parole prior to starting their probationary term, thus creating the potential for a "limbo" period prior to the commencement of formal court probation and its attendant conditions. This bill further limits the necessity of mandatory parole to those prisoners who have sentences of more than two years, thus obviating the need for expensive supervision for the least serious offenders. All of these changes will streamline the mandatory parole system and free the time of overburdened parole officers to supervise the more serious offenders.

Section 3, which deals with discretionary parole, is somewhat problematical. Currently, those persons who are convicted of unclassified felonies may not be eligible for discretionary parole until they have served one third of their sentence. This provision ensures that a person serving a lengthy sentence for First or Second Degree Murder will not be released prior to serving at least one third of their term of imprisonment. All other offenses allow parole eligibility at the discretion of the parole board after service of one fourth of a sentence.

Section 3 of this bill adds Class A offenses to the list of crimes requiring service of at least one third of the sentence prior to discretionary parole rather than one fourth. Although persons convicted of Class A felonies are normally not eligible for discretionary parole due to the requirement that they receive a presumptive sentence even on a first offense, a discrete group of persons convicted of Class A felonies have received the right to discretionary parole eligibility

from the three judge sentencing panel due to unusual mitigating circumstances in their cases. Since Class A felony prisoners are not normally eligible for discretionary parole, the legislature may not wish to deprive those persons with extraordinarily mitigating circumstances from consideration after one quarter of their term. It should be noted that if the parole board does not wish to grant discretionary parole after one quarter of a sentence due to the circumstances of the offense, nothing in this bill will deprive the parole board of its discretion to deny parole application.

Based on the above reasons, the Public Defender Agency and Office of Public Advocacy support all provisions of this bill except Section 3. The Public Defender Agency and Office of Public Advocacy oppose Section 3 of this bill.

Dana Fabe, Director
Public Defender Agency

3/13/87
Date

Brant McGee, Director
Office of Public Advocacy

3/13/87
Date

Commissioner Garrey Peska
Department of Administration

3/18/87
Date

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF CORRECTIONS

NORTHERN REGION

March 17, 1987

C.E. Swackhammer
State Representative
Box V
Juneau, Alaska 99811

Dear Representative Swackhammer:

I am responding to your letter dated 02-20-87. I am sorry for the late response, however, I have just returned from the lower 48, due to a death in my family.

Regarding H.B. 140, I conferred with Ken Brown, Regional Director, and was informed that the Department of Corrections is extremely supportive of your bill.

If passed, your bill would have a positive effect on my district caseload. My district is 100,000 square miles (approximately the size of the state of Oregon). The district caseload has been as high as 175 offenders this year, and is covered by myself and two other probation officers. A total of 18% of our caseload is located in Bethel, the other 82% is located in 50 plus villages in the Yukon-Kuskokwim Region.

I am sure with your law enforcement background, you can see we are spread about as thin as we can be, and still provide protection to the public.

If there is anything that I may do to assist the passing of H.B. 140, please feel free to contact me.

Yours, for a better Alaska,

Daniel W. Hicklin

Daniel W. Hicklin, District Superior
DEPARTMENT OF CORRECTIONS
Probation/Parole
Bethel, Alaska

DWH:gp

cc: Susan Humphrey-Barnett, Commissioner
Art Schmidt, Deputy Commissioner
Ken Brown, Regional Director
File

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTHE
STAFF COUNSEL

303 K Street
Anchorage, Alaska 99501

(907) 264-8228

March 9, 1987

Representative John Sund
Chair, House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

On February 27, 1987, I wrote to you providing background information about the Alaska Court System's request for legislation requiring municipalities to process uncontested traffic citations issued by their enforcement officers (copy of letter attached). Since that time, the court system has refined its proposal. The court system asks that the committee review the attached draft and sectional analysis and consider introducing this proposed legislation.

The attached draft incorporates two changes from the previous draft, both intended to benefit municipalities. First, language in the attached draft gives municipalities clear authority to establish fine schedules, rather than leaving this authority with the supreme court. This change would give municipalities the ability to control both enforcement and revenue attributable to these offenses, and to change the fine amounts to meet local conditions without having to seek approval from the judicial branch of state government. Also, this draft incorporates language authorizing municipalities to establish fine schedules for all minor offenses, which would include such offenses as littering and animal control ordinance violations as well as traffic offenses. This change would result in consistent treatment for all minor municipal offenses.

It could be argued that these changes would permit municipalities to establish fines for minor offenses solely as a revenue-generating mechanism. There are two factors which counteract this possibility. First, if a municipality sets a fine at an excessively high level, persons cited will come to court to contest the citation, which will require enforcement officers to spend time in court rather than on the streets. A modest fine is more likely to promote a plea of no contest and a mail-in fine payment, with minimal impact on enforcement resources. Also, the public can raise concerns about excessive fines directly with the legislative body which established them, which is the appropriate forum to resolve such concerns.

Thank you for considering the court system's request. I will be glad to supply any additional information or answer any questions from your or your staff.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
Staff Counsel

KLF:bs

Att.

cc: Arthur H. Snowden, II, Administrative Director
Robert G. Fisher, Fiscal Officer
Sandy Ganong, Traffic Division
Susan Miller, Manager, Special Projects
Area Court Administrators

3/9/87-4

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

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303 K Street
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February 27, 1987

Representative John Sund
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

I am writing to provide background about a request from the Alaska Court System for legislation requiring municipalities to process uncontested traffic citations issued by their enforcement officers.

In most court locations, citations issued by both state enforcement officials and also by municipal enforcement officials are filed with courts. Many of these citations are resolved by a bail forfeiture and plea of no contest. Processing consists of accepting payment from a defendant, either in person or by mail. If a defendant wishes to plead not guilty, a court trial is scheduled. If a defendant does not respond to the citation, a bench warrant or an order to show cause must be issued. However, the vast majority of these matters are resolved by the forfeited payment, without a court appearance.

If an offense is cited under provisions of state law, the resulting fine or forfeiture is paid to the general fund of the State of Alaska. However, under AS 22.15.270, forfeitures resulting from violations of ordinances of municipalities are returned to the political subdivision.

As a practical consequence, this means that court staff, who are funded by the state, perform what is essentially an accounting function for municipalities. The court system proposes that municipalities take over the responsibility for processing these uncontested citation payments. This procedure is currently in place in Juneau, based on a voluntary agreement between the Juneau court and Juneau enforcement officials, and works quite effectively.

This procedure would benefit the courts, because resources now devoted to processing these payments could be focused on other functions which would benefit both the state and localities, such pre-trial screening to determine which defendants are able to bear the costs of counsel appointed at public expense. Stepped-up efforts by the court to screen these defendants would result in decreased costs to municipalities because of the decreased burden of paying for costs of defense.

Municipalities would also benefit by assuming direct control over this process. Along these lines, the supreme court would not object to legislation authorizing municipalities to enact mail-in fine schedules, which would give municipalities the ability to determine appropriate fine payments in conjunction with specific enforcement goals, instead of relying on the supreme court to adopt bail forfeiture schedules.

Some smaller political subdivisions may not have the capability to process these citations. If a municipality can demonstrate that the system as a whole will benefit from retaining this function within the court system, the court system would continue to process these citations for that municipality. It is anticipated that this exemption would apply primarily to outlying communities which issue very few traffic citations.

