

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672  
5781 HOUSE JUDICIARY

*tian Schools, Inc.*, 477 U.S. 619 (1986), the Supreme Court observed:

[W]e have repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.'

*Id.* at 628 (citation omitted).

In *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), the appellant obtained an injunction from the District Court of Nevada to bar the remaining unrecused judges of the Supreme Court of Nevada from hearing disciplinary proceedings against an attorney based on affidavits alleging that bias against him by the present members of the court would also taint any substitute judges from the trial court. *Id.* at 947-48. We reversed the order granting the injunction. We distinguished *Gibson* on the ground that the failure of the appellant to utilize Nevada's disqualification procedures makes it impossible for us to determine whether the factual allegations of pervasive bias were true. *Id.* at 950. We held that "Flangas may not simply ignore the disqualification procedures based upon his perception that his chances of success in disqualifying the biased judges 'are not auspicious.'" *Id.* (citation omitted). We also noted in *Flangas* that "[t]here is no indication in *Gibson* that there was a statutory procedure for disqualification of the biased Board members." *Id.*

[2] In Alaska, judges may be challenged for cause upon a showing of financial interest in the matter. (Alaska Statute 22.20.020.) At such a proceeding, the Producers can mount a challenge to the impartiality of the Alaska judges by attempting to show that each of them has a *substantial* pecuniary interest in the outcome of the *Hess* matter. We cannot determine from the present record whether this matter comes within the *Gibson* exception to *Younger* abstention. In

*Gibson*, a decision to revoke the licenses of all optometrists employed by a business establishment would have reduced competition by almost fifty percent. Because all Board members were in private practice, revocation would mean that it was possible that each Board member could almost double his income through fees obtained from former patients of the employee-optometrists. Here, the Producers argue that a judgment for Alaska would ultimately increase a qualified resident's dividend from the permanent fund by \$70 a year. No evidence has been presented, however, that supports this figure. Assuming that it is accurate, we do not have sufficient facts before us to determine whether an increase of \$70 in dividends as a result of a favorable judgment for the state in *Hess* would constitute a substantial financial interest compelling disqualification for cause. An evidentiary hearing will also inform a reviewing court whether all Alaska judges and jurors have applied for permanent fund dividends or whether, in order to provide a forum for the trial of this matter, any are willing to waive such benefits.

[3] The Producers' failure to raise their claim of bias before the Alaska courts has denied that state's judges the opportunity to determine whether they must decline to hear this matter because they have a substantial interest in the outcome of this matter. In *Parlington v. Gedan*, No. 87-2375, slip op. 2161 (March 13, 1989), we stated that when a party "has not attempted to present his federal claims in related state court proceedings, [we will] assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.* at 2177 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)). Here, a prompt due process challenge in the Alaska trial court may result in a factual determination that each Alaska judge and juror is not competent to hear this matter. Such a ruling would eliminate the federal constitutional claim without federal court interference and avoid a needless conflict in this nation's dual court system.

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In addition, the Producers have failed to meet their burden of showing that the Alaskan state courts cannot provide a fair tribunal to hear their federal constitutional claims. *See id.* (a litigant bears the burden of showing "that state procedural law bar[s] presentation of [his] claims") (citation omitted). Instead, the Producers have bypassed the Alaska court system on the sensitive issue of its ability to provide a fair and impartial trial in this matter. As a result, critical and dispositive factual questions remain unresolved.

We agree with the explanation by the Eighth Circuit of its disposition of an appeal regarding a similar claim of bias:

The difficulty here is that the bias claim, unless first presented to the state court, does not reach constitutional ripeness. If requested to do so, some state supreme court justices might well rule under the record presented to them that they should step aside and allow others to be designated in their place. If some recuse themselves, and we in no way suggest that they should or shouldn't, this would obviate the necessity for any court to pass on the federal constitutionality claims. Thus, we rule the constitutional issues are not ripe for decision since all state issues have not been presented to the state court.

*Peterson v. Sheran*, 635 F.2d 1335, 1341 (8th Cir. 1980) (citation omitted).

[4] The district court did not err in determining that the Producers' claim of bias in the Alaska court system cannot be resolved until a factual presentation demonstrating bias is made before the state trial judge.

The Producers claim that the failure of the district court to decide whether an injunction should issue on ripeness grounds creates a hardship for them. No showing has been made that the Producers will suffer any hardship by present-

ing to the state evidence, if any exists, that the Alaskan judges and potential jurors have a substantial pecuniary interest in the outcome of the *Hess* matter. The Producers argue that "[i]f the State is constitutionally required to seek relief in an alternative forum, that determination should be made at the earliest opportunity to prevent as much needless delay and wasted pretrial and trial preparation as possible." Brief for Appellants at 12. This is a surprising argument for the Producers to assert. They have had several years to present a disqualification motion in the state court regarding the competency of any Alaska judge to try the *Hess* matter. They have not done so. Any injury suffered by the delay in determining the Producers' bias claim has been self-inflicted. The Producers suggest that if they prevail on their disqualification theory, this matter can be tried in an "alternative forum." If so, no time has been wasted in trial preparation.

We are persuaded from our independent review of the meagre record before us, that the question of the capacity of the State of Alaska to provide a fair and impartial trial and appellate review in the *Hess* matter is not ripe. Until a proper motion for disqualification is made in the state court, the disputed factual questions concerning the alleged bias of all Alaska judges and jurors cannot be reviewed by any federal court.

In dismissing this matter without prejudice, the district court issued a challenge to the State of Alaska "to provide a forum which will ensure a fair trial before an unbiased judge and unbiased jurors" within a reasonable time. The district court invited the Producers "to re-open this federal case" if the State Officials fail to provide an unbiased forum within a reasonable time. We applaud the district court's wise resolution of a very delicate test of the joint responsibility of state and federal courts to provide every person with due process.

## VI

In their cross-appeal, the State Officials contend that the district court should have dismissed this matter pursuant to

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the doctrine of *Younger v. Harris*. We need not address the merits of this issue because we have determined that the district court properly dismissed the federal constitutional issue raised in this matter because it is not ripe for review.

## VII

The district court's order denying the motion to dismiss pursuant to the Eleventh Amendment is Affirmed. The order dismissing this matter because it is not ripe is Affirmed.

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ALASKA OIL COMPANY, a general partnership, and Charter Oil (Alaska), Inc., a corporation. Appellants.

v.

STATE OF ALASKA, Appellee.

Civ. A. Nos. A83-128, A83-129.  
Bankruptcy Nos. 1-82-0000-1,  
1-82-0000-2.

United States District Court,  
D. Alaska.

Jan. 4, 1985.

On appeal from decision in the United States Bankruptcy Court, David N. Naugle, J., ruling for debtors, but denying attorney fee award, debtors moved for recusal. The District Court, Fitzgerald, J., held that judge's entitlement, as Alaska resident, to Alaska permanent fund dividend was neither "financial interest in the subject matter in controversy" nor "any other interest that could be substantially affected by the outcome of the proceedings" so as to require disqualification from hearing appeal which involved amounts which debtors owed state as royalties under mineral leases.

So ordered.

### 1. Judges ⇨42

Entitlement of federal judge, as resident of Alaska, to dividends from permanent fund and in which percentage of all mineral lease rentals, royalties, etc., received by state is placed, is not "financial interest," within meaning of statute which governs disqualification of federal judges in Alaska permanent fund, since entitlement to dividend does not confer any ownership interest in permanent fund. 28 U.S.C.A. § 455.

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

### 2. Judges ⇨39

Alaska permanent fund, in which percentage of mineral lease rentals, royalties,

etc., received by state is placed, was not part of "subject matter in controversy," within statute which governs judge's disqualification, in appeal from decision of bankruptcy court dismissing involuntary bankruptcy proceedings, in which basic issue faced was whether state was entitled to additional payments under royalty oil sale agreement with debtor; rather, on appeal, issues were whether bankruptcy court should have entered findings of fact and conclusions of law and whether bankruptcy court should have awarded attorney fees to debtors. 28 U.S.C.A. § 455.

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

### 3. Judges ⇨39

Entitlement of federal judge, as resident of Alaska, to dividend from permanent fund, in which percentage of mineral lease rentals, royalties, etc., received by state is placed, did not warrant disqualification of judge, for having "any other interest that could be substantially affected by the outcome of the proceeding" from presiding over appeal in bankruptcy initiated by state's involuntary petitions against oil companies, in which permanent fund was only indirectly implicated and amount at stake was possible increase in individual dividends of only \$1.78 annually. 28 U.S.C.A. § 455(b)(4).

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

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Charles E. Cole, Law Offices of Charles E. Cole, Fairbanks, Alaska, Stuart L. Kadison, Lee L. Blackman, Monica Bachner, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, Cal., Stephen D. Busey, Douglas P. McClurg, Smith & Hulse, Jacksonville, Fla., Richard B. Levin, Anthony Castanares, members of Stutman, Treister & Glatt, Professional Corp., Los Angeles, Cal., for appellants.

Norman C. Gorsuch, Atty. Gen. of State of Alaska, Juneau, Alaska, Haley J. Fromholz, Jonathan M. Landers, Kenneth M.

Glazier, Steven S. Rosenthal, Morrison & Foerster, Los Angeles, Cal., for appellee.

### OPINION

FITZGERALD, District Judge.

#### *Background*

The original dispute had to do with the sale of oil which the State of Alaska was entitled to receive as "in kind" royalties under its North Slope mineral leases. Appellant Alaska Oil Co. (AOC) succeeded in 1979 to the obligations to purchase the royalty oil under a 1978 contract. Charter Oil (Alaska), Inc. (COA) owns a majority interest in AOC.

A dispute arose as to whether AOC fulfilled its contractual obligations under the agreement. In December 1981, AOC filed suit for declaratory judgment against the state in the state superior court.<sup>1</sup> In February 1982, the state filed involuntary petitions in bankruptcy against AOC and COA seeking payments allegedly due under the contract.<sup>2</sup>

Judge David N. Naugle, Bankruptcy Judge for the Central District of California, was designated by Chief Judge James Browning of the Ninth Circuit to Alaska and was assigned the bankruptcy court proceedings. On January 21, 1983, after five days of trial, Judge Naugle ruled in favor of AOC and COA, and requested that the companies submit proposed findings of fact and conclusions of law. AOC and COA did so on February 11, 1983, and also filed a Motion for an Award of Reasonable Attorneys' Fees. At a post-trial hearing on April 27, 1983, the court denied the award of attorneys' fees. It also settled the findings of fact and conclusions of law, and announced them from the bench.

The state then requested that the court not enter adverse findings, and, at the court's suggestion, the state moved for leave to dismiss the petitions with prejudice without formal entry of findings of fact

and conclusions of law. On June 15, 1983, the bankruptcy court granted the state's motions. The Order of Dismissal, entered on June 29, 1983, specifically denied the request for entry of findings and conclusions and the request for attorneys' fees.

On July 7, 1983, AOC and COA appealed to this court. The case was initially assigned to Judge von der Heydt, but later reassigned to me. On appeal, AOC and COA seek reversal of the decision of the bankruptcy court, and a remand with instructions to enter the settled findings of fact and conclusions of law and to determine and enter judgment for the reasonable attorneys' fees incurred by AOC and COA.

On October 25, 1983, appellants AOC and COA filed a Motion for Recusal, requesting that I disqualify myself from hearing the appeal, and that the Chief Judge of the Ninth Circuit designate a nonresident district judge to preside. In support of their motion, AOC and COA cite 28 U.S.C. § 455 (1982) which provides for disqualification if a judge has "a financial interest in the subject matter in controversy ... or any other interest that could be substantially affected by the outcome of the proceeding." AOC and COA observe that a portion of any income the state might recover in this action would be deposited in the state's permanent fund, and that part of the income from the fund would be distributed to all Alaska residents, including resident federal judges, as a permanent fund dividend. This, AOC and COA reason, gives the judge an "interest" in the proceedings, thus requiring disqualification.

#### *Applicable Statutes*

Title 28 U.S.C. § 455 (1982) provides for disqualification of federal judges under certain circumstances. In relevant part, this statute reads:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

1. *Alaska Oil Co. v. State of Alaska*, No. 4FA 81-2071 (filed December 17, 1981).

2. *In re Alaska Oil Co.*, No. 1-82-00001 (Bankr.Ct. filed February 26, 1982); *In re Charter Oil (Alaska), Inc.*, No. 1082-00002 (Bankr.Ct. filed February 26, 1982).

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(b) He shall also disqualify himself in the following circumstances:

\*\*\*\*  
 (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

\*\*\*\*  
 (d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

\*\*\*\*  
 (4) "financial interest" means ownership of a legal or equitable interest, however small ...;

\*\*\*\*  
 (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).