I hope this information is helpful to the committee. Please let me know if I can provide additional background.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
Staff Counsel

KLF:bs

cc: Arthur H. Snowden, II, Administrative Director
Stephane J. Cole, Deputy Administrative Director
Robert G. Fisher, Fiscal Officer
Sandy Ganong, Traffic Division
Area Court Administators

2/26/87-4

SECTIONAL ANALYSIS: AN ACT RELATING TO CITATIONS FOR VEHICLE AND TRAFFIC OFFENSES

Section 1. Paragraph a. This section provides that citations for offenses under municipal ordinances for which a fine schedule has been established shall be deposited with the municipality for processing rather than with the court. However, if the supreme court by rule exempts a municipality from this provision, citations may still be filed with the court. It is anticipated that outlying communities which do not have the resources to process these citations would still be permitted to deposit citations with the court.

Paragraph b. This paragraph sets forth the procedure for responding to a citation under a municipal ordinance for which a fine schedule has been established. The person to whom the citation is issued will have five days to either pay the fine to the municipality or to plead not guilty. This paragraph also sets forth provisions which must appear on the citations in order to protect a person's due process rights. The paragraph provides that if a person fails to respond to the citation, the citation is considered a summons, which will provide the basis for the court to issue a bench warrant. Finally, this paragraph provides that if a person requests a trial and appears in court and is ultimately found guilty, the person may be sentenced to pay no more than the amount of the fine established under ordinance.

Paragraphs c-f. These provisions are contained in existing law, and are relettered in the proposed draft. These paragraphs relate to disposition of the citation and retention of copies.

Section 2. This section amends the current bail forfeiture statute for vehicle and traffic violations to provide that the state supreme court will issue a bail forfeiture schedule only for those offenses under state law which are amenable to disposition without court appearance, and that municipalities will establish fine schedules for municipal traffic offenses amenable to disposition without court appearance. This section also clarifies that if a person cited for an offense for which a fine or bail amount has been established appears in court and is found guilty, the penalty imposed may not exceed the fine or bail amount, so that the person's constitutional right to request a trial will not be infringed.

Section 3. Current law requires the court to notify the Department of Public Safety of convictions. This section inserts new language requiring a municipality to similarly notify the department if a fine payment has been accepted for a violation of a municipal ordinance relating to driving vehicles.

Section 4. This section amends Title 29, and is intended to give municipalities clear authority to determine that some minor offenses are amenable to disposition without court appearance and to establish a schedule of fine amounts for these offenses. Under existing law revenue generated by this procedure would be returned to the municipalities.

Section 5. This section sets an effective date of January 1, 1988, in order to give sufficient lead time for municipalities to review their ordinances and adopt fine schedules.

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NOTES TO DECISIONS

Authority to impose period of incarceration as condition of probation prior to enactment of AS 12.55.080. See Boyne v. State, Sup. Ct. Op. No. 1766 (File No. 3678), 586 P.2d 1250 (1978).

Applied in Jackson v. State, Sup. Ct. Op. No. 1194 (File No. 2422), 541 P.2d 23 (1975).

Quoted in Newsom v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975).

Sec. 33.05.090. Short title. This chapter may be cited as the Probation Administration Act. (§ 7 ch 105 SLA 1960)

Chapter 10. Interstate Compact on Probation and Parole.

[Renumbered as AS 33.36.110 — 33.36.120.]

Chapter 15. Parole Administration Act.

[Repealed, § 7 ch 88 SLA 1985.]

Chapter 16. Parole Administration.

Collateral references. — 59 Am. Jur. 2d, Pardon and Parole, § 1 et seq.

67A C.J.S., Pardon and Parole, § 1 et seq.

Sec. 33.16.010. Parole. (a) A prisoner who is serving a term or terms of at least 181 days is eligible for either discretionary or mandatory parole.

(b) A prisoner who is eligible under AS 33.16.090 may be granted discretionary parole by the board of parole.

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(c) A prisoner who is not eligible for discretionary parole, or who is not released on discretionary parole, shall be released on mandatory parole for the term of good time deductions credited under AS 33.20, if the term or terms of imprisonment exceed 180 days.

(d) A prisoner released on discretionary or mandatory parole is subject to the conditions of parole imposed under AS 33.16.150. Parole may be revoked under AS 33.16.220. (§ 2 ch 88 SLA 1985)

Legislative history reports. — For House letter of intent related to this section, see 1985 House Journal, p. 821.

Sec. 33.16.020. Board of parole. (a) There is in the Department of Corrections a board of parole consisting of five members appointed by the governor, subject to confirmation by a majority of members of the legislature in joint session.

(b) Members of the board serve for staggered terms of five years and until their successors are appointed.

(c) The governor shall choose the presiding officer of the board from among the membership.

(d) The governor shall make appointments to the board with due regard for representation on the board of the ethnic, racial, sexual, and cultural populations of the state.

(e) The governor shall appoint at least one member who resides in the First Judicial District, one member who resides in the Third Judicial District, and one member who resides in either the Second or Fourth Judicial District. (§ 2 ch 88 SLA 1985)

Cross references. — For transitional provisions relating to board members, see § 8, ch 88, SLA 1985 in the Temporary and Special Acts.

NOTES TO DECISIONS

There is no authority which would sanction the expansion of the superior court's jurisdiction to pass sentence into a realm of review and modification which is statutorily vested in either the supreme court or the executive branch of government. Davenport v. State, Sup. Ct. Op. No. 1218 (File No. 2202), 543 P.2d 1204 (1975); Szeratics v. State, Sup. Ct. Op. No. 1525 (File No. 3390), 572 P.2d 63 (1977), decided under former AS 33.15.-010.

Collateral references. — Statute conferring power upon administrative body in respect to parole of prisoners or discharge of parolees, as unconstitutional infringement of power of executive. 143 ALR 1488.

Sec. 33.16.030. Selection criteria for board members. (a) The governor shall appoint board members on the basis of their qualifications to make decisions that are compatible with the welfare of the community and of individual offenders. The governor shall appoint members who are able to consider the character and background of offenders and the circumstances under which offenses were committed.

(b) At least one person appointed to the board must have experience in the field of criminal justice.

(c) Officers or employees of the state may not be appointed to the board. (§ 2 ch 88 SLA 1985)

Sec. 33.16.040. Compensation and expenses. A board member is entitled to compensation at an amount to be set by the governor for each day the member is participating in business of the board, and is also entitled to the per diem and travel allowances provided under AS 39.20.180. (§ 2 ch 88 SLA 1985)

Sec. 33.16.050. Meetings of the board. (a) The board may meet as often as it considers necessary to carry out its responsibilities, but shall meet at least four times a year.

(b) Three members of the board constituted a quorum for the conduct of business.

(c) Decisions and orders of the board require the affirmative votes of a majority of the members present.

(d) The board may conduct meetings by the use of teleconferencing facilities. (§ 2 ch 88 SLA 1985)

Sec. 33.16.060. Duties of the board. (a) The board shall

(1) serve as the parole authority for the state;

(2) upon receipt of an application, consider the suitability for parole of a prisoner who is eligible for discretionary parole;

(3) impose parole conditions on all prisoners released under discretionary or mandatory parole;

(4) under AS 33.16.210, discharge a person from parole when custody is no longer required;

(5) maintain records of the meetings and proceedings of the board;

(6) recommend to the governor and the legislature changes in the law administered by the board;

(7) recommend to the governor or the commissioner changes in the practices of the department and of other departments of the executive branch necessary to facilitate the purposes and practices of parole;

(8) upon request of the governor, review and recommend applicants for executive clemency; and

(9) execute other responsibilities prescribed by law.

(b) The board shall adopt regulations under the Administrative Procedure Act (AS 44.62)

(1) establishing standards under which the suitability of a prisoner for discretionary parole shall be determined;

(2) providing for the supervision of parolees and for recommitment of parolees; and

(3) governing procedures of the board. (§ 2 ch 88 SLA 1985)

NOTES TO DECISIONS

No rules promulgated by the parole board regarding eligibility of prisoners for parole have been brought to the attention of the supreme court. Robinson v. State, Sup. Ct. Op. No. 691 (File No. 1344), 484 P.2d 686 (1971), decided under former AS 33.15.100.

Rules should be adopted as soon as practicable. — Concerning sentencing, sentence appeals, and parole matters in general, the supreme court believed it would be of benefit to all concerned if, as soon as practicable, the parole board, in conformity with former AS 33.15.100, adopted rules regarding eligibility of prisoners for parole, the conduct of parole hearings, and conditions of release to be imposed on parolees. Robinson v. State, Sup. Ct. Op. No. 691 (File No. 1344), 484 P.2d 686 (1971).

Parole board urged to prescribe specific rules to govern situations where searches of parolees are permissible. — See Roman v. State, Sup. Ct. Op. No. 1521 (File No. 2856), 570 P.2d 1235 (1977), decided under former AS 33.15.100.

Due process requirements. — There is no difference between parole and probation revocations as regards due process requirements. Avery v. State, Sup. Ct. Op. No. 2175 (File No. 4440), 616 P.2d 872 (1980), decided under former AS 33.15.100.

It was not error for a parole board to apply the preponderance of the evidence standard in a parole revocation hearing. Avery v. State, Sup. Ct. Op. No. 2175 (File No. 4440), 616 P.2d 872 (1980), decided under former AS 33.15.100.

Sec. 33.16.070. Process. The board or a member of the board may issue subpoenas and subpoenas duces tecum in the performance of board duties under AS 33.16.060(a). Subpoenas issued under this section are enforceable in Superior Court. (§ 2 ch 88 SLA 1985)

Sec. 33.16.080. Executive director. The board shall hire an executive director to serve the board in the discharge of its duties. The executive director must have had training and experience in the field of criminal justice. The executive director may employ additional staff to assist the board. (§ 2 ch 88 SLA 1985)

Sec. 33.16.090. Eligibility for discretionary parole. (a) A prisoner who is serving a term of at least 181 days, and who is not otherwise ineligible under (b) of this section, may, in the discretion of the board, be released on discretionary parole subject to AS 12.55.086(b), 12.55.115, and AS 33.16.100(c) and (d).

(b) A prisoner is not eligible for discretionary parole during the term of a presumptive sentence; however, a prisoner is eligible for discretionary parole during a term of sentence enhancement imposed

under AS 12.55.155(a) or during the term of a consecutive or partially consecutive presumptive sentence imposed under AS 12.55.025(e) or (g).

(c) A prisoner eligible for discretionary parole during a period of sentence enhancement imposed under AS 12.55.155(a) or during a consecutive or partially consecutive presumptive sentence imposed under AS 12.55.025(e) or (g) shall serve the unenhanced portion of the sentence or the initial presumptive sentence before being otherwise eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this subsection, the sentence for the most serious offense in the case of consecutive or partially consecutive presumptive sentences shall be considered the initial presumptive sentence. The unenhanced sentence or the initial presumptive sentence is considered served for purposes of discretionary parole on the date the unenhanced or initial presumptive sentence is due to expire less good time earned under AS 33.20.010.

(d) In determining the eligibility of a prisoner for discretionary parole, the board may rely on the verbatim written transcript of the judge's sentencing remarks under AS 12.55.025(a)(1), and any other portion of the sentencing proceeding, as well as the judgment entered by the court. (§ 2 ch 88 SLA 1985)

Editor's notes. — Section 9, ch. 88, SLA 1985 provides that (b) of this section "shall be applied prospectively, except that prisoners sentenced before January 1, 1986 are eligible for discretionary parole during a term of sentence enhancement imposed under AS 12.55.155(a) or during the term of a consecutive or partially consecutive presumptive sentence imposed under AS 12.55.025(e) or (g) if the sentencing court orders discretionary parole eligibility for that period."

Legislative history reports. — For House letter of intent related to (b) of this section, the 1985 House Journal, p. 821.

NOTES TO DECISIONS

Wording of order. — The wording, "an order suspending the imposition of sentence for a given length of time, and requiring, as a special condition of probation, a definite term of imprisonment to be served periodically," is necessary to ensure that a prisoner given periodic time receives appropriate "good time" credit, and so that his parole eligibility is properly computed. Whittlesey v. State, Sup. Ct. Op. No. 2231 (File No. 5155), 626 P.2d 1066 (1980), decided under former AS 33.15.180.

Release of presumptively sentenced prisoner. — A presumptively sentenced prison who is mandatorily released with 180 days or less remaining on his sentence cannot be released unconditionally. State v. Frazier, Sup. Ct. Op. No. 3061 (File No. S-972), 719 P.2d 261 (1986), reversing Ct. App. Op. No. 460 (File No. A-415), 698 P.2d 1212 (1985), decided under former AS 33.15.180.

Jurisdiction to decide challenges and constitutionality. — District court lacked jurisdiction to decide challenges to the state parole board's interpretation of this section and to the constitutionality of AS 33.15.180 as interpreted. Such challenges had to be brought in the superior court. Bishop v. Municipality of Anchorage, Ct. App. Op. No. 392 (File No. A-169), 685 P.2d 103 (1984), decided under former AS 33.15.180.

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Sec. 33.16.100. Granting of discretionary parole. (a) The board may authorize the release of a prisoner on discretionary parole if it determines a reasonable probability exists that

(1) the prisoner will live and remain at liberty without violating any laws or conditions imposed by the board;

(2) the prisoner's rehabilitation and reintegration into society will be furthered by release on parole;

(3) the prisoner will not pose a threat of harm to the public if released on parole; and

(4) release of the prisoner on parole would not diminish the seriousness of the crime.

(b) If the board finds a change in circumstances in a prisoner's parole release plan submitted under AS 33.16.130(a), or discovers new information concerning a prisoner who has been granted a parole release date, the board may rescind or revise the previously granted parole release date. In reconsidering the release date, the procedures set out in AS 33.16.130(b) and (c) shall be followed.

(c) Except as provided in (d) of this section, a prisoner may not be released on discretionary parole until the prisoner has served at least one-fourth of the period of confinement imposed, one-fourth of an enhanced period of confinement imposed under AS 12.55.155(a), or any minimum term set under AS 12.55.115 at sentencing, whichever is greater.

(d) A prisoner who is sentenced for a term under AS 12.55.125(a) or (b) may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a) or (b), at least one-third of the period of confinement imposed, or any minimum term set under AS 12.55.115 at sentencing, whichever is greater. (§ 2 ch 88 SLA 1985)

NOTES TO DECISIONS

The trial court is not required to advise of parole minimums, or of its authority to fix parole eligibility, under the terms of Cr. R. 11; but it is preferable for the court to inform the defendant. Morgan v. State, Sup. Ct. Op. No. 1663 (File No. 2894), 582 P.2d 1017 (1978), decided under former AS 33.15.080.