The Alaska permanent fund was created by art. IX, § 15 of the Alaska Constitution which provides:

At least twenty-five percent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law

Alaska Stat. title 43, ch. 23 (1983) provides for permanent fund dividends. Under this statute, 50% of the income from the permanent fund is transferred each year to the dividend fund. Alaska Stat. § 43.23.045(b) (1983). The dividend fund is then distributed each year in equal shares to all eligible Alaska residents. *Id.* § 43-

23.025. In general, an individual who has been a state resident for at least six months is eligible to receive a permanent fund dividend. *Id.* § 43.23.005(a).

#### Issues

(1) Do the federal judges of the District of Alaska have a "financial interest," as that term is defined in 28 U.S.C. § 455, in the Alaska permanent fund?

(2) Is the Alaska permanent fund part of the "subject matter in controversy"?

(3) Does the judge's entitlement to a permanent fund dividend constitute "any other interest that could be substantially affected by the outcome of the proceeding"?

Title 28 U.S.C. § 455 defines "financial interest" as "ownership of a legal or equitable interest however small." I must initially determine whether as an Alaska resident I have a "financial interest" in the Alaska permanent fund.

Alaska Constitution art. IX, § 15 mandates that "[a]t least twenty-five percent of all mineral lease ... royalties [and] royalty sale proceeds" be placed in the permanent fund. In these involuntary bankruptcy proceedings, the state seeks payments allegedly due under a contract for the sale of the state's royalty oil. Thus, if successful, any money recovered by the state would constitute "royalty sale proceeds," and at least 25% would be deposited in the permanent fund. Under the statutes providing for the permanent fund dividend, half of the annual income from these proceeds would be distributed to all eligible residents. Alaska Stat. §§ 43.23.025, 43.23.045 (1983).

[1] I conclude that entitlement to a permanent fund dividend is not a "financial interest" as that term is defined in 28 U.S.C. § 455(d)(4). Entitlement to a dividend does not confer any "ownership" interest in the permanent fund. The commentary on Canon 3(C) of the ABA Code of Judicial Conduct, on which § 455 was based, supports this conclusion:

Not all of a judge's economic interests are defined as "financial interests." ... The "financial interest" of a judge that will disqualify him is his *direct legal or*

*equitable ownership* no matter how small ... in the subject matter in a proceeding before him.

E. Thode, Reporter's Notes to Code of Judicial Conduct, 69-70 (1973) (emphasis added). The reporter further noted that certain interests were not direct financial interests. These included financial interests as a customer of a public or private utility, as a taxpayer, and as a premium payer in a stock insurance company. *Id.* at 66; see also *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 719 F.2d 733, 734 (5th Cir.1983) (en banc) (holding that judge's status as rate payer did not require automatic disqualification); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir.1980) (same).

I therefore conclude that I do not, as an Alaska resident, have a "financial interest" in the permanent fund.

[2] Turning to the second part of the statutory requirement for disqualification based on "financial interest," I further conclude that the permanent fund is not a part of the "subject matter in controversy." The case at bar in the district court is an appeal from a decision of the bankruptcy court dismissing the involuntary bankruptcy proceedings. One of the basic issues faced by the bankruptcy court was whether the state was entitled to additional payments under the royalty oil sale agreement. Thus the permanent fund was more directly implicated in the bankruptcy court proceedings.

The same is not true in this court, however. There are two issues before me in this appeal: (1) whether the bankruptcy court should have entered findings of fact and conclusions of law, and (2) whether the bankruptcy court should have awarded attorneys fees to AOC and COA. Whatever decision I make here can have no direct effect on the permanent fund.

AOC and COA argue, however, that the statute's focus on "the subject matter in controversy," rather than on the particular issue to be resolved, requires a broad inter-

pretation of "the subject matter in controversy."<sup>3</sup> The companies suggest that the permanent fund is indeed part of the larger "subject matter in controversy" for these reasons: The merits of the royalty payment dispute are currently before the state superior court in a declaratory judgment action. If the bankruptcy court is ordered to enter findings of fact and conclusions of law, the state court judge may give such findings and conclusions collateral estoppel effect in the state court proceeding. The outcome of the underlying royalty payment dispute, and potential permanent fund revenues, thus may be affected by whether or not I direct the bankruptcy court to enter findings and conclusions.

I conclude otherwise. While the proceedings in bankruptcy court may have had an impact on the amount of revenue obtained by the state for the permanent fund, the issues raised on appeal are otherwise. Permanent fund revenues are not at stake in this appeal. I therefore conclude that the permanent fund is not part of the "subject matter in controversy" before me.

Given my conclusion that entitlement to a permanent fund dividend is not a "financial interest in the subject matter in controversy," I now turn to the second provision of 28 U.S.C. § 455(b)(4). This provision requires disqualification if a judge has "any other interest that could be substantially affected by the outcome of the proceeding." The term "other interest" is not defined in the statute. Whereas the first provision of § 455(b)(4) requires disqualification for any financial interest, "however small," *id.* § 455(d)(4), the second provision applies only to those other interests which could be "substantially affected" by the outcome.

It has been suggested that the outcome of this test should "depend on the interaction of two variables: the remoteness of the interest and its extent or degree." Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv.L. Rev. 736, 753 (1973). To elaborate,

November 15, 1983).

3. See Appellants' Reply to the State of Alaska' Opposition to Motion for Recusal at 3-4 (filed

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If the interest strongly resembles a direct interest—for example, stock held in a subsidiary (or parent) of the corporate party—any amount should disqualify, just as does any stock held in the party itself. As the interest becomes less direct, such as that in an enterprise carrying on business with the party, only if the extent of the interest is itself substantial can the judge's impartiality reasonably be questioned.

*Id.*; see also *In re Virginia Electric and Power Co.*, 539 F.2d 357, 368 (4th Cir.1976); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3547 (2d ed. 1984).

[3] Applying this analysis to the facts of the case before me, I conclude entitlement to a permanent fund dividend does not warrant disqualification. First, as discussed above, the permanent fund is only indirectly implicated in this appeal. My decision here will not directly increase or decrease permanent fund revenues. Second, the extent of my interest is very small. AOC and COA themselves estimate that the amount at stake in these proceedings might translate into an increase of \$1.78 in the annual permanent fund dividend for each Alaska resident.<sup>4</sup> This small amount, coupled with the indirectness of the effect, does not rise to the level of "any other interest that could be substantially affected." This conclusion comports with decisions of the Fourth and Tenth Circuits in which small, indirect, potential benefits were held to not require disqualification. See *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In re Virginia Electric and Power Co.*, 539 F.2d 357 (4th Cir.1976).

In *In re New Mexico Natural Gas*, the Tenth Circuit identified additional factors to be considered under the "substantially affected" provision of § 455(b)(4). The court observed:

In view of the statutory requirement that interests must be substantially affected before recusal is required, we be-

lieve Congress did not intend to require disqualification in all cases in which the judge might benefit as a member of the general public. We realize that recusal would be required by the statute if the judge owned even one share of stock in a party to the litigation. But an interest shared by the judge in common with the public is distinguishable for at least two reasons. First, the policy to promote public confidence in the impartiality of the judicial system is not served to as great an extent by disqualifying a judge who would receive only such a benefit. It is not simply a question of de minimis effect; a personal benefit or detriment shared in common with the community at large is perceived to have a different psychological effect on a judge than would a benefit or detriment not so shared.

Second, practical problems abound if recusal is required whenever a judge benefits simply as a member of the common populace. There is much litigation today that can have far-reaching effects on large segments of the nation. For instance, an antitrust suit against a major oil company could reduce gasoline prices within the entire United States, and hence affect the transportation costs of every judge. The ratemaking proceedings of public utility commissions throughout the nation are reviewed by the courts in the states involved, where most of the reviewing judges are customers of the telephone, electric, water or gas company; yet there is no suggestion in any cases we have seen that these judges should disqualify themselves. Federal and state judges sit every day on tort, patent or other cases in which potentially large verdicts could affect an insurance or other company's profitability, and the loser is in a position to pass the loss on through higher future costs which increase the judges' cost of living.

620 F.2d at 796-97.

Similar considerations apply here. According to the records of the Clerk of the

<sup>4</sup> See Affidavit of Charles E. Cole in Support of Motion for Recusal, exhibit 2 at 11-12 (filed

October 25, 1983).

Court for this district, 60 cases have been filed here since 1981 which likely involve potential permanent fund revenues. This averages 15 cases per year, and these cases often entail far-reaching and complex litigation. Moreover, I note that the state is entitled to 90% of oil revenues received by the federal government from federal oil leases in the state. Cases involving federal leases thus may also have an impact on the permanent fund. It is readily apparent that frequent assignment of nonresident judges to hear these cases would impair the effective administration of justice in the federal court in the District of Alaska.

For these reasons, I conclude that my entitlement to an Alaska permanent fund dividend does not constitute either a "financial interest in the subject matter in controversy" nor "any other interest that could be substantially affected by the outcome of the proceedings." Accordingly, there are no grounds for disqualification under 28 U.S.C. § 455. The Motion for Recusal is therefore DENIED.

ORDERED ACCORDINGLY.



In re STORAGE TECHNOLOGY  
CORPORATION, Debtor.

BENDER & TREECE, P.C., Movant.

v.

STORAGE TECHNOLOGY  
CORPORATION,

Respondent.

Bankruptcy No. 84 B 05377 G.

Motion No. 1130J43.

United States District Court,  
D. Colorado.

Jan. 7, 1985.

As Amended Jan. 8, 1985.

Former counsel for Chapter 11 debtor  
moved for relief from automatic stay to

perfect and otherwise enforce its attorneys' lien. The District Court, Roland J. Brumbaugh, J., held that lien was statutory and that counsel violated automatic stay when it filed its notice of lien after the bankruptcy filing.

Motion denied.

#### 1. Bankruptcy § 191

An attorneys' lien is "statutory" for purpose of avoiding the fixing of a statutory lien. Bankr.Code, 11 U.S.C.A. §§ 101(45), 545(2).

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

#### 2. Attorney and Client § 174

Under Colorado law, an attorneys' lien does not exist apart from statute. C.R.S. 12-5-119, 12-5-120.

#### 3. Attorney and Client § 174

Attorneys' lien arises solely by force of a statute on specified conditions, i.e., entitlement to the fruits of a suit or settlement accruing to the client.

#### 4. Bankruptcy § 659(3)

Attorneys having lien under Colorado law for services rendered Chapter 11 debtor in connection with civil action violated automatic stay by filing notice of attorneys' lien, and perfection of lien as to third parties was not retroactive so as to trigger Bankruptcy Code provision exempting the "act" of filing from the automatic stay and, thus, notice was void and lien was neither enforceable nor perfected against third parties. C.R.S. 12-5-119, 12-5-120; Bankr. Code, 11 U.S.C.A. §§ 101(45), 362, 362(a)(5), (b)(3), 546(b).

#### 5. Bankruptcy § 675

Debtor in possession stands in shoes of the trustee and may exercise lien avoidance powers, but such requires filing of an adversary proceeding. Bankr.Code, 11 U.S.C.A. § 545(2); Rules Bankr.Proc.Rule 7001, 11 U.S.C.A.

Paul G. Hyman, Jr., Holme, Roberts & Owen, Denver, Colo., for Storage Technology Corp., debtor.

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HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF  
HB 277

Gender Balance on Bds. Commns & Other Gps

Received April 7, 1989

by Reps. Boyer, Spohnholz, Koponen, Brown, Elli.,  
Ulmer, Menard, Boucher, and Goll

Heard April 20, 1989

Committee Substitute adopted April 20, 1989

Passed Out of Committee April 20, 1989

4 Do Pass

1 No Recommendation

1 Amend

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- Item 2:** Fiscal Note
- Item 3:** Memorandum from Rep. Boyer, April 9, 1989
- Item 4:** Letter from NEA - Alaska, April 17, 1989
- Item 5:** Iowa Statute

# HOUSE COMMITTEE REPORT

(7) ~~XXXXXX~~  
Date Referred: April 7, 1989

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: \_\_\_\_\_

This STATE AFFAIRS Committee considered:

HB 277

HOUSE BILL NO. 277 [GENDER BALANCE ON BDS, COMMS & OTHER GPS]  
"An Act requiring gender balance on state boards, commissions, and similar groups."

### RECOMMENDATIONS:

- be replaced with CSHB 277 (SA)  the same title  
 have 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):  
(Dept)

APPROVES PREVIOUS: (Date/Dept)

- fiscal impact \_\_\_\_\_  fiscal note(s) \_\_\_\_\_  
 zero fiscal note of no force  zero fiscal note(s) \_\_\_\_\_  
 zero with analysis \_\_\_\_\_  zero fn/analysis \_\_\_\_\_

### SIGNING DO PASS:

W. A. Pugh  
Eileen P. McLean  
[Signature]  
W. A. Pugh

### SIGNING:

(Check approp. column)

	Do Not Pass	No Rec	Amend
<u>[Signature]</u>		X	
<u>[Signature]</u>			X

[Signature]  
Chairman's Signature

*Item 2*

**FISCAL NOTE**

**REQUEST:**

Revision Date: \_\_\_\_\_ Agency Affected: Office of the Governor  
Title: An Act requiring gender balance  
on state boards, commissions, and similar.. BRU: Executive Office  
Sponsor: Bower, Spohnholz, Koronen, et al. Components: \_\_\_\_\_  
Requestor: Representative Bower

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

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>		-0-	-0-	-0-	-0-	-0-
<b>CAPITAL</b>						
<b>REVENUE</b>						

**FUNDING: (Thousands of Dollars)**

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

**POSITIONS:**

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

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

Prepared by: Michael A. Nizich, Director *Man* Phone: 465-3616  
Division: Division of Administrative Services Date: 4-11-89  
Approved by Commissioner: Garrey M. Baska *[Signature]* Date: 4-11-89  
Agency: Chief of Staff

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

# Alaska State Legislature

Item 3

REPRESENTATIVE  
MARK BOYER

VICE-CHAIRMAN, HOUSE  
HEALTH, EDUCATION AND  
SOCIAL SERVICES COMMITTEE

MEMBER, HOUSE LABOR AND  
COMMERCE COMMITTEE

CHAIR, CHILDREN'S CAUCUS



House of Representatives

FAIRBANKS

1098 LAKEVIEW TERRACE  
FAIRBANKS, ALASKA 99701  
(907) 456-6473

JUNEAU

P.O. BOX V  
STATE CAPITOL  
JUNEAU, ALASKA 99811  
(907) 465-3466

## MEMORANDUM

TO: Representative "Red" Boucher  
Chair, State Affairs Committee

FROM: Representative Mark Boyer *MB*

DATE: April 9, 1989

SUBJECT: Scheduling a hearing on HB 277, "An Act requiring gender balance on state boards, commissions and similar groups."

I am requesting that you schedule a hearing on HB 277. I am proud to be a sponsor of this legislation because I believe that equality between the sexes will not be achieved until women are allowed to participate in all walks of life on an equal basis with men. I am appalled that women in Alaska, even though they comprise 48% (Department of Labor statistic, July 1, 1987) of the population, are either not represented or under-represented on the 137 state boards and commissions. To name a few, there are no women on the six member Permanent Fund Board, the seven member Railroad Corporation Board, the fourteen member Forestry Board, and the five member Alaska Housing Finance Corporation. I would also think that of the 21 members of the Alaska Tourism Council, one qualified woman could be found to serve.

Our state has a strong history of equality. The citizens of Alaska voted for equality in 1972 by adopting a constitutional amendment prohibiting sex discrimination. Also, the first act of the 1st Territorial Legislature in 1913 was to give women the right to vote. Though our state has endorsed equality, I think it is clear by the attached list that we have failed to achieve this goal. There are qualified women for each of these boards and commissions.

Red, my sincere thanks to you for being in the forefront by co-sponsoring this "fairness" piece of legislation. If you have any questions or require further information, contact me or my staff, Nancy Groszek at 465-3466.

FAIRBANKS 208

Representative Red Boucher  
House Bill 277  
Page 2

Thank you in advance for your prompt consideration.

MB/NJG/bhn

Attachment

cc: State Affairs Committee Members

Compiled by House Research Agency  
#s as of March 31, 1989

TABLE 1  
FEMALE BOARD AND COMMISSION MEMBERS

BOARD NUMBER	BOARD OR COMMISSION	TOTAL MEMBERS *	FEMALE MEMBERS	PERCENT OF FEMALE MEMBERS AS PERCENT OF TOTAL MEMBERS
1	Accountancy Board	7	3	42.9%
2	Agricultural Revolving Loan Fund Board	7	2	28.6
3	Alcoholic Beverage Control Board	5	1	20.0
4	Review Board on Alcoholism (Terminated)	0	0	0.0
5	Architects, Engineers, Land Surveyors	9	2	22.2
6	Arts Council	11	8	72.7
7	Assessment Review Board	5	0	0.0
8	Athletic Commission	5	0	0.0
9	Bald Eagle Preserve Advisory Council	12	0	0.0
10	Bar Association	12	5	41.7
11	Barbers and Hairdressers	5	4	80.0
12	Bicentennial Commission	20	7	35.0
13	Block Grant Advisory Committee	11	6	54.5
14	Broadcasting Commission	9	6	66.7
15	Building Authority	5	2	40.0
16	Chiropractic Examiners	5	1	20.0
17	Clemency Advisory Committee	3	0	0.0
18	Coastal Policy Council	16	2	12.5
19	Code Revision Commission	8	2	25.0
20	Commercial Fisheries Entry Commission	3	0	0.0
21	Commercial Fishing and Agriculture Bank	7	0	0.0
22	Compensation Commission	7	4	57.1
23	Correctional Industries Commission	7	2	28.6
24	Dental Examiners	9	3	33.3
25	Public Employees and Teachers Disability Review Board	5	0	0.0
26	Dispensing Opticians Board	5	2	40.0
27	Domestic Violence and Sexual Assault	7	6	85.7
28	Advisory Board on Drug Abuse (Terminated)	0	0	0.0
29	Education Board	9	5	55.6
30	Education Commission of the States	7	0	0.0
31	Emergency Medical Services Advisory Council	16	5	31.3
32	Emergency Response Commission	13	4	30.8
33	Employees Retirement Board	5	2	40.0
34	Employment of the Handicapped	12	7	58.3
35	Employment Security Advisory Council	5	2	40.0
36	Federal Areas of Alaska	16	4	25.0
37	Fisheries Board	8	0	0.0
38	Fisherman's Fund Advisory and Appeals Council	6	1	16.7
39	Forestry Board	14	0	0.0
40	Game Board	8	1	12.5
41	Geographic Board	8	3	37.5
42	Guide Board	7	1	14.3
43	Handicapped and Gifted Council	23	9	39.1
44	Historic Sites Advisory Committee	7	5	71.4
45	Historical Commission	6	4	66.7
46	Historical Records Advisory board	7	4	57.1
47	Housing Finance Corporation	5	0	0.0
48	Human Rights Commission	7	5	71.4
49	Humanities Forum	3	0	0.0
50	Industrial Development and Export Authority	5	0	0.0
51	Job Training Coordinating Council	21	7	33.3
52	Judicial Conduct Commission	9	3	33.3
53	Judicial Council	7	2	28.6
54	Juvenile Justice and Family Services Advisory Committee	15	8	53.3
55	Labor Relations Agency	3	1	33.3

TABLE 1 (Continued)  
FEMALE BOARD AND COMMISSION MEMBERS

BOARD NUMBER	BOARD OR COMMISSION	TOTAL MEMBERS *	FEMALE MEMBERS	PERCENT OF FEMALE MEMBERS AS PERCENT OF TOTAL MEMBERS
56	Land Use Council Advisors Committee	20	4	20.0
57	Libraries Advisory Council	10	8	80.0
58	Local Boundary Commission	5	2	40.0
59	Marine Pilots Board	7	0	0.0
60	Medicaid Rate Commission	5	0	0.0
61	Medical Board	7	2	28.6
62	Medical Indemnity Corporation of Alaska	9	2	22.2
63	Mental Health Board	13	6	46.2
64	Mental Health Trust Commission	5	2	40.0
65	Minerals Commission	11	1	9.1
66	Municipal Bond Bank Authority	5	0	0.0
67	Nursing Board	7	7	100.0
68	Nursing Home Administrators Board	3	2	66.7
69	Occupational Safety and Health Review Board	3	0	0.0
70	Oil and Gas Conservation Commission	3	0	0.0
71	Older Alaskans Commission	11	6	54.5
72	Optometry Board	5	1	20.0
73	Pacific Marine Fisheries Commission	3	0	0.0
74	Park and Park Monument Subsistency Resource Commissions	20	5	25.0
75	Parole Board	5	1	20.0
76	Permanent Fund Corporation Board of Trustees	6	0	0.0
77	Personnel Board	3	1	33.3
78	Pharmacy Board	7	4	57.1
79	Physical Therapy and Occupational Therapy Board	7	4	57.1
80	Pioneers' Homes Advisory Board	7	1	14.3
81	Police Standards Council	11	2	18.2
82	Postsecondary Education Commission	14	6	42.9
83	Power Authority	7	1	14.3
84	Private Industry Council	15	8	53.3
85	Professional Teaching Practices Commission	9	5	55.6
86	Psychologist and Psychological Associate Examiners	5	2	40.0
87	Public Offices Commission	5	1	20.0
88	Railroad Corporation Board	7	0	0.0
89	Railroad Labor Relations Agency	3	1	33.3
90	Real Estate Commission	7	3	42.9
91	Regents, University of Alaska	11	5	45.5
92	Royalty Oil and Gas Development Advisory Board	6	1	16.7
93	Rural Alaska Television Users Network	14	6	42.9
94	Safety Advisory Council	14	2	14.3
95	Science and Engineering Advisory Commission	7	1	14.3
96	Seafood Marketing Institute	18	2	11.1
97	Soil and Water Conservation Board	6	1	16.7
98	Student Loan Corporation	5	2	40.0
99	Teachers' Retirement Board	5	2	40.0
100	Telecommunications Information Council	19	3	15.8
101	Utilities Commission	5	3	60.0
102	Veterinary Examiners	5	2	40.0
103	Violent Crimes Compensation Board	3	2	66.7
104	Vocational and Career Education Council	13	5	38.5
105	Water and Wastewater Works Advisory Board	9	0	0.0
106	Water Resources Board	9	3	33.3
107	Western Interstate Commission of Higher Education	3	1	33.3
108	Women's Commission	10	9	90.0
109	Wood-Titichik State Park Management Council	7	0	0.0
110	Worker's Compensation Board	11	1	9.1

TABLE 1 (Continued)  
FEMALE BOARD AND COMMISSION MEMBERS

BOARD NUMBER	BOARD OR COMMISSION	TOTAL MEMBERS *	FEMALE MEMBERS	PERCENT OF FEMALE MEMBERS AS PERCENT OF TOTAL MEMBERS
111	Children and Youth Commission	22	15	68.2
112	Health Care	12	0	0.0
113	Housing Market Council	12	4	33.3
114	Trade Alaska Advisors	20	5	25.0
115	Tourism Coordinating Committee	12	2	16.7
116	Tourism Marketing Council	21	0	0.0
117	Science and Technology Foundation Board	9	2	22.2
118	Guiding and Game Task Force	0	0	0.0
119	Mechanical Examiners Board	3	0	0.0
120	Electrical Examiners Board	3	0	0.0
121	Alaska-Soviet Relations Commission	Inactive	0	0.0
122	Clinical Social Work Examiners	5	4	80.0
123	Recreation Rivers Advisory Board	11	0	0.0
124	Finfish Farming Task Force	Inactive	0	0.0
125	Fishing Vessel Safety Interim Commission	Inactive	0	0.0
126	Alcoholism and Drug Abuse Advisory Board	12	5	41.7
127	Native Services Commission	8	1	12.5
128	Small Business Conference Board	22	5	22.7
129	***	0	0	0.0
130	North Pacific and Bering Sea Fisheries Advisory Body **	0	0	0.0
131	Equal Opportunity Advisory Council	12	3	25.0
132	North Pacific Fisheries Management Council **	0	0	0.0
133	Public Defender (Not a Board or Commission)	0	0	0.0
134	Judgeships (Not a Board or Commission)	0	0	0.0
135	***	0	0	0.0
136	Yukon River Salmon Negotiations **	0	0	0.0
137	Health Care Cost Containment Task Force	7	2	28.6
	TOTALS	1,098	338	30.8%

\* Total number of members is constantly changing.

\*\* Federal Board

\*\*\* Not presently filled.

Prepared by the House Research Agency, April 1989 (89.331).

1 IN THE HOUSE

BY BOYER, SPOHNHOLZ, HOPOONEN,  
BROWN, ELLIS, ULMER, MELHARD,  
BOUCHER, AND GOLL

2

HOUSE BILL NO. 277

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act requiring gender balance on state boards,  
7 commissions, and similar groups."

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

9 \* Section 1. AS 39.05 is amended by adding a new section to read:

10 Sec. 39.05.062. GENDER BALANCE ON BOARDS AND COMMISSIONS. (a)

11 All appointive boards, commissions, committees, councils, task forces,  
12 and similar groups established by law must be gender balanced, unless  
13 otherwise provided by the law establishing the group.

14 (b) Unless otherwise provided by law, a person may not be  
15 appointed or reappointed to a board, commission, committee, council,  
16 task force, or similar group established by law if that appointment or  
17 reappointment would cause the number of members of one gender to  
18 exceed by more than one the number of members of the other gender  
19 serving as members of the group.

20 (c) If there are multiple appointing authorities for a board,  
21 commission, committee, council, task force, or similar group governed  
22 by this section, the appointing authorities shall consult each other  
23 to avoid a violation of this section.