An increase in the minimum period of incarceration required before becoming eligible for parole is an increase in the sentence. Nelson v. State, Sup. Ct. Op. No. 2260 (File No. 4098), 617 P.2d 502 (1981), decided under former AS 33.15.080.

Sec. 33.16.110. Preparole report. (a) In determining whether a prisoner is suitable for discretionary parole, the board shall consider the preparole reports including

(1) the presentence report made to the sentencing court;

(2) the recommendations made by the sentencing court, by the prosecuting attorney, and by the defense attorney, and any statements made by the victim or the prisoner at sentencing;

(3) the prisoner's institutional conduct history while incarcerated;

(4) recommendations made by the staff of the correctional facilities in which the prisoner was incarcerated;

(5) reports of prior crimes, juvenile histories, and previous experiences of the prisoner on parole or probation;

(6) physical, mental, and psychiatric examinations of the prisoner;

(7) information submitted by the prisoner, the sentencing court, the victim of the crime, the prosecutor, or other persons having knowledge of the prisoner or the crime;

(8) information concerning an unjustified disparity in the sentence imposed on a prisoner in relation to other sentences imposed under similar circumstances; and

(9) other relevant information that may be reasonably available.

(b) The board shall provide information available under (a)(3) and (a)(6) of this section when requesting comments on the discretionary parole of a prisoner from the sentencing court. (§ 2 ch 88 SLA 1985)

Sec. 33.16.120. Right of victim to comment on parole of prisoner. (a) Upon request of the victim, notice of a hearing to review or consider discretionary parole for a state prisoner who is convicted of a crime against a person shall be sent to the victim of the crime at least 30 days before the scheduled hearing.

(b) It is the responsibility of the victim to keep the board apprised of the victim's most current mailing address. The board shall send the notice required under (a) of this section to the last known address of the victim. The address of the victim may not be disclosed to the prisoner or the prisoner's attorney.

(c) The victim has a right to comment in writing on the proposed action of the board. Copies of the comments shall be provided to the prisoner and the prisoner's attorney before action by the board.

(d) The board shall consider the comments presented under (c) of this section in deciding whether to release the prisoner on parole.

(e) Upon request of the victim, if the board decides to release on parole a prisoner who is convicted of a crime against a person, the board shall make every reasonable effort to notify the victim before the prisoner's release date. Notification under this subsection must include the expected date of the prisoner's release, the geographic area in which the prisoner is required to reside, and other pertinent information concerning the prisoner's conditions of parole that may affect the victim.

(f) Upon request of the victim, if a prisoner is released under AS 33.16.010(c), the board shall make every reasonable effort to notify the victim before the prisoner's release date. Notification under this subsection must include the expected date of the prisoner's release, the geographic area in which the prisoner is required to reside, and

other pertinent information concerning the prisoner's conditions of parole that may affect the victim. (§ 2 ch 88 SLA 1985)

Cross references. — For rights of victims generally, see AS 12.61.

Sec. 33.16.130. Application for discretionary parole. (a) A prisoner eligible for discretionary parole may apply to the board for discretionary parole. As part of the application for parole, the prisoner shall submit to the board a parole release plan that includes the prisoner's plan for employment, residence, and other information concerning the prisoner's rehabilitative plans if released on parole.

(b) Before the board determines a prisoner's suitability for discretionary parole, the prisoner is entitled to a hearing before the board. The prisoner shall be furnished a copy of the preparole reports listed in AS 33.16.110, and permitted access to all records that will be considered by the board in making its decision except those that are made confidential by law. The prisoner may also respond in writing to all materials considered by the board, be present at the hearing, and present evidence to the board.

(c) The board shall issue its decision in writing and provide the basis for a denial of discretionary parole. A copy of the decision shall be provided to the prisoner. (§ 2 ch 88 SLA 1985)

Sec. 33.16.140. Order for parole. An order for parole issued by the board, setting out the conditions imposed under AS 33.16.150(a) and (b), and the date parole custody ends, shall be furnished to each prisoner released on discretionary or mandatory parole. (§ 2 ch 88 SLA 1985)

Sec. 33.16.150. Conditions of parole. (a) As a condition of parole, a prisoner released on discretionary or mandatory parole shall refrain from conduct punishable by imprisonment under state or federal law or municipal ordinance.

(b) The board may require as a condition of discretionary or mandatory parole that a prisoner released on parole

(1) meet family obligations;

(2) pursue employment, education, counseling, or training;

(3) remain within stated geographic limits unless written permission to depart from the stated limits is granted the parolee;

(4) report upon release to the parole officer assigned to the parolee;

(5) report as required to the parole officer assigned to the parolee;

(6) reside at a stated place and notify the board of any change in place of residence;

(7) not possess or control firearms or other dangerous weapons;

(8) refrain from possessing or consuming alcoholic beverages;

(9) submit to reasonable searches and seizures by a parole officer, or a peace officer acting under the direction of a parole officer;

(10) submit to appropriate medical, mental health, or controlled substance or alcohol examination, treatment, or counseling;

(11) submit to periodic examinations designed to detect the use of alcohol or controlled substances;

(12) make restitution ordered by the court to a victim of the prisoner's crime, according to a schedule established by the board;

(13) refrain from opening, maintaining, or using a checking account or charge account;

(14) refrain from entering into a contract other than a prenuptial contract or a marriage contract;

(15) refrain from operating a motor vehicle;

(16) refrain from entering an establishment where alcoholic beverages are served, sold, or otherwise dispensed;

(17) refrain from participating in any other activity or associating with any other person that the board determines is reasonably likely to diminish the rehabilitative goals of parole, or that may endanger the public.

(c) Except for a condition imposed under (b)(4), (7), (9), (11) or (12) of this section, the board may generally delegate imposition of special conditions under (b) of this section to the discretion of the parole officer.

(d) The board may require a prisoner released on parole to comply with special conditions imposed under (b) of this section for any period up to the maximum term under which the prisoner is subject to the custody and jurisdiction of the board. (§ 2 ch 88 SLA 1985)

Sec. 33.16.160. Change in parole conditions. (a) Upon application of the state or the parolee, the board may change a condition of parole previously imposed under AS 33.16.150(b).

(b) If the proposed change in conditions of parole is more restrictive of a parolee's liberty, the parolee is entitled to notice of the proposed change, the reasons for the proposed change, a hearing before the board, and an opportunity to respond to the proposed change and to present evidence.

(c) Notwithstanding (a) and (b) of this section, when a parole officer determines that an emergency situation requires an immediate change in a condition of parole, or the imposition of a new condition, the parole officer may impose the change or new condition immediately, without a hearing. The parole officer shall immediately notify the board of the imposition of the emergency change or new condition and shall provide a written report setting out the basis for the change or new condition and the nature of the emergency. The effective period

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of a change in condition or imposition of a new condition under this subsection may not exceed 15 working days.

(d) A condition of parole may be changed, a new condition of parole may be imposed, or a new or changed condition imposed under (c) of this section may be extended by a member of the board or the board's designee if, after a preliminary hearing, an emergency situation is found that requires a change in condition. The effective period of a change in condition under this subsection, the imposition of a new condition under this subsection, or the extension under this subsection of a new or changed condition imposed under (c) of this section may not exceed 90 days. (§ 2 ch 88 SLA 1985)

Sec. 33.16.170. Confidentiality of records and information. (a) Except as provided in (b) of this section, the preparole reports listed in AS 33.16.110, and other information obtained and used by the board under this chapter, are confidential and may not be disclosed to anyone other than the board, the sentencing judge, the prosecuting and defense attorneys, the prisoner, the prisoner's attorney, the attorney for the board, the staff of the board, or others granted access to this information under this chapter.