24 \* Sec. 2. TRANSITIONAL PROVISION. Notwithstanding AS 39.05.062, enact-  
25 ed by sec. 1 of this Act, an individual may complete a term as a member of  
26 a board, commission, committee, council, task force, or similar group if  
27 the term is being served on the effective date of this Act.



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

P.O. Box Y, State Capitol  
Juneau, Alaska 99811-3100  
Mail Stop 3100  
(907) 465-3991

April 17, 1989

MEMORANDUM

TO: Representative Mark Boyer

ATTN: Nancy Groszek

FROM: Sandi Depue *JMD*  
Administrative Officer

RE: Women Serving on Alaska Boards and Commissions  
Research Request 89.331

Attached is a revised Table 1 showing the number of women serving on Alaska's boards and commissions. Two changes have been made: one woman serves on board no. 115--the Tourism Coordinating Committee--compared to two previously reported, and five women serve on board no. 116--the Tourism Marketing Council--compared to none being previously reported. Consequently, the percent of female members as a percent of total members changes from 30.8% to 31.1%. Please replace the original table with the attached revised table. I apologize for any inconvenience this error has caused.

TABLE 1  
FEMALE BOARD AND COMMISSION MEMBERS

BOARD NUMBER	BOARD OR COMMISSION	TOTAL MEMBERS *	FEMALE MEMBERS	PERCENT OF FEMALE MEMBERS AS PERCENT OF TOTAL MEMBERS
1	Accountancy Board	7	3	42.9%
2	Agricultural Revolving Loan Fund Board	7	2	28.6
3	Alcoholic Beverage Control Board	5	1	20.0
4	Review Board on Alcoholism (Terminated)	0	0	0.0
5	Architects, Engineers, Land Surveyors	9	2	22.2
6	Arts Council	11	8	72.7
7	Assessment Review Board	5	0	0.0
8	Athletic Commission	5	0	0.0
9	Bald Eagle Preserve Advisory Council	12	0	0.0
10	Bar Association	12	5	41.7
11	Barbers and Hairdressers	5	4	80.0
12	Bicentennial Commission	20	7	35.0
13	Block Grant Advisory Committee	11	6	54.5
14	Broadcasting Commission	9	6	66.7
15	Building Authority	5	2	40.0
16	Chiropractic Examiners	5	1	20.0
17	Clemency Advisory Committee	3	0	0.0
18	Coastal Policy Council	16	2	12.5
19	Code Revision Commission	8	2	25.0
20	Commercial Fisheries Entry Commission	3	0	0.0
21	Commercial Fishing and Agriculture Bank	7	0	0.0
22	Compensation Commission	7	4	57.1
23	Correctional Industries Commission	7	2	28.6
24	Dental Examiners	9	3	33.3
25	Public Employees and Teachers Disability Review Board	5	0	0.0
26	Dispensing Opticians Board	5	2	40.0
27	Domestic Violence and Sexual Assault	7	6	85.7
28	Advisory Board on Drug Abuse (Terminated)	0	0	0.0
29	Education Board	9	5	55.6
30	Education Commission of the States	7	0	0.0
31	Emergency Medical Services Advisory Council	16	5	31.3
32	Emergency Response Commission	13	4	30.8
33	Employees Retirement Board	5	2	40.0
34	Employment of the Handicapped	12	7	58.3
35	Employment Security Advisory Council	5	2	40.0
36	Federal Areas of Alaska	16	4	25.0
37	Fisheries Board	8	0	0.0
38	Fisherman's Fund Advisory and Appeals Council	6	1	16.7
39	Forestry Board	14	0	0.0
40	Game Board	8	1	12.5
41	Geographic Board	8	3	37.5
42	Guide Board	7	1	14.3
43	Handicapped and Gifted Council	23	9	39.1
44	Historic Sites Advisory Committee	7	5	71.4
45	Historical Commission	6	4	66.7
46	Historical Records Advisory board	7	4	57.1
47	Housing Finance Corporation	5	0	0.0
48	Human Rights Commission	7	5	71.4
49	Humanities Forum	3	0	0.0
50	Industrial Development and Export Authority	5	0	0.0
51	Job Training Coordinating Council	21	7	33.3
52	Judicial Conduct Commission	9	3	33.3
53	Judicial Council	7	2	28.6
54	Juvenile Justice and Family Services Advisory Committee	15	8	53.3
55	Labor Relations Agency	3	1	33.3

TABLE 1 (Continued)  
FEMALE BOARD AND COMMISSION MEMBERS

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56	Land Use Council Advisors Committee	20	4	20.0
57	Libraries Advisory Council	10	8	80.0
58	Local Boundary Commission	5	2	40.0
59	Marine Pilots Board	7	0	0.0
60	Medicaid Rate Commission	5	0	0.0
61	Medical Board	7	2	28.6
62	Medical Indemnity Corporation of Alaska	9	2	22.2
63	Mental Health Board	13	6	46.2
64	Mental Health Trust Commission	5	2	40.0
65	Minerals Commission	11	1	9.1
66	Municipal Bond Bank Authority	5	0	0.0
67	Nursing Board	7	7	100.0
68	Nursing Home Administrators Board	3	2	66.7
69	Occupational Safety and Health Review Board	3	0	0.0
70	Oil and Gas Conservation Commission	3	0	0.0
71	Older Alaskans Commission	11	6	54.5
72	Optometry Board	5	1	20.0
73	Pacific Marine Fisheries Commission	3	0	0.0
74	Park and Park Monument Subsistency Resource Commissions	20	5	25.0
75	Parole Board	5	1	20.0
76	Permanent Fund Corporation Board of Trustees	6	0	0.0
77	Personnel Board	3	1	33.3
78	Pharmacy Board	7	4	57.1
79	Physical Therapy and Occupational Therapy Board	7	4	57.1
80	Pioneers' Homes Advisory Board	7	1	14.3
81	Police Standards Council	11	2	18.2
82	Postsecondary Education Commission	14	6	42.9
83	Power Authority	7	1	14.3
84	Private Industry Council	15	8	53.3
85	Professional Teaching Practices Commission	9	5	55.6
86	Psychologist and Psychological Associate Examiners	5	2	40.0
87	Public Offices Commission	5	1	20.0
88	Railroad Corporation Board	7	0	0.0
89	Railroad Labor Relations Agency	3	1	33.3
90	Real Estate Commission	7	3	42.9
91	Regents, University of Alaska	11	5	45.5
92	Royalty Oil and Gas Development Advisory Board	6	1	16.7
93	Rural Alaska Television Users Network	14	6	42.9
94	Safety Advisory Council	14	2	14.3
95	Science and Engineering Advisory Commission	7	1	14.3
96	Seafood Marketing Institute	18	2	11.1
97	Soil and Water Conservation Board	6	1	16.7
98	Student Loan Corporation	5	2	40.0
99	Teachers' Retirement Board	5	2	40.0
100	Telecommunications Information Council	19	3	15.8
101	Utilities Commission	5	3	60.0
102	Veterinary Examiners	5	2	40.0
103	Violent Crimes Compensation Board	3	2	66.7
104	Vocational and Career Education Council	13	5	38.5
105	Water and Wastewater Works Advisory Board	9	0	0.0
106	Water Resources Board	9	3	33.3
107	Western Interstate Commission of Higher Education	3	1	33.3
108	Women's Commission	10	9	90.0
109	Wood-Tikchik State Park Management Council	7	0	0.0
110	Worker's Compensation Board	11	1	9.1

TABLE 1 (Continued)  
FEMALE BOARD AND COMMISSION MEMBERS

BOARD NUMBER	BOARD OR COMMISSION	TOTAL MEMBERS *	FEMALE MEMBERS	PERCENT OF FEMALE MEMBERS AS PERCENT OF TOTAL MEMBERS
111	Children and Youth Commission	22	15	68.2
112	Health Care	12	0	0.0
113	Housing Market Council	12	4	33.3
114	Trade Alaska Advisors	20	5	25.0
115	Tourism Coordinating Committee	12	1	8.3
116	Tourism Marketing Council	21		23.8
117	Science and Technology Foundation Board	9		22.2
118	Guiding and Game Task Force	0	0	0.0
119	Mechanical Examiners Board	3	0	0.0
120	Electrical Examiners Board	3	0	0.0
121	Alaska-Soviet Relations Commission	Inactive	0	0.0
122	Clinical Social Work Examiners	5	4	80.0
123	Recreation Rivers Advisory Board	11	0	0.0
124	Finfish Farming Task Force	Inactive	0	0.0
125	Fishing Vessel Safety Interim Commission	Inactive	0	0.0
126	Alcoholism and Drug Abuse Advisory Board	12	5	41.7
127	Native Services Commission	8	1	12.5
128	Small Business Conference Board	22	5	22.7
129	***	0	0	0.0
130	North Pacific and Bering Sea Fisheries Advisory Body **	0	0	0.0
131	Equal Opportunity Advisory Council	12	3	25.0
132	North Pacific Fisheries Management Council **	0	0	0.0
133	Public Defender (Not a Board or Commission)	0	0	0.0
134	Judgeships (Not a Board or Commission)	0	0	0.0
135	***	0	0	0.0
136	Yukon River Salmon Negotiations **	0	0	0.0
137	Health Care Cost Containment Task Force	7	2	28.6
	TOTALS	1,098	342	31.1%

\* Total number of members is constantly changing.

\*\* Federal Board

\*\*\* Not presently filled.

Prepared by the House Research Agency, April 1989 (89.331).



# NEA-ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

### ANCHORAGE REGIONAL OFFICE

1411 W 33RD AVENUE  
ANCHORAGE, ALASKA 99503  
(907) 274-0536

### JUNEAU OFFICE

105 MUNICIPAL WAY, SUITE 302  
JUNEAU, ALASKA 99801  
(907) 586-3090

### FAIRBANKS REGIONAL OFFICE

2118 CUSHMAN STREET  
FAIRBANKS, ALASKA 99701  
(907) 456-4435

April 17, 1989

To: Representative Red Boucher, Chair  
Members, House State Affairs Committee

Re: House Bill No. 277; "An Act requiring gender  
balance on state boards, commissions, and  
similar groups."

NEA-Alaska supports and encourages your favorable  
consideration of HB 277.

This legislation addresses an area of concern which has been  
too long ignored in Alaska and provides an effective means  
to positive resolution.

Women comprise 48% of the state population but they hold  
only 30% of the appointive positions on the boards and  
commissions of the state. Even more significant is the fact  
that some of the more prestigious and significant boards and  
commissions have no women in their membership.

The basic premise of equal opportunity is just that - equal  
opportunity. The opportunity to be involved through active  
participation at the board and commission level opens other  
doors of opportunity.

Alaska can and must re-affirm its commitment to affirmative  
action by passing HB 277.

Thank you for your consideration of our position.

Respectfully submitted,

Bob Manners  
Executive Secretary

Judy Salo  
President

cc: Representative Mark Boyer

# IOWA Statutes

## 69.16A Gender balance.

All appointive boards, commissions, committees and councils of the state established by the Code if not otherwise provided by law shall be gender balanced. No person shall be appointed or reappointed to any board, commission, committee, or council established by the Code if that appointment or reappointment would cause the number of members of the board, commission, committee, or council of one gender to be greater than one-half the membership of the board, commission, committee, or council plus one. If there are multiple appointing authorities for a board, commission, committee, or council, they shall consult each other to avoid a violation of this section. This section shall not prohibit an individual from completing a term being served on June 30, 1987.

87 Acts, ch 218, § SF 148  
Section amended

1987



Representative H.A. "Red" Boucher, Chair  
House State Affairs Committee

DATE: 4/19/89

PLACE: Juneau

SUBJECT OF MEETING  
HB 232  
HR 5  
HB 277  
HB 255

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?	WHAT SUBJECT/ WHICH BILL?
KATHLEEN STRASSBURGH	DEPT. LAW	Rm 404 CAP			3600	(Y) N	HB 277
Erwin Jones	Dept of Rev.	P.O. Box 5-0462 Juneau, AK 99811		7	2323	(Y) N	HB 255
NOLA CAPP	VIOLENT CRIMES Comp.	Bd - Box N	99811		3040	(Y) N	HB 255
CURTIS LOMAS	OHSA - Du Pont business	Box H-07	99811		3347	Y (N)	HB 255 - AVAILABLE FOR 90 DAYS RETURN TO AFRC PROGRAM
SHERRE GOU	ALASKA WOMEN'S LOBBY	419 Kennedy Street Juneau, AK. 99801			4788	(Y) N	HB 255 HB 277
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

## FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_  
Title: "An Act requiring gender balance on state boards, commissions, and ..."  
Sponsor: Reps. Bover, Spohnholz, Koponen, et al  
Requestor: House Judiciary Committee

Agency Affected: Office of the Governor  
BRU: Executive Operations

Components: \_\_\_\_\_

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

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

**FUNDING:** (Thousands of Dollars)

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

**POSITIONS:**

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

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

Prepared by: Michael A. Nizich, Director Phone: 465-3616  
Division: Division of Administrative Services Date: 1/25/90

Approved by Commissioner: Garrey M. Peska, Chief of Staff Date: 1/25/90  
Agency: Office of the Governor

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# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

1031 W 4th AVENUE  
SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 276-3550

1st NATIONAL CENTER  
100 CUSHMAN ST  
SUITE 400  
FAIRBANKS, ALASKA 99701-4679

P.O. BOX K—STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600

May 4, 1989

Hon. Max Gruenberg AND  
Hon. Peter Goll, Co-chairs  
House Judiciary Committee  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Re: CSHB 277 (SA)

Dear Representatives Gruenberg and Goll:

Regarding the above bill, which we understand will not be heard again until next session, please find enclosed a memorandum we have prepared outlining the constitutional problems the bill presents.

We have provided a copy to an aide of the prime sponsor.

Please advise us if we can provide any additional information.

Very truly yours,

DOUGLAS B. BAILY  
ATTORNEY GENERAL

By: *Virginia B. Ragle*  
Virginia B. Ragle  
Assistant Attorney General

VBR/pjg

Enc.

cc: Arthur H. Peterson  
Assistant Attorney General  
Department of Law - Juneau

# MEMORANDUM

State of Alaska  
Department of Law

TO Garrey Peska, Chief of Staff  
Office of the Governor

DATE May 2, 1989

FILE NO 663-89-0504

TEL NO 465-3600

SUBJECT HB 277 -- Gender balance  
on state boards and com-  
missions

FROM

*Virginia B. Ragle*  
Virginia B. Ragle  
Assistant Attorney General  
Governmental Affairs-Juneau

You have asked this office to review HB 277 and to address constitutional questions presented by the bill. We believe that it may be difficult to defend this legislation against a challenge alleging violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

## Provisions of HB 277

HB 277 requires all appointive boards, commissions, and similar groups established by law (hereafter "boards") to be gender balanced, unless the law establishing the board provides otherwise. The bill prohibits appointment or reappointment of a person to a board if the appointment would cause the number of persons of one gender to exceed by more than one the number of persons of the other gender on the board. The bill does not prevent existing board members from serving out terms on boards that are not gender balanced on the effective date of the Act. A committee substitute offered by the House State Affairs Committee limits the gender balance requirement to nongovernmental members of boards. There is no provision for waiver of the gender balance requirement, and the duration of the requirement is not limited in time.

## Evidence presented at hearing on HB 277

The prime sponsor of the bill testified in support of the bill before the House State Affairs Committee at a hearing on April 20, 1989. The committee was provided with a copy of an Iowa statute that includes provisions similar to HB 277. The committee was also provided with a table that lists 135 boards and that shows the number of members, number of female members, and percentage of female members on the boards. A memorandum attached to the table, dated April 17, 1989, indicates that 17.1 percent of the total members of the 135 boards are female.

bers of the committee noted that there were a number of boards on which the majority of members were female. It was pointed out by the prime sponsor that "men serve on men kinds of things," such as fisheries, game, guide, and "money" boards like the Permanent Fund Board, while women served on the arts council, the barbers and hairdressers board, domestic violence board, and women's commission.

The prime sponsor read to the committee from a review prepared a number of years ago concerning women's routes to elective office, which indicated that women elective office holders were more likely than men office holders to have held appointive positions and worked in political campaigns, which gave women visibility in the community. He stated that "what we're trying to suggest here is that we have an ongoing commitment to equality and affirmative action in the State of Alaska, that it's important on boards and commissions in the State of Alaska that we strive to have gender balance..." Although the committee chairman stated his belief that there is a bias against women, there was no testimony offered at the hearing concerning specific evidence of discrimination against members of either gender in appointments to state boards.

An amendment to make the gender balance effective for a board on the board's sunset date, thereby allowing the legislature to consider the gender balance requirement one board at a time, was not adopted by the committee.

#### Potential constitutional problems with HB 277

There is some question as to whether the requirements of HB 277 would unduly infringe on the governor's appointment authority. These appointments are "political" in nature and, except for broad eligibility requirements imposed by law, are exclusively made at the governor's discretion. It is possible that a blanket gender allocation applying to all board appointments constitutes a usurpation of the executive power of appointment. However, our main concern with the bill is that it is subject to challenge on equal protection grounds.

HB 277 essentially establishes gender-based quotas for membership on boards. We have found no cases specifically addressing the constitutionality of race or gender-based classifications for determining eligibility for membership on boards. However, case law on the constitutionality of race and gender-based quotas in affirmative action plans enacted to remedy past discrimination in public employment and contracting provides a

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Office of the Governor  
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basis for analysis of HB 277. 1/ That case law is evolving, and the analysis by the U.S. Supreme Court is shifting with the shift in the ideological balance on the court.

Hundreds of pages of plurality decisions could be reviewed and analyzed in discussing the potential outcome of a challenge to HB 277. The recent case of Richmond v. Croson Co., 488 U.S. \_\_\_, 102 L.Ed.2d 854 (1989), so "modifies the analysis lower courts should apply when reviewing the constitutionality of affirmative action programs" that "cases decided before Croson are of limited usefulness." Milwaukee County Pavers Ass'n v. Fielder, \_\_\_ F. Supp. \_\_\_, No. 89-C-0177-C (W.D. Wis., Feb. 27, 1989). 2/ The shift represented by this case is not in a direction favorable to the gender balance requirement of HB 277. 3/

Although the race classification challenged in Croson was enacted for "benign" or remedial purposes, a majority of the court applied strict scrutiny in reviewing the city of Richmond's minority set-aside program. 4/ The program required prime contractors (other than minority prime contractors) to subcontract at least 30 percent of the dollar amount of city construction

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1/ These cases involve economic opportunity. We do not speculate whether the equal protection analysis would be significantly different for HB 277, which primarily affects political opportunity.

2/ The Iowa Attorney General's Office has advised us that, based on case law that predates Croson, it issued an informal opinion that Iowa's gender balance legislation was constitutional, although it was a close issue. No legal challenge to Iowa's gender balance law has yet been filed.

3/ In this memorandum, we limit our detailed analysis of case law to the Croson case, because it represents a change in the court's analysis of affirmative action programs and because of time constraints in preparing our advice in advance of the House Judiciary Committee hearing of HB 277 on May 2, 1989. If you require more detailed analysis of earlier case law concerning race and gender-based quotas in the context of employment law (a few of Alaska's board positions are actually full-time jobs), we can provide that analysis during the legislative interim.

4/ In Alaska, the state supreme court uses a sliding scale to determine the level of scrutiny, thereby making the state's burden of proof difficult to assess.

contracts to minority business enterprises (MBEs). The program was found to be constitutionally deficient because (1) the racial classification was not based on specific evidence of past discrimination against the identified minorities sufficient to support a conclusion that remedial action was necessary, and (2) the program could not be shown to be narrowly tailored to remedy past discrimination.

In reviewing the evidence of discrimination, the court considered facts recited by the district court to support Richmond's 30 percent set-aside, which were

- (1) the ordinance declares itself to be remedial;
- (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry;
- (3) minority businesses received .67% of prime contracts from the city while minorities constituted 50% of the city's population;
- (4) there were very few minority contractors in local and state contractor's associations; and
- (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

102 L.Ed.2d at 885-86. These facts were found by the Supreme Court to be insufficient to support a conclusion that remedial action was necessary. The mere recitation of a remedial purpose was declared to be entitled to little or no weight in determining whether a suspect classification could be employed. Assertions by the program's proponents that there was discrimination in the construction industry were considered to be "of little probative value in establishing identified discrimination in the Richmond construction industry." 102 L.Ed.2d at 886. The disparity between the number of contracts awarded to MBEs and the number of members of minorities in the population of Richmond could not be relied on to support the set-aside, since the city did "not even know how many MBE's in the relevant market [were] qualified to undertake prime or subcontracting work in public construction projects" and, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." 102 L.Ed.2d at 887. Low membership in contractors associations could not, alone, establish a prima facie case of discrimination: It would have to be shown that there was a great statistical disparity between eligible MBEs and MBE membership. Congressional findings of nationwide

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Office of the Governor  
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discrimination in the construction industry could also not be relied upon. Rather, the city had to establish the presence of discrimination in Richmond.

In discussing the requirement that remedial action using a suspect classification must be narrowly tailored, the court stated that it was impossible to assess that issue, since the Richmond program was not linked to identified discrimination. The court observed (1) that it did not appear that there had been any consideration of race-neutral means to increase MBE participation in city contracting, and (2) that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests on the 'completely unrealistic' assumption that minorities will choose a particular trade in lock-step proportion to their representation in the local population." 102 L.Ed.2d at 890-91 (citation omitted).

Applying the analysis of the court in Croson, we think it questionable that the gender classification is supported by a factual basis establishing discrimination against either gender or that the gender balance requirement is narrowly tailored to remedy past discrimination. The general views of members of the House State Affairs Committee that there is bias against women do not constitute specific findings of discrimination against women. The fact that men predominate in membership on some boards while women predominate on others does not necessarily establish discrimination against either gender. Croson indicates that statistical disparity alone is not enough to justify utilization of a suspect classification, but probably would require consideration on a board-by-board basis of the relevant pool of available appointees.

The legislation is not narrowly tailored to remedy identified past discrimination. Even if the disparity in the gender balance of some boards were linked to identified discrimination, the inflexible requirement that gender be a controlling consideration for appointment to all boards is not narrowly tailored to remedy that discrimination. The court stated in Croson "the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." 102 L.Ed.2d at 891.

Please let us know if you need further advice in this matter.

VBR/pjg

# Alaska State Legislature

REPRESENTATIVE  
MARK BOYER

VICE-CHAIRMAN, HOUSE  
HEALTH, EDUCATION AND  
SOCIAL SERVICES COMMITTEE

MEMBER, HOUSE LABOR AND  
COMMERCE COMMITTEE

CHAIR, CHILDREN'S CAUCUS



House of Representatives

FAIRBANKS

1098 LAKEVIEW TERRACE  
FAIRBANKS, ALASKA 99701  
(907) 456-6473

JUNEAU

P.O. BOX V  
STATE CAPITOL  
JUNEAU, ALASKA 99811  
(907) 465-3466

COMMITTEE SUBSTITUTE FOR HOUSE BILL 277

## Section-by-Section Analysis

CS for HB 277 (State Affairs) - "An Act requiring gender balance on state boards, commissions, and similar groups."

Section 1 states that nongovernmental membership of all appointive boards, commissions, committees, councils, task forces and similar groups established by law must be gender balanced unless otherwise provided by the law establishing the group. It further states that no person may be appointed or reappointed if it would cause the number of nongovernmental members of one gender to exceed by more than one the number of nongovernmental members of the other gender serving as members of the group. Also, if there are multiple appointing authorities, they are required to consult with each other so the group is gender balanced. Nongovernmental member is defined.

Section 2 is a "grandparent clause" which states that a person may complete their term if the term is being served on the effective date of the act.

DIVISION OF OCCUPATIONAL LICENSING

(Gender sampling of occupational licensing boards)

BOARD:	LESS # OF LICENSEES BY GENDER	TOTAL # LICENSEES
- ARCHITECTS, ENGINEERS & LAND SURVEYORS AS 8.48.611(b)		
9 members Architects	24 females	578
2 civil engineers Engineers	44 females	3,143
1 land surveyor Land Surveyors	7 females	744
1 mining engineer Engineers from other branches		
2 architects - CHIROPRACTORS	23 females	125
1 public member AS 08.20.020	4 licensed chiropractor who have practiced in the state at least 2 years 1 members - no direct financial interest in the health care industry	
- DENTAL AS 08.36.010		
9 members Dentists	18 females	393
2 licensed dentists practice for 5 yrs. Dental Hygienists	4 males	329
2 dental hygienists practice for 5 years 1 public member		
ELECTRICAL ADMINISTRATORS AS 08.46.011		
1 female	1 female	596
3 members 2 licensed electrical 1 public member		
GUIDES AS 08.45.010 - 10 year residency requirement for all members		
35 females	35 females	1,146
7 members 3 - guides 4 - general knowledge of state resources not vested interest regarding industry		
MARINE PILOTS AS 08.62.010		
0 females	0 females	87
3 females	3 females	25
		not all from same district
- 7 members 2 licensed pilots 2 agents/managers in district 2 public members 1 commissioner		
NURSING HOME ADMINISTRATORS AS 08.70.020		
28 females	28 females	56
- 3 members 1 licensed nursing home adm. 1 registered nurse 1 - public member		
6 females	6 females	70
- OPTOMETRY AS 08.71.02		
50 females	50 females	198
5 members 4 licensed opticians 1 public member		
VETERINARY AS 08.98.010		
50 females	50 females	198
		5 members 4 licensed + actively practicing 5 yrs. vet 1 - public member

**Sec. 08.45.200. Definitions.** In this chapter

- (1) "controlled substance" has the meaning given in AS 11.71.900;
- (2) "division" means the division of occupational licensing in the Department of Commerce and Economic Development;
- (3) "naturopathy" means the use of hydrotherapy, dietetics, electrotherapy, sanitation, suggestion, mechanical and manual manipulation for the stimulation of physiological and psychological action to establish a normal condition of mind and body. (§ 1 ch 56 SLA 1986)

## Chapter 48. Architects, Engineers and Land Surveyors.

**Article**

1. Board of Registration (§§ 08.48.011 — 08.48.141)
2. Registration and Practice (§§ 08.48.171 — 08.48.265)
3. Unlawful Acts (§§ 08.48.281 — 08.48.291)
4. General Provisions (§§ 08.48.311 — 08.48.351)

**Collateral references.** — 5 Am. Jur. 2d, Architects, §§ 1-4; 58 Am. Jur. 2d, Occupations, Trades and Professions, §§ 1, 17-22.