(b) Notwithstanding (a) of this section and AS 33.16.130(b), in a preparole proceeding under AS 33.16.130 the board may not disclose to the prisoner or the prisoner's attorney

(1) diagnostic opinions that, if made known to the eligible prisoner, could lead to serious disruption of the prisoner's institutional program;

(2) portions of a document that reveal sources of information obtained upon a promise of confidentiality; or

(3) other information that, if disclosed, may result in physical harm to any other person.

(c) When the board withholds information from a prisoner or the prisoner's attorney under (b) of this section, the board shall provide the prisoner with an excised copy of the material or summary of the material withheld containing as much specificity as the circumstances allow. (§ 2 ch 88 SLA 1985)

Sec. 33.16.180. Duties of the commissioner. The commissioner shall

(1) conduct investigations of prisoners eligible for discretionary parole, as requested by the board;

(2) supervise the conduct of parolees;

(3) appoint and assign parole officers and personnel;

(4) provide the board, within 30 days after sentencing, information on a sentenced prisoner who may be eligible for discretionary parole under AS 33.16.090;

(5) notify the board and provide information on a prisoner 120 days before the prisoner's mandatory release date, if the prisoner is to be released to mandatory parole; and

(6) maintain records, files, and accounts as requested by the board. (§ 2 ch 88 SLA 1985)

Sec. 33.16.190. Parole and probation officers. An officer appointed by the commissioner under AS 33.05.020(a) or under this chapter, may discharge duties under AS 33.05 or this chapter. (§ 2 ch 88 SLA 1985)

Sec. 33.16.200. Custody of parolee. Except as provided in AS 33.16.210, the board retains custody of discretionary and mandatory parolees until the expiration of the maximum term or terms of imprisonment to which the parolee is sentenced. (§ 2 ch 88 SLA 1985)

Sec. 33.16.210. Discharge of parolee. The board may unconditionally discharge a parolee from the jurisdiction and custody of the board after the parolee has completed two years of parole, if the sentence of the parolee does not include a residual period of probation. A parolee with a residual period of probation may, after two years of parole, be discharged by the board to immediately begin serving the residual period of probation. (§ 2 ch 88 SLA 1985)

Sec. 33.16.220. Revocation of parole. (a) The board may revoke parole for conduct in violation of AS 33.16.150(a) or (b).

(b) Except as provided in (e) of this section, within 15 working days after the arrest and incarceration of a parolee for violation of a condition of parole, the board or its designee shall hold a preliminary hearing. At the preliminary hearing, the board or its designee shall determine if there is probable cause to believe that the parolee violated the conditions of parole and, when probable cause exists, whether the parolee should be released pending a final revocation hearing. A finding of probable cause at a preliminary hearing in a criminal case is conclusive proof of probable cause that a parole violation occurred.

(c) In determining whether a parole violator should be released pending a final revocation hearing, the board or its designee shall consider

(1) the likelihood of the parolee's appearance at a final revocation hearing;

(2) the seriousness of the alleged violation;

(3) whether the parolee presents a danger to the community; and

(4) whether the parolee is likely to further violate conditions of parole.

(d) If the parole violator is released pending a final revocation hearing, the board or its designee may impose additional conditions necessary to ensure the parolee's appearance at the final revocation hearing, and to prevent further violation of conditions of parole.

(e) A preliminary hearing under (b) of this section is not required if the board holds a final revocation hearing within 20 working days after the parolee's arrest and incarceration.

(f) The board shall hold a final revocation hearing no later than 120 days after a parolee's arrest, subject to restrictions arising under AS 33.36.110 and (g) of this section.

(g) When the basis for the revocation proceeding is a criminal charge, the parolee may request, or the board upon its own motion may propose that further proceedings on the revocation be delayed. In making the determination to delay further proceedings, the board shall consider prejudice that may result to the parolee's and the state's interests in the pending criminal case and the parolee's decision to delay final revocation proceedings. If good cause to proceed is found, the board shall consult with the attorney general before continuing the final revocation proceeding.

(h) At a final revocation hearing, a violation of a condition of parole must be established by a preponderance of the evidence.

(i) If, after the final revocation hearing, the board finds that the parolee has violated a condition of parole imposed under AS 33.16.150(b), or a law or ordinance, the board may revoke all or a portion of the parole, or change any condition of parole. (§ 2 ch 88 SLA 1985)

NOTES TO DECISIONS

Right to impartial fact finder in proceedings. — Due process includes the right to an impartial fact finder in parole revocation proceedings. Newell v. State, Sup. Ct. Op. No. 2241 (File No. 4453), 620 P.2d 680 (1980), decided under former AS 33.15.090.

When a person sitting in on deliberations in a parole revocation hearing was the person who initially recommended revocation and whose reports and testimony form the bulk of the evidence supporting revocation, such a person was part of the prosecution, and his presence violated the parolee's due process rights to an impartial fact finder. Newell v. State, Sup. Ct. Op. No. 2241 (File No. 4453), 620 P.2d 680 (1980), decided under former AS 33.15.090.

Use of illegally obtained evidence in revocation proceeding. — Ordinarily, neither the Alaska Constitution nor its criminal rules bar the use of illegally obtained evidence in parole revocation proceedings. Davenport v. State, Sup. Ct. Op. No. 1479 (File No. 2885), 568 P.2d 939 (1977), decided under former AS 33.15.200.

Collateral references. — Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 ALR2d 1074; 44 ALR3d 306.

Right to assistance of counsel at pro-

ceedings to revoke probation. 44 ALR3d 306.

Acquittal in criminal proceeding as precluding revocation of parole on same charge. 76 ALR3d 578.

Sec. 33.16.230. Waiver of hearing. A prisoner or parolee may waive the right to a hearing provided under AS 33.16.120, 33.16.160, or 33.16.220 by submitting a written waiver to the board. (§ 2 ch 88 SLA 1985)

Sec. 33.16.240. Arrest of parole violator. (a) A parolee may be arrested, with or without a warrant, for a violation of parole.

(b) A warrant for the arrest of a parolee who is charged with a violation of parole may be issued by the board, or a member of the board, based on probable cause that a violation has occurred.

(c) A parole officer may, without a warrant, arrest a parolee for a violation of parole only if there is danger to the public, if there is a likelihood that the parolee will flee, or if the parolee committed a crime in the presence of the parole officer.

(d) If a parolee is arrested without a warrant, the parole officer shall notify the board no later than the working day immediately following the arrest. The parole officer shall, within five working days after the arrest, provide the board with a written report setting out the alleged violation and circumstances that required immediate arrest of the parolee.

(e) A parolee arrested for violation of parole is not entitled to bail.

(f) Time spent in custody pending revocation proceedings shall be credited toward the unexpired term of imprisonment of the parolee; however, the time the parolee was at liberty on parole does not alter the time the parolee was sentenced to serve. (§ 2 ch 88 SLA 1985)

NOTES TO DECISIONS

A parolee's liberty should be afforded all protections consistent with his status as one convicted of a crime and under supervision and restrictions, although released from incarceration. Davenport v. State, Sup. Ct. Op. No. 1479 (File No. 2885), 568 P.2d 939 (1977), decided under former AS 33.15.200.