6 C.J.S., Architects, §§ 7-15; 53 C.J.S., Licenses, §§ 4-11, 32-45.

Failure of architect to procure license as affecting validity or enforceability of contract. 30 ALR 851; 42 ALR 1226; 118 ALR 646.

Constitutionality of statutes regulating

land surveyors or civil engineers. 55 ALR 307.

Practice of architecture by corporation as affected by license regulation. 56 ALR2d 726.

Right of architect or engineer licensed in one state to recover compensation for services rendered in another state, or in connection with construction in another state, where he was not licensed in the latter state. 32 ALR3d 1151.

### Article 1. Board of Registration.

**Section**

11. Board created
21. Appointments
31. Qualifications
41. Removal of members
51. Organization and meetings
61. Finances
71. Records and reports
81. Roster

**Section**

91. Written examinations and examination fees
101. Regulations; bylaws; code of ethics
111. Power to revoke, suspend, or reissue certificate
121. Disciplinary action and procedure
131. Injunction
141. Legal counsel

*Sec. 08.48.010. [Repealed, § 1 ch 179 SLA 1972.]*

**Sec. 08.48.011. Board created.** (a) There is created the State Board of Registration for Architects, Engineers and Land Surveyors. The board shall administer the provisions of this chapter and comply with the Administrative Procedure Act (AS 44.62).

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(b) The board consists of nine members appointed by the governor having the qualifications as set out in AS 08.48.031. The board consists of two civil engineers, one land surveyor, one mining engineer, two engineers from other branches of the profession of engineering, two architects, and one public member. (§ 3 ch 179 SLA 1972; am § 1 ch 44 SLA 1975; am § 2 ch 63 SLA 1984)

**Effect of amendments.** — The 1984 amendment substituted "two architects, and one public member" for "and three architects." in the second sentence in subsection (b).

*Sec. 08.48.020. [Repealed, § 1 ch 179 SLA 1972.]*

**Sec. 08.48.021. Appointments.** (a) The governor shall give each member of the board a certificate of appointment, and the member shall file with the lieutenant governor a written oath or affirmation for faithful discharge of the member's official duty.

(b) *[Repealed, § 49 ch 94 SLA 1987.]* (§ 3 ch 179 SLA 1972; am § 3 ch 63 SLA 1984; am § 49 ch 94 SLA 1987)

**Cross references.** — For term of office, see AS 08.01.035. for the former second and third sentence, relating to terms of office for the first board and successive terms, respectively.

**Effect of amendments.** — The 1984 amendment, in subsection (b), substituted "four" for "six" in the first sentence and substituted the present second sentence. The 1987 amendment repealed subsection (b), concerning terms of office and filling of vacancies.

*Sec. 08.48.030. [Repealed, § 1 ch 179 SLA 1972.]*

**Sec. 08.48.031. Qualifications.** Each member of the board must have been a resident in the state for three consecutive years immediately preceding appointment and, except for the public member, must be registered and have a minimum of five years of professional practice in the member's respective field. (§ 3 ch 179 SLA 1972; am § 2 ch 44 SLA 1975; am § 4 ch 63 SLA 1984)

**Effect of amendments.** — The 1984 amendment inserted "except for the public member."

*Sec. 08.48.040. [Repealed, § 3 ch 59 SLA 1966.]*

**Sec. 08.48.041. Removal of members.** The governor may remove a member of the board for misconduct, incompetency or neglect of duty. (§ 3 ch 179 SLA 1972)

amendments. — The 1985 amended paragraph (4)

...ense of setting about, en-  
...ntering upon an activity  
...statute. Industrial Power  
...rp. v. Western Modular  
...Op. No. 2259 (File Nos.  
...P.2d 291 (1981).  
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...Modular Corp., Sup. Ct.  
...e Nos. 4163, 4176). 623

s v. Bayshore Land Co.,  
1002 (Files Nos. S-711,  
007 (1985).  
Protection Servs., Inc.  
ble, Inc., Sup. Ct. Op.  
7562, 7609). 660 P.2d

100 SLA 1968.]

statute prescribing  
ng medicine as af-  
tion against chiro-  
: 42 ALR 1342; 54

Kind or character of treatment which  
may be given by one licensed chiropractor.  
86 ALR 630.

Article 1. Board of Chiropractic Examiners.

Section	Section
10. Creation and membership of Board of Chiropractic Examiners	50. Power of officers to administer oaths and take testimony
20. Members of board	55. Board regulations
25. Removal of board members	60. Power of board to adopt seal
40. Organization of board	90. Quorum of board

Sec. 08.20.010. Creation and membership of Board of Chiropractic Examiners. There is created the Board of Chiropractic Examiners consisting of five members appointed by the governor. (§ 35-3-23 ACLA 1949; am § 2 ch 102 SLA 1976)

Cross references. — For constitutionality of ch. 102, SLA 1976, see notes to AS 09.55.536 and Alas. Const., art. II, § 14.

Sec. 08.20.020. Members of board. Four members of the board shall be licensed chiropractic physicians who have practiced chiropractic in this state not less than two years. One member of the board shall be a person with no direct financial interest in the health care industry. Each member serves without pay but is entitled to per diem and travel expenses allowed by law. (§§ 35-3-23, 35-3-30 ACLA 1949; am § 3 ch 102 SLA 1976; am § 2 ch 162 SLA 1980)

Sec. 08.20.025. Removal of board members. A member of the board may be removed from office by the governor for cause. The board may by regulation provide that unexcused absences from meetings constitute cause for removal. (§ 3 ch 162 SLA 1980)

Sec. 08.20.030. Members' terms; vacancies. [Repealed, § 19 ch 94 SLA 1987. For current law, see AS 08.01.035.]

Sec. 08.20.040. Organization of board. Every two years, the board shall elect from its membership a president, vice president and secretary. (§ 35-3-24 ACLA 1949)

Sec. 08.20.050. Power of officers to administer oaths and take testimony. The president and the secretary may administer oaths in conjunction with the business of the board. (§ 35-3-24 ACLA 1949)

(3) "direct supervision" means the dentist is in the dental office, personally diagnoses the condition to be treated, personally authorizes the procedure, and before dismissal of the patient evaluates the performance of the dental hygienist;

(4) "general supervision" means the dentist has authorized the procedures and they are being carried out in accordance with the dentist's diagnosis and treatment plan;

(5) "indirect supervision" means a licensed dentist is in the dental facility, authorizes the procedures, and remains in the dental facility while the procedures are being performed by the dental hygienist. (am § 13 ch 59 SLA 1978)

Revisor's notes. — Reorganized in 1987 to alphabetize the defined terms.

Chapter 36. Dentistry.

Article

- 1. Board of Dental Examiners (§§ 08.36.010 — 08.36.091)
- 2. Examination and Licensing (§§ 08.36.100 — 08.36.290)
- 3. Unlawful Acts (§§ 08.36.315 — 08.36.340)
- 4. General Provisions (§§ 08.36.350 — 08.36.370)

NOTES TO DECISIONS

Cited in Allison v. State, Sup. Ct. Op. No. 1703 (File No. 3716), 583 P.2d 813 (1978).

Article 1. Board of Dental Examiners.

Section

- 10. Creation and membership of board
- 20. Term of office
- 25. Suspension of board members
- 30. Election of officers
- 40. Meetings
- 50. Quorum

Section

- 61. Reimbursement for expenses
- 70. General powers
- 80. Applicability of Administrative Procedure Act
- 91. Records and reports

Sec. 08.36.010. Creation and membership of board. There is created the Board of Dental Examiners consisting of nine members. Six members shall be licensed dentists who have been engaged in the practice of dentistry in the state for five years immediately preceding appointment, two members shall be dental hygienists licensed under AS 08.32 who have been engaged in the practice of dental hygiene in the state for five years immediately preceding appointment, and one member shall be a public member. (§ 1 art II ch 186 SLA 1955; am § 2 ch 155 SLA 1968; am § 8 ch 102 SLA 1976; am § 12 ch 49 SLA 1980; am § 17 ch 100 SLA 1984; am § 1 ch 63 SLA 1987)

Cross references. — Similarity of ch 102, SLA 1955; 09.55 536 and Alas. C for the purposes of ch § 1, ch. 155, SLA 196 and Special Acts.

For initial terms pointed to the position SLA 1987, see § 7, ch. The Temporary and S Effect of amendm. amendment, in the substituted "licensed" for

Sec. 08.36.020. the board begins c ch 59 SLA 1964; a am § 18 ch 94 SL

Cross references. — and term of office, see Effect of amendme

Sec. 08.36.025. against whom an a tion of AS 08.32.16 the decision of the 44.62.520. (§ 14 ch ch 94 SLA 1987)

Cross references. — office, see AS 08.01.02 Effect of amendmer amendment inserted " the catchline and added The 1987 amendment: or" at the beginning of :

Sec. 08.36.030. E dent and a secretary not to exceed two ye SLA 1972)

Sec. 08.36.040. M president at least fo conduct its business ity of the board may § 19 ch 100 SLA 19

(2) a sufficient number of persons are so qualified. (§ 2 ch 53 SLA 1977)

*Editor's notes.* — This section is set out to incorporate editorial changes by the Revisor of Statutes.

**Sec. 08.40.011. Board of electrical examiners.** (a) There is created the Board of Electrical Examiners consisting of three members, two of whom are licensed electrical administrators and one of whom is a public member.

(b) The board shall meet at least annually. The board may also meet at other times as determined by the board. (§ 4 ch 98 SLA 1988)

*Effective dates.* — Section 13, ch. 98, SLA 1988, provides: "This Act takes effect July 1, 1988."

**Sec. 08.40.045. Categories of licenses.** The board may adopt regulations establishing categories of electrical administrators, establishing qualifications for those categories and the content of examinations for applicants for each category. (§ 4 ch 53 SLA 1977; am § 22 ch 94 SLA 1987; am § 5 ch 98 SLA 1988)

*Effect of amendments.* — The 1988 amendment, effective July 1, 1988, substituted "board" for "department."

**Sec. 08.40.050. Regulations.** The board shall adopt regulations subject to the Administrative Procedure Act (AS 44.62), relating to the examination and licensing of electrical administrators, the establishing of the continued competency of an applicant for license renewal and reinstatement, and the suspension or revocation of licenses. (§ 2 ch 158 SLA 1960; am § 5 ch 53 SLA 1977; am § 3 ch 71 SLA 1980; am § 23 ch 94 SLA 1987; am § 6 ch 98 SLA 1988)

*Effect of amendments.* — The 1988 amendment, effective July 1, 1988, substituted "board" for "department."

**Sec. 08.40.060. Examinations.** A licensing examination shall be offered by the board at least twice during each year at appropriate places in the state. (§ 2 ch 158 SLA 1960; am § 24 ch 94 SLA 1987; am § 7 ch 98 SLA 1988)

*Effect of amendments.* — The 1988 amendment, effective July 1, 1988, substituted "offered by the board" for "conducted by the department."

# Guides

§ 08.54.010

BUSINESS AND PROFESSIONS

§ 08.54.040

**Sec. 08.54.010. Creation and membership of board.** For the purposes of licensing and regulating the activities of guides in the interest of the state's wildlife resources there is created the Guide Board consisting of seven members. No more than three members of the board shall hold or have held a registered, master, or class A assistant guide license. The other members must have a general knowledge of the game resources of the state and may not have a vested interest in the guiding industry. A minimum of 10 years residence in the state is required for all members of the board. For administrative purposes, the board is in the Department of Commerce and Economic Development. (§ 1 ch 17 SLA 1973; am § 3 ch 71 SLA 1986)

**Effect of amendments.** — The 1986 amendment in the first sentence substituted "For the purposes of licensing and regulating the activities of guides in the interest of the state's wildlife resources there" for "There" and deleted "Licensing and Control" preceding "Board." in the

second sentence inserted "hold or," "held," and "registered, master, or class A assistant," in the third sentence substituted "must" for "shall" and added "and may not have a vested interest in the guiding industry," and added the last sentence.

**Sec. 08.54.020. Appointment and term of office.** [Repealed, § 49 ch 94 SLA 1987. For current law, see AS 08.01.035.]

**Sec. 08.54.030. Chairman of board.** The board shall elect one of its members as chairman. (§ 1 ch 17 SLA 1972)

**Sec. 08.54.035. Quorum; voting requirement.** Four members of the board constitute a quorum for the transaction of business, for the performance of a duty, and for the exercise of any power under this chapter. The board may not adopt a regulation, revoke, suspend, or deny renewal of a license, or assign, modify, or revoke a restricted guide area unless the action is approved by a vote of a majority of the full membership of the board. (§ 5 ch 71 SLA 1986)

**Sec. 08.54.040. Powers and duties.** (a) Except as provided in AS 08.54.045, the board shall

(1) prepare, grade and administer examinations, which may include oral examinations of applicants who demonstrate limited ability to read or write the English language;

(2) determine qualifications of applicants for licenses and authorize the issuance of licenses to those who qualify;

(3) establish guide performance standards and regulate activity;

(4) compile, maintain and publish an annual register of master and registered guides who have not been convicted of a violation of a state game or guiding statute or regulation; a guide listed in the register whose license is revoked or suspended shall be removed from the register while the guide's license is revoked or suspended;

club, governmental agency, organization, association, or other combination of individuals. (§ 6 ch 26 SLA 1962)

*Revisor's notes.* — Reorganized in 1987 to alphabetize the defined terms.

## Chapter 62. Marine Pilots.

### Article

1. Board of Marine Pilots (§§ 08.62.010 — 08.62.040)
2. Licensing (§§ 08.62.080 — 08.62.150)
3. General Provisions (§§ 08.62.160 — 08.62.200)

*Collateral references.* — 70 Am. Jur. 2d, Shipping, §§ 92-95, 288-293  
70 C.J.S., Pilots, §§ 1-6.

### Article 1. Board of Marine Pilots.

#### Section

10. Creation and membership of board
20. Appointment and term of office

#### Section

30. Meetings
40. Powers and duties

**Sec. 08.62.010. Creation and membership of board.** There is created the Board of Marine Pilots. It consists of two pilots licensed under this chapter who have been actively engaged in piloting on vessels subject to this chapter, two agents or managers of vessels subject to this chapter, two public members in accordance with AS 08.01.025, and the commissioner or the commissioner's designee. Not more than one pilot and one agent or manager shall be from any one judicial district. All members of the board shall be residents of the state. (§ 2 ch 106 SLA 1970; am § 8 ch 258 SLA 1976)

**Sec. 08.62.020. Appointment and term of office.** The governor shall appoint the pilot and agent or manager members of the board, subject to confirmation by a majority of the members of the legislature in joint session, for terms of four years, or until their successors are appointed. A person, with the exception of the commissioner or the commissioner's designee, may not be appointed to the board for more than two consecutive terms. (§ 2 ch 106 SLA 1970; am § 1 ch 143 SLA 1980; am § 8 ch 14 SLA 1987)

*Effect of amendments.* — The 1987 amendment deleted the former second sentence, which read "The first members shall be initially appointed for one, two,

three and four year terms" and in the last sentence substituted "A" for "No" and inserted "not."

by the board. (§ 2 ch 90 SLA 1957; am § 5 ch 37 SLA 1970; am § 3 ch 67 SLA 1973; am §§ 11, 12 ch 129 SLA 1974; am § 25 ch 14 SLA 1982)

**Chapter 70. Nursing Home Administrators.**

<p><b>Section</b>                  10. Creation of Board of Nursing Home Administrators                  20. Board membership                  30. Election of officers                  40. Board meetings: quorum                  50. Duties and powers of the board                  55. Removal of board members                  80. License required                  90. Application                  110. Licensing</p>	<p><b>Section</b>                  120. Examination                  130. Provisional licenses                  140. Expired licenses                  150. Fees                  155. Grounds for imposition of disciplinary sanctions                  170. Penalties                  180. Definitions                  190. Facilities operated by religious organizations</p>
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**Collateral references.** — 58 Am. Jur. 2d, Occupations, Trades and Professions, §§ 17-22. Licensing and regulation of nursing or rest homes. 9 ALR2d 1187.

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**Sec. 08.70.010. Creation of Board of Nursing Home Administrators.** There is established the Board of Nursing Home Administrators. (§ 1 ch 123 SLA 1975)

**Sec. 08.70.020. Board membership.** (a) The board consists of three members: one nursing home administrator licensed under this chapter and practicing in the state, a registered nurse licensed in the state and having no direct financial interest in any nursing home, and one person from the general public.

(b) *[Repealed, § 49 ch 94 SLA 1987.]*

(c) *[Repealed, § 49 ch 94 SLA 1987.]* (§ 1 ch 123 SLA 1975; am § 1 ch 77 SLA 1977; am §§ 3, 4 ch 141 SLA 1980; am § 2 ch 99 SLA 1986; am § 49 ch 94 SLA 1987)

**Cross references.** — For transitional provisions related to the 1986 amendments to (a) of this section, see § 4, ch. 99, SLA 1986, in the Temporary and Special Acts.

For appointment and terms of office, see AS 08.01.035.

**Effect of amendments.** — The 1986

amendment in subsection (a) substituted "three" for "five," "one" for "two," "administrator" for "administrators" and "one person" for "two persons."

The 1987 amendment repealed subsections (b) and (c), concerning appointment by the governor and term of office respectively.

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ch 141 SLA 1980)

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Home Administrators.  
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p. Att'y Gen.

J, § 49 ch 94 SLA

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Administrators;  
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of illness, disease

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also serves in the administrative capacity defined in this paragraph.  
(§ 1 ch 123 SLA 1975; am § 51 ch 218 SLA 1976)

**Sec. 08.70.190. Facilities operated by religious organizations.** Nothing in this chapter or the regulation under this chapter is to be construed as requiring a person who applies for a license as administrator of a facility operated by a religious organization relying on spiritual means alone for healing to have skills in medical techniques or educational qualifications which are not in accord with the care and treatment provided in the facility. (§ 1 ch 123 SLA 1975)

### Chapter 71. Dispensing Opticians.

#### Article

1. Board of Dispensing Opticians (§§ 08.71.010 — 08.71.055)
2. Licensing (§§ 08.71.080 — 08.71.160)
3. Unlawful Acts (§§ 08.71.170 — 08.71.180)
4. Miscellaneous Provisions (§ 08.71.200)
5. General Provisions (§§ 08.71.230 — 08.71.240)

**Collateral references.** — 61 Am. Jur. 70 C.J.S., Physicians and Surgeons, 2d, Physicians, Surgeons and Other §§ 11, 13. Healers, §§ 3, 40-43.

#### Article 1. Board of Dispensing Opticians.

##### Section

10. Creation of board
20. Membership

##### Section

40. Election of officers
55. Powers and duties

**Sec. 08.71.010. Creation of board.** There is created the Board of Dispensing Opticians. (§ 1 ch 45 SLA 1973)

**Sec. 08.71.020. Membership.** The board consists of four opticians licensed under AS 08.71.080 and one public member appointed by the governor. (§ 1 ch 45 SLA 1973; am § 20 ch 102 SLA 1976; am § 2 ch 56 SLA 1980; am § 36 ch 94 SLA 1987)

**Cross references.** — For appointment and terms, see AS 08.01.035.  
**Effect of amendments.** — The 1987 amendment deleted "and term of office" at the end of the catchline and deleted the second, third and fourth sentences of the section, concerning terms of office.

the scheduled

Collateral references. — 78 Am. Jur. 2d, Veterinarians, §§ 1-3.  
70 C.J.S., Physicians and Surgeons, §§ 3, 4.

Validity, construction, and effect of statutes or regulations governing practice of veterinary medicines. 8 ALR4th 223

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Article 1. Board of Veterinary Examiners.

Section	Section
10. Creation and membership of the board	80. Department regulations
40. Board meetings	90. Applicability of the Administrative Procedure Act
50. Powers and duties of the board	100. Compensation
70. Duties of the department	

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ch 114 SLA

**Sec. 08.98.010. Creation and membership of the board.** There is created the Board of Veterinary Examiners composed of five members appointed by the governor and approved by the legislature. Four members shall be licensed veterinarians who have been in active practice in the state for at least five years preceding appointment and one shall be a public member. A person may not serve on the board who is, or was during the two years immediately preceding appointment, a member of a faculty, board of trustees, or advisory board of a veterinary school. (§ 1 ch 91 SLA 1963; am § 1 ch 94 SLA 1966; am § 2 ch 130 SLA 1980)

omedy act,  
for which a  
promoter;

**Sec. 08.98.020. Term of office.** [Repealed, § 49 ch 94 SLA 1987. For current law, see AS 08.01.035.]

and Eco-

**Sec. 08.98.025. Removal of board members.** [Repealed, § 49 ch 94 SLA 1987. For current law, see AS 08.01.020.]

rranges a  
irt time in  
(LA 1977)

**Sec. 08.98.030. Executive secretary of board.** [Repealed, § 16 ch 130 SLA 1980.]

**Sec. 08.98.040. Board meetings.** The board shall hold at least three meetings each year. The board may hold special meetings at the call of the chairman or of a majority of the members. A majority of board members constitutes a quorum and a majority vote of those present is the decision of the board. (§ 1 ch 91 SLA 1963; am § 5 ch 130 SLA 1980; am § 12 ch 59 SLA 1982)

**Sec. 08.98.050. Powers and duties of the board.** (a) The board shall

(1) establish examination requirements for eligible applicants for licensure to practice veterinary medicine;

FISCAL NOTE *cl*

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Office of the Governor  
 Title: An Act requiring gender balance BRU: Executive Office  
on state boards, commissions, and similar..  
 Sponsor: Bover, Spohnholz, Koronen, et al. Components: \_\_\_\_\_  
 Requestor: Representative Bover

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Michael A. Nizich, Director *Man* Phone: 465-3616  
 Division: Division of Administrative Services Date: 4-14-89

Approved by Commissioner: Garrey M. Peska *[Signature]* Date: 4-14-89  
 Agency: Chief of Staff

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

B

# HOUSE COMMITTEE REPORT

4/25

(7)  
Date Referred: April 7, 1989

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: \_\_\_\_\_

The STATE AFFAIRS Committee considered:

HB 277

HOUSE BILL NO. 277 [GENDER BALANCE ON BDS, COMMNS & OTHER GPS]  
"An Act requiring gender balance on state boards, commissions, and similar groups."

RECOMMENDATIONS:

- be replaced with (15) HB 277 (SA)  the same title
- have attached amendment(s)  a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

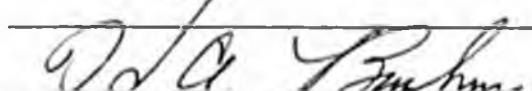

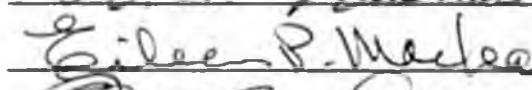
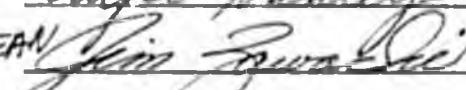


ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Date/Dept)

- fiscal impact \_\_\_\_\_  fiscal note(s) \_\_\_\_\_
- zero fiscal note \_\_\_\_\_  zero fiscal note(s) \_\_\_\_\_
- zero with analysis \_\_\_\_\_  zero fn/analysis \_\_\_\_\_

SIGNING DO PASS:

SIGNING: (Check approp. column)

Do Not Pass No Rec Amend

	BOUCHER		HANLEY	X	
	MACLEAN		ZAWACKI		X
					
	FLUKELSTEIN				
_____					
_____					
_____					
_____					

  
Chairman's Signature

H B

286

STATE OF ALASKA  
THE LEGISLATURE

POUCHY - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

LEGISLATIVE AFFAIRS AGENCY  
LEGISLATIVE REFERENCE LIBRARY

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

HB 286

H. LSC

11/30/89

A M E N D M E N T #1

OFFERED IN THE HOUSE

TO: HB 286

Page 1, line 7, after "laws":

Insert "; and assessing costs for an employer's failure to appear at certain hearings of the OSHA Review Board"

Page 1, after line 8:

Insert a new bill section to read:

\*\* Section 1. AS 18.60.093 is amended by adding a new subsection to read:

(f) If an employer fails without good cause to appear at a hearing held under this section after receiving proper notice of the hearing, the OSHA Review Board may order the employer to pay all reasonable expenses incurred by the board for the hearing, including the board's actual travel expenses and per diem."

Page 1, line 9:

Delete "Section 1"

Insert "Sec. 2"

Renumber the following bill sections accordingly.