Warrant ordinarily required. — This section requires that absent exigent circumstances a parole officer must secure a warrant from the parole board or board member. Davenport v. State, Sup. Ct. Op. No. 1479 (File No. 2885), 568 P.2d 939 (1977), decided under former AS 33.15.200.

Warrant issued only upon probable cause. — In order for the warrant requirement of this section to be meaningful, the warrant should be issued only upon probable cause of a violation of the conditions of parole being presented to the parole board or a member thereof. Davenport v. State, Sup. Ct. Op. No. 1479 (File No. 2885), 568 P.2d 939 (1977), decided under former AS 33.15.200.

Written statement of probable cause required. — To avoid unnecessary appeals from warrants issued on oral statements, the contents of which may be subject to argument, in the future a written statement indicating probable cause shall be required to be filed with the parole board or member as justification for issuance of a warrant. Davenport v. State, Sup. Ct. Op. No. 1479 (File No. 2885), 568 P.2d 939 (1977), decided under former AS 33. 5.200.

Parolee subject to arrest for a wide variety of causes which do not apply

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88 SLA 1985)

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File No. 2885), 568
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to others. Davenport v. State, Sup. Ct. Op. No. 1479 (File No. 2885), 568 P.2d 939 (1977), decided under former AS 33.15.200.

Usual arrest requirements not imposed as regards arrest of parolee. — To impose the same requirements on the arrest of a parolee as are otherwise mandated for an arrest, including an affidavit or sworn complaint, would constitute meaningless additional time and effort on the part of parole officers. Davenport v. State, Sup. Ct. Op. No. 1479 (File No. 2885), 568 P.2d 939 (1977), decided under former AS 33.15.200.

For a discussion of cases decided in state and federal courts addressing the subject of parole arrest warrants, see Davenport v. State, Sup. Ct. Op. No. 1479 (File No. 2885), 568 P.2d 939 (1977), decided under former AS 33.15.200.

Credit for time served since arrest for subsequent offenses. — Where defendant's sentences were to be served consecutively to a sentence then being served for a parole revocation on an earlier offense, the trial court order that the defendant receive no credit for time served since his arrest was proper in view of the court's action in making the sentences consecutive to the time to be served on the parole revocation, for the time served from defendant's arrest should properly have been credited toward the parole revocation sentence. Reynolds v. State, Sup. Ct. Op. No. 1849 (File No. 4024), 595 P.2d 21 (1979), decided under former AS 33.15.200.

Collateral references. — Parole as suspending running of sentence. 28 ALR 947.

Extradition of paroled convict. 78 ALR 422.

Sentence for new offense committed while accused was at large on parole or conditional release, as concurrent or consecutive. 116 ALR 811.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases. 26 ALR4th 455.

Sec. 33.16.250. Execution of warrant for arrest of parolee. (a) A parole officer, or a peace officer acting at the request of a parole officer, shall execute a warrant issued under AS 33.16.240 by arresting the parolee and confining the parolee in a correctional facility designated by the commissioner.

(b) The parole officer or peace officer shall immediately notify the board or a member of the board of an arrest under (a) of this section. (§ 2 ch 88 SLA 1985)

Sec. 33.16.900. Definitions. In this chapter

(1) "board" means the board of parole;

(2) "commissioner" means the commissioner of corrections;

(3) "controlled substance" means a drug, substance, or immediate precursor included in the schedules set out in AS 11.71.140 — 11.71.190;

(4) "crime against a person" has the meaning given in AS 33.30.900;

(5) "department" means the Department of Corrections;

(6) "discretionary parole" means the release of a prisoner by the board before the expiration of a term, subject to conditions imposed by the board and subject to its custody and jurisdiction;

(7) "mandatory parole" means the release of a prisoner who was sentenced to one or more terms of imprisonment exceeding 180 days,

for the period of good time credited under AS 33.20, subject to conditions imposed by the board and subject to its custody and jurisdiction;

(8) "parolee" means a prisoner, sentence to one or more terms of imprisonment exceeding 180 days, released by the board or by operation of law before the expiration of the term, subject to the custody and jurisdiction of the board;

(9) "prisoner" means an offender confined for a violation of state law, but does not include a person confined under AS 47;

(10) "victim" has the meaning given in AS 12.55.185. (§ 2 ch 88 SLA 1985)

Revisor's notes. — Formerly AS 33.16.260. Renumbered in 1986.

Chapter 20. Remission of Sentences and Executive Pardons and Clemency.

Article
1. Remission of Sentences (§§ 33.20.010 — 33.20.060)
2. Power of Governor to Grant Pardons, Commutations and Reprieves (§§ 33.20.070 — 33.20.080)

Article 1. Remission of Sentences.

Section
10. Computation of good time
30. Discharge
40. Released prisoner
50. Forfeiture for offense
60. Restoration of forfeited good time

NOTES TO DECISIONS

Derivation. — Alaska's mandatory release scheme is derived from 18 U.S.C. 4161-66. Morton v. Hammond, Sup. Ct. Op. No. 1982 (File No. 4882), 604 P.2d 1 (1979).

Sec. 33.20.010. Computation of good time. (a) Except as provided in (b) of this section and notwithstanding AS 12.55.125(f)(3) and 12.55.125(g)(3), a prisoner convicted of an offense against the state or a political subdivision of the state and sentenced to a term of imprisonment that exceeds three days is entitled to a deduction of one-third of the term of imprisonment rounded off to the nearest day if the prisoner follows the rules of the correctional facility in which the prisoner is confined.

(b) A prisoner sentenced to a term of imprisonment of more than one year before April 9, 1986 who was entitled to a deduction of less

REPRESENTATIVE
C.E. "SWACK" SWACKHAMMER

Alaska State Legislature

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(907) 262-7663

JUNEAU
BOX V
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House of Representatives

M E M O R A N D U M

TO: All Members
House of Representatives

FROM: Rep. Swackhammer

DATE: April 9, 1987

SUBJ: CS HB 140 (Jud)

CS HB 140 (Jud) will be before the House on Friday, April 10. This bill is an effort to make our current mandatory parole statutes more efficient. The bill lessens the workload of an already overburdened parole/probation staff, and allows them to spend more time with offenders who have committed the more serious crimes. Included is a sectional summary of this bill.

I would appreciate your support in the passage of this bill.

SUMMARY OF MANDATORY PAROLE BILL

Mandatory parole is the supervision time a misdemeanor or felony offender must complete immediately after being released from incarceration. The supervised time is determined by the amount of good time an inmate earns during incarceration.

181 days is the current minimum for mandatory parole eligibility. Under the new bill being submitted, this eligibility would be increased to a minimum of two years as outlined in Sections 1 and 2. This would decrease the parole work load by an an estimated 130 cases at the current time. This in turn allows the probation/parole officer to devote more time to the long term offender who, as statistics show, require more supervision. The majority of short term offenders falls under probation guidelines, therefore, there is no need for double supervision as there is under current statute. It should also be pointed out that the misdemeanor offender was not intended to be supervised by the parole board, as is currently the case.

Section 3 of the current statute allows certain Class A felons discretionary parole after serving only 1/4 of the sentence. Under the proposed bill, those particular Class A felons are eligible after 1/3 of the sentence. This was the parole board's original intent and the intent of the 1985 legislature as noted on page 4 of the House Journal Supplement which is found in the miscellaneous section of this packet.

Sections 4 and 5 amend the methods that the Parole Board may use to release a parolee to probation. In the event an offender is released to discretionary parole, the Parole Board may release the offender to serve court ordered probation time after successful completion of two years of parole. A mandatory parolee may be released to serve probation as long as the term of probation and the period of suspended imprisonment each equal or exceed the mandatory parole period.

In the proposed bill, Section 6 defines mandatory parole and Section 7 defines parolee. Section 8 amends the definitions to comply with the changes made in sections 1 through 5.

In the event both mandatory parole supervision and probationary supervision are required upon release, section 9 allows for the mandatory parole time and the probation time to be served concurrently.

Offered: 3/27/87
Referred: Finance

5-0584L

Original sponsors: Swackhammer, Gruenberg, Navarre, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 140 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to mandatory and discretionary parole and residual probation."

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

* Section 1. AS 33.16.010(a) is amended to read:

(a) A prisoner who is serving a term or terms of <u>two years or more</u> [AT LEAST 181 DAYS] is eligible for [EITHER DISCRETIONARY OR] mandatory parole.

* Sec. 2. AS 33.16.010 (c) is amended to read:

(c) A prisoner who is not eligible for discretionary parole, or who is not released on discretionary parole, shall be released on mandatory parole for the term of good time deductions credited under AS 33.20, if the term or terms of imprisonment <u>are two years or more</u> [EXCEED 180 DAYS].

* Sec. 3. AS 33.16.100(d) is amended to read:

(d) A prisoner who is sentenced for a term under AS 12.55.-125(a), [OR] (b), <u>(c), or (i)</u> may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a), [OR] (b), <u>(c), or (i),</u> at least one-third of the period of confinement imposed, or any minimum term set under AS 12.-55.115 at sentencing, whichever is greater.

* Sec. 4. AS 33.16.210 is amended to read:

Sec. 33.16.210. DISCHARGE OF PAROLEE. The board may unconditionally discharge a parolee from the jurisdiction and custody of the board after the parolee has completed two years of parole [, IF THE

[EXCEEDED 180 DAYS]. However, a prisoner released on mandatory parole may be discharged under AS 33.16.210 before the expiration of the term. A prisoner who was sentenced to a term or terms of [AN] imprisonment of less than two years [180 DAYS OR LESS] shall be unconditionally discharged from mandatory parole [, EXCEPT AS PROVIDED IN (c) OF THIS SECTION].

* Sec. 9. AS 33.20.040(c) is amended to read:

(c) If a prisoner's sentence includes a residual period of probation, the probationary period shall run concurrently with a period of mandatory parole for that sentence and the prisoner shall be under the concurrent jurisdiction of the court and the parole board. Nothing in this section precludes both the court and the parole board from revoking the prisoner's probation and mandatory parole for the same conduct. A period of imprisonment resulting from the revocation of probation or mandatory parole may be imposed consecutively in the discretion of the court or the parole board [A PRISONER RELEASED UNDER AS 33.20.030 SHALL IMMEDIATELY BEGIN SERVING THE RESIDUAL PROBATIONARY PERIOD, EXCEPT THAT IF MANDATORY PAROLE IS REQUIRED UNDER (a) OF THIS SECTION, SERVING THE PROBATIONARY PERIOD SHALL IMMEDIATELY FOLLOW DISCHARGE FROM PAROLE].

SUMMARY OF MANDATORY PAROLE BILL

Mandatory parole is the supervision time a misdemeanant or felony offender must complete immediately after being released from incarceration. The supervised time is determined by the amount of good time an inmate earns during incarceration.

181 days is the current minimum for mandatory parole eligibility. Under the new bill being submitted, this eligibility would be increased to a minimum of two years as outlined in Sections 1 and 2. This would decrease the parole work load by an an estimated 130 cases at the current time. This in turn allows the probation/parole officer to devote more time to the long term offender who, as statistics show, require more supervision. The majority of short term offenders falls under probation guidelines, therefore, there is no need for double supervision as there is under current statute. It should also be pointed out that the misdemeanant offender was not intended to be supervised by the parole board, as is currently the case.

Section 3 of the current statute allows a Class A felon discretionary parole after serving only 1/4 of the sentence. Under the proposed bill, a Class A felon is eligible after 1/3 of the sentence. This was the parole board's original intent and the intent of the 1985 legislature as noted on page 4 of the House Journal Supplement which is found in the miscellaneous section of this packet.

Sections 4 and 5 amend the methods that the Parole Board may use to release a parolee to probation. In the event an offender is released to discretionary parole, the Parole Board may release the offender to serve court ordered probation time after successful completion of two years of parole. A mandatory parolee may be released to serve probation as long as the term of probation is equal to or exceeds the mandatory parole period.

In the proposed bill, Section 6 defines mandatory parole and Section 7 defines parolee. Section 8 amends the definitions to comply with the changes made in sections 1 through 5.

In the event both mandatory parole supervision and probationary supervision are required upon release, section 9 allows for the mandatory parole time and the probation time to be served concurrently.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB140
Publish Date :

Revision Date:
Title :"An act relating to Parole."

Agency Affected : Department of Corrections
BRU :

Sponsor : Rep. Swackhammer, Gruenberg
Requestor :

Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

See attached pages.

Susan Knighton

Prepared by : Susan Knighton, Research Analyst IV
Phone : 465-3376
Division : Administrative Services
Date : 3/6/87

William W. Finley for
Approved by Commissioner : Susan Humphrey-Barnett
Date : 3/6/87
Agency : Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB140

The statute changes included in House Bill 140 will have no fiscal impact on the Department of Corrections but will increase the level of service provided to those offenders supervised by the Parole Board. Changes that were made to the Parole Board law during 1985 have extended supervision requirements to include many misdemeanants and minor non-violent felony offenders. With the limited resources of the Parole Board, it would be better to concentrate on the more serious offenders.

Sections 1 and 2:

The effect of the amendments to AS 33.16.010(a) and AS 33.16.010(c) will be to eliminate mandatory parole for persons sentenced to terms of imprisonment of 181 days to 2 years. Mandatory parole places an offender under the supervision of the Parole Board for the amount of good time earned while incarcerated.

Anyone sentenced to 2 years or more of imprisonment will continue to serve a term of mandatory parole under the supervision of the Parole Board.

At any one time, there are around 140 offenders who were sentenced to terms of imprisonment of 181 to 2 years and are on mandatory parole. This represents one-third of the Parole Board's total caseload.

They are offenders convicted of misdemeanors or minor felony offenses. The state will be better served by allowing the Parole Board to concentrate its limited resources on the more serious offenders.

Section 3:

Under its current policies, the Parole Board is not releasing Class A felons until they have served at least one-third of the period of confinement imposed. This amendment will not increase the amount of time currently being served by Class A felons, but will bring the law into line with current practice.

Sections 4 and 5:

These sections amend the methods that the Parole Board may use to release an offender to the jurisdiction of the field Probation/Parole staff. These methods may be used when a parolee had demonstrated good behavior and adjusted to supervision.

For a discretionary parolee, the Parole Board will have the authority to release an offender to a period of probation after the successful completion of two years of parole. If the discretionary parolee has no court imposed probation to follow, he will remain under the supervision of the Parole Board for the full term of his sentence.

For a mandatory parolee, the Parole Board will have the authority to release the offender to the term of probation imposed by the courts as long as this term of probation is equal to or exceeds the period of mandatory parole.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB140

These changes will allow for more flexible treatment of offenders who are doing well on parole by enabling transfer to field probation supervision. They will allow the Parole Board to concentrate on more serious, at-risk offenders.

Sections 6 - 8:

These sections amend the definitions in AS 33 to agree with the changes made in Sections 1 through 5.

Section 9:

This amendment will allow mandatory parolees with probation sentences to follow to serve the mandatory parole and probation time concurrently.

The current population is serving an average of 6 months on mandatory parole followed by 3 years on probation supervision. This change in the statutes will reduce the period of supervision from a total of 3.5 years to 3.0 years. The savings are estimated at: 2,500 clients x .5 years x $1,898/year, $2,372,500 over three years or $790,800 per year. These estimates are based on an average field supervision cost of $5.20 per day. The savings in staff time will allow the field probation staff to concentrate on clients needing supervision and newly assigned cases.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 140
REQUEST
Publish Date:
Revision Date:
Agency Affected: Public Safety
Title: "An Act relating to parole."
BRU: Alaska State Troopers

Sponsor: Rep. Swackhammer ....
Components: Detachments & CIB
Requestor: House HESS

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING:: (Thousands of Dollars)

GENERAL FUNDS	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

F.C.A.

Prepared by: Francis C. Allan
Phone: 269-5691
Division: Alaska State Troopers
Date: 2/23/87

JM 2/25/87

Approved by Commissioner: William R. Nix
Date: 2/25/87
Agency: Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

BILL NO: HB 140 DATE: March 3, 1987

TITLE: "An Act relating to parole." CONTACT: Maj. Walter J. Gilmour
Acting Director
Alaska State Troopers

DEPARTMENT OF PUBLIC SAFETY

This bill does not impact the Department of Public Safety.

William R. Nix
Acting Commissioner

EXAMPLE

7 yr. Sentence
6 yrs. jail
1 yr. Suspended
5 yrs. Probation

a) Defendant Sentenced to 7 yrs.
b) Judge Suspends 1 year
c) Requires Def. serve 6 yrs.
d) Places Def. on 5 yrs. Probation upon release.
(6 yrs jail, 1 yr. Suspended, 5 yrs. probation)
e) Def. on Mandatory Parole (good time) for 2 yrs. (1/3 of 6 yrs)

A. Section 5, lines 8-10 before ammended:

Since probation period (5 yrs.) exceeds Mand. Parole period, Parole Board could discharge def. to probation. However, if Def. then Violated probation, Judge could only impose 1 yr. of jail, the suspended time

B. Section 5, lines 8-10 AS AMMENDED:

Since the Suspended time is not at least as long as the Mand. Parole period, then Board could not discharge def. to probation.

(7)

HOUSE COMMITTEE REPORT

Date referred: 2/18/87

FURTHER REFERRALS: Judiciary
Finance

DATE: ____________________

The Health, Education and Social Services Committee has considered HB 140

"An Act relating to parole."

RECOMMENDS:

[ ] replace with ____________________ [ ] the same title

[ ] attached amendment(s) [ ] a new title

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ____________________ Committee

ADOPTS: [ ] __________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published ____________

[ ] same as previous zero fiscal note published ____________

SIGNING DO PASS:

[signatures]

SIGNING OTHER RECOMMENDATIONS:

Daniel Donley - NO REC: needs further consideration of victims rights regarding certainty in sentencing and judicial options for extended probation

[signature]
Co-Chairman's signature
[signature]

SUMMARY OF MANDATORY PAROLE BILL

Mandatory parole is the supervision time a misdemeanant or felony offender must complete immediately after being released from incarceration. The supervised time is determined by the amount of good time an inmate earns during incarceration.

181 days is the current minimum for mandatory parole eligibility. Under the new bill being submitted, this eligibility would be increased to a minimum of two years as outlined in Sections 1 and 2. This would decrease the parole work load by an an estimated 130 cases at the current time. This in turn allows the probation/parole officer to devote more time to the long term offender who, as statistics show, require more supervision. The majority of short term offenders falls under probation guidelines, therefore, there is no need for double supervision as there is under current statute. It should also be pointed out that the misdemeanant offender was not intended to be supervised by the parole board, as is currently the case.

Section 3 of the current statute allows a Class A felon discretionary parole after serving only 1/4 of the sentence. Under the proposed bill, a Class A felon is eligible after 1/3 of the sentence. This was the parole board's original intent and the intent of the 1985 legislature as noted on page 4 of the House Journal Supplement which is found in the miscellaneous section of this packet.

Sections 4 and 5 amend the methods that the Parole Board may use to release a parolee to probation. In the event an offender is released to discretionary parole, the Parole Board may release the offender to serve court ordered probation time after successful completion of two years of parole. A mandatory parolee may be released to serve probation as long as the term of probation is equal to or exceeds the mandatory parole period.

In the proposed bill, Section 6 defines mandatory parole and Section 7 defines parolee. Section 8 amends the definitions to comply with the changes made in sections 1 through 5.

In the event both mandatory parole supervision and probationary supervision are required upon release, section 9 allows for the mandatory parole time and the probation time to be served concurrently.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB140
Publish Date :

Revision Date:
Title : "An act relating to Parole."

Agency Affected : Department of Corrections
BRU :

Sponsor : Rep. Swackhammer, Gruenberg
Requestor :

Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

See attached pages.

Susan Knighton

Prepared by : Susan Knighton, Research Analyst IV Phone : 465-3376
Division : Administrative Services Date : 3/6/87

William L. Tooley for
Approved by Commissioner : Susan Humphrey-Barnett Date : 3/6/87
Agency : Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB140

The statute changes included in House Bill 140 will have no fiscal impact on the Department of Corrections but will increase the level of service provided to those offenders supervised by the Parole Board. Changes that were made to the Parole Board law during 1985 have extended supervision requirements to include many misdemeanants and minor non-violent felony offenders. With the limited resources of the Parole Board, it would be better to concentrate on the more serious offenders.

Sections 1 and 2:

The effect of the amendments to AS 33.16.010(a) and AS 33.16.010(c) will be to eliminate mandatory parole for persons sentenced to terms of imprisonment of 181 days to 2 years. Mandatory parole places an offender under the supervision of the Parole Board for the amount of good time earned while incarcerated.

Anyone sentenced to 2 years or more of imprisonment will continue to serve a term of mandatory parole under the supervision of the Parole Board.

At any one time, there are around 140 offenders who were sentenced to terms of imprisonment of 181 to 2 years and are on mandatory parole. This represents one-third of the Parole Board's total caseload.

They are offenders convicted of misdemeanors or minor felony offenses. The state will be better served by allowing the Parole Board to concentrate its limited resources on the more serious offenders.

Section 3:

Under its current policies, the Parole Board is not releasing Class A felons until they have served at least one-third of the period of confinement imposed. This amendment will not increase the amount of time currently being served by Class A felons, but will bring the law into line with current practice.

Sections 4 and 5:

These sections amend the methods that the Parole Board may use to release an offender to the jurisdiction of the field Probation/Parole staff. These methods may be used when a parolee had demonstrated good behavior and adjusted to supervision.

For a discretionary parolee, the Parole Board will have the authority to release an offender to a period of probation after the successful completion of two years of parole. If the discretionary parolee has no court imposed probation to follow, he will remain under the supervision of the Parole Board for the full term of his sentence.

For a mandatory parolee, the Parole Board will have the authority to release the offender to the term of probation imposed by the courts as long as this term of probation is equal to or exceeds the period of mandatory parole.