A M E N D M E N T

#1 passed

OFFERED IN THE HOUSE

TO: HB 286

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Insert "; and assessing costs for an employer's failure to appear at certain hearings of the OSHA Review Board"

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Page 1, line 9:

Delete "Section 1"

Insert "Sec. 2"

Renumber the following bill sections accordingly.

# Alaska State Legislature




## House of Representatives House Judiciary Committee

P. O. Box V  
State Capitol  
Juneau, Alaska 99811  
(907) 465-4990  
(907) 465-4712

### M E M O R A N D U M

**TO:** Representative Lyman Hoffman, Co-Chair  
Representative Ron Larson, Co-Chair  
House Finance Committee

**FROM:** Representative Peter Goll, Co-Chair   
House Judiciary Committee

**DATE:** March 7, 1990

**SUBJECT:** CSHB 286 (JUD)

The House Judiciary Committee respectfully requests careful review of the justification for the fiscal note submitted by the Department of Labor in the amount of \$40.0.

# HOUSE COMMITTEE REPORT

(7)

Date Referred: February 16, 1990

FURTHER REFERRALS:

Date of Committee Action: 3-7-90

FINANCE

The JUDICIARY Committee considered:

HB 286

HOUSE BILL NO. 286

PENALTIES FOR OSHA VIOLATIONS

"An Act relating to penalties for violation of workplace safety laws."

### RECOMMENDATIONS:

- be replaced with CS HB 286 (JUD)  the same title
- have 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):

APPROVES PREVIOUS:

(Date/Dept)

- fiscal impact LABOR  9/2/90  fiscal note(s) \_\_\_\_\_
- zero fiscal note \_\_\_\_\_  zero fiscal note(s) \_\_\_\_\_
- zero with analysis \_\_\_\_\_  zero fn/analysis \_\_\_\_\_

To: House Finance  
 House Judiciary Requests careful review of  
The justification for this fiscal note:  
SIGNING DO PASS:

SIGNING:

(Check approp. column)

Do Not Pass No Rec Amend

Mike Miller  
Terry Moxton  
Cliff Davidsen

	Do Not Pass	No Rec	Amend
<u>Mike Miller</u>		<input checked="" type="checkbox"/>	
<u>Terry Moxton</u>		<input checked="" type="checkbox"/>	

Mike Miller / Terry Moxton  
Chairman's Signature

STATE OF ALASKA  
1990 LEGISLATIVE SESSION

BILL VERSION: HB 286  
PUBLISH DATE: \_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Labor  
Title: "An Act relating to penalties for violation of workplace safety laws." BRU: Labor Standards & Safety  
Sponsor: Koponen, et al. Components: \_\_\_\_\_  
Requestor: House Labor & Commerce Occupational Safety & Health

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL	10.0	10.0				
CONTRACTUAL	30.0	30.0				
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	40.0	40.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE	100.0	50.0	35.0	15.0		
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FUNDING: (Thousands of Dollars)

GENERAL FUND	40.0	40.0				
FEDERAL FUNDS						
OTHER						
TOTAL	40.0	40.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Note: There will be no impact on FY 90.

Prepared by: Tom Stuart, Director Phone: 465-2712  
Division: Labor Standards & Safety Date: 3/2/90  
Approved by Commissioner: Jim Sampson Date: 3/2/90  
Agency: Department of Labor

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

Fiscal Note Analysis  
for

"An Act relating to penalties for violation of workplace safety laws."

This bill would increase the penalties charged for the violation of workplace safety laws. Because of the increase in penalties, we expect an increase in the number of contested violations and in the number of requests for informal conferences. This increased workload would result in additional travel for existing staff as well as the OSHA Review Board members. Additional legal support would also be required. The additional costs are summarized as follows:

Travel	\$ 10.0
OSHA Review Board (6.0)	
Existing staff (4.0)	
Contractual	\$ 30.0
Legal support for Review Board (10.0)	
Legal support for department (20.0)	
<u>Total Cost</u>	<u>\$ 40.0</u>

These costs should decrease after the first two years if the bill achieves its goal of providing more incentive for employers to voluntarily correct hazards so that we find fewer serious violations. Therefore we should have no additional costs beyond 1992.

We assessed a total of \$272,296 in penalties in FY 1989 of which we collected \$101,394. Given that this bill will increase penalties by 300 percent, it is reasonable to project at least an increase of \$100,000 in actual revenues during the first year and this hopefully would decline as employers voluntarily correct hazards and fewer violations are detected.

# HOUSE COMMITTEE REPORT

(7)

Date Referred: April 13, 1989

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 2/15/90

The LABOR & COMMERCE Committee considered:

~~HOUSE BILL NO. 286~~

[PENALTIES FOR OSHA VIOLATIONS]

"An Act relating to penalties for violation of workplace safety laws."

**RECOMMENDATIONS:**

- [ ] be replaced with ~~OTHERS~~ [ ] the same title
- [ ] have 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):  
(Dept)

APPROVES PREVIOUS: (Date/Dept)

- [ ] fiscal impact \_\_\_\_\_
- [ ] zero fiscal note \_\_\_\_\_
- [ ] zero with analysis \_\_\_\_\_

- [ ] fiscal note(s) \_\_\_\_\_
- [ ] zero fiscal note(s) \_\_\_\_\_
- [ ] zero fn/analysis \_\_\_\_\_

**SIGNING DO PASS:**

David D. Wiley  
Mark R. ...  
[Signature]  
Wesley ...  
[Signature]

**SIGNING:**  
(check appropr. column)

	Do Not Pass	No Rec	Amend
<u>[Signature]</u>		X	
<u>[Signature]</u>		X	

Chairman's Signature

Bill No: House Bill No. 286

Date: April 24, 1989

Title: "An Act relating to penalties for violation of workplace safety laws."

Contact: Richard Arab  
465-4855  
Eileen Plate  
465-2700

House Bill No. 286 proposes that the penalties the Department of Labor may assess for violations of Alaska's Occupational Safety and Health law and regulations be increased to keep pace with inflation.

Specifically, the provisions of this bill:

- (1) increase the maximum penalty for a willful or repeat violation from \$10,000 to \$30,000;
- (2) increase the maximum penalty for a serious or non-serious violation from \$1,000 to \$3,000;
- (3) increase the daily penalty for not correcting a violation from \$1,000 to \$3,000;
- (4) increase the maximum penalty for a willful or repeat violation which results in the death of a worker from \$10,000 to \$30,000; and increase from \$20,000 to \$60,000 the maximum penalty for a second conviction of a willful or repeat violation causing death;
- (5) increase from \$10,000 to \$30,000 the maximum penalty for falsifying or otherwise misrepresenting occupational safety and health records or documents; and
- (6) increase the maximum penalty for a violation of occupational safety and health posting requirements from \$1,000 to \$3,000.

The penalties currently in effect have not been increased since Alaska's occupational safety and health law was initially enacted in 1973. The state's penalty structure is based on the federal OSHA Act that was adopted in 1970. Since 1970, the rate of inflation has increased by 300 percent. This bill, therefore, reflects the inflationary increase that has occurred since the penalty amounts were established in 1970.

**POSITION PAPER/Department of Labor**

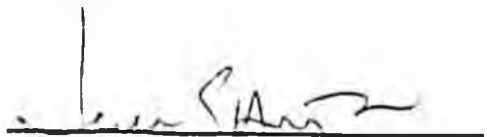
More important than providing for an overdue inflationary increase in the penalty structure, however, the increased penalties would serve as an effective deterrent to workplace safety and health violations. This, of course, will translate into safer workplaces, and a reduced risk of injury and illness to Alaska's workers. Alaska's occupational injury and illness rate is one of the highest in the nation. The latest available information indicates that the Alaska rate stands at 10.7 injuries and illnesses per 100 full-time workers. Only Oregon and Maine had higher rates in 1986. In addition, there are some industries in Alaska with some of the highest rates in the nation. For example in 1987, the injury and illness rate for logging was 51.8 which means that one out of two workers in this industry suffered an injury.

An increased emphasis on worker safety and health is particularly important in slower economic times, such as presently being experienced in Alaska. When cost-saving measures are implemented by employers during recessionary periods, equipment maintenance and replacement are diminished, and the need to increase worker productivity often results in unsafe "shortcuts" that would not be taken or even considered in more prosperous times. The deterrent effect of increased penalties would, therefore, help assure that implementation of cost-saving measures by Alaska business is not at the expense of or to the detriment of the safety and health of Alaska's workers.

The need for increasing the penalty amount for occupational safety and health violations is becoming evident throughout the nation. The states of Washington, Oregon, California, Arizona, and Utah have recently passed legislation to increase penalties, and legislation has been introduced in the U.S. Congress this year to increase federal OSHA penalties to the same amounts as proposed by HB 286.

The Department of Labor supports the increased penalties for violations of Alaska's occupational safety and health laws and regulations as provided in this bill.

APPROVED:

  
\_\_\_\_\_  
Jim Sampson, Commissioner  
Department of Labor

STATE OF ALASKA  
1989 LEGISLATIVE SESSION

BILL VERSION: HB 286  
PUBLISH DATE: \_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Labor  
 Title: "An Act relating to penalties for  
violation of workplace safety laws." BRU: Labor Standards & Safety  
 Sponsor: Koponen, et al. Components: \_\_\_\_\_  
 Requestor: House Labor & Commerce Occupational Safety & Health

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		14.6	14.6			
TRAVEL		8.0	8.0			
CONTRACTUAL		20.0	20.0			
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	42.6	42.6	0.0	0.0	0.0

CAPITAL						
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REVENUE		100.0	50.0	35.0	15.0	0.0
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FUNDING: (Thousands of Dollars)

GENERAL FUND		21.3	21.3			
FEDERAL FUNDS		21.3	21.3			
OTHER						
TOTAL	0.0	42.6	42.6	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME		1.0	1.0			
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached.

Prepared by: Tom Stuart, Director Phone: 264-2452  
 Division: Labor Standards & Safety Date: 4/24/89  
 Approved by Commissioner: Jim Sampson Date: 4/24/89  
 Agency: Department of Labor

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

Fiscal Note Analysis  
for

"An Act relating to penalties for violation of workplace safety laws."

This bill would increase the penalties charged for the violation of workplace safety laws. Because of the large increase in penalties, we expect an increase in the number of contested violations and in the number of requests for informal conferences. This increased workload would result in additional travel for existing staff as well as the OSHA Review Board members. Additional legal support would also be required. In order to handle the increased clerical workload a part time Clerk Typist III would be hired. The additional costs are summarized as follows:

Personal Services	\$ 14.6
For part time Clerk Typist III	
Travel	\$ 8.0
OSHA Review Board (2.0)	
Existing staff (6.0)	
Contractual	\$ 20.0
Legal support for Review Board (5.0)	
Legal support for department (15.0)	
<u>Total Cost</u>	<u>\$ 42.6</u>

These costs should decrease after the first two years if the bill achieves its goal of providing more incentive for employers to voluntarily correct hazards so that we find fewer serious violations. Therefore we should have no additional costs beyond 1991.

The increase in penalties will increase the amount of revenue to the state. While we project this will be about \$100.0 in the first year, that amount should decline as employers voluntarily correct hazards and less violations are issued. These revenues are deposited in the general fund as unrestricted receipts.

We have assumed an effective date of July 1, 1989.

Position Title <b>Clerk Typist III</b>		No. of Positions <b>1</b>	Range/Step <b>8A</b>	Barg. Unit <b>GGU</b>
Time Status <b>Part Time</b>	Staff Months <b>6</b>	Location <b>Anchorage</b>		Election District
Type of Expenditure		Justification		
1	2	3		
Salary	\$9,786	<p>This position will handle the increased clerical work associated with the increase in contested violations and informal conferences. The position will provide support both for the department and the OSHA Review Board.</p> <p>Non-personal services costs will be covered out of our existing budget.</p>		
Benefits	4,856			
Premium Pay				
Other				
<b>Total Personal Services</b>	<b>\$14,642</b>			
Travel				
Contractual				
Commodities				
Equipment				
Other				
<b>Total Cost</b>	<b>\$14,642</b>			
Funding Source for Total Cost				
Federal Receipts 1002		7,321		
G. F. Match 1003		7,321		
General Fund 1004				
GF Program Receipts 1005				
Other				

**Request For  
New Position**

Agency Labor  
 BRU Labor Standards & Safety  
 Component Occupational Safety & Health

Page 3 of 3  
 Revised Date

**FY 89**

### How tough is that doggie in the window?



The case of two Cambodian refugees, who were prosecuted in California last spring for killing a German shepherd for food, was dismissed after a judge ruled that there was no law against eating dogs. There is now. Newly enacted California legislation makes it a misdemeanor to possess, sell or give away for the sole purpose of killing for food any animal "commonly kept as a pet or companion." Violators can receive up to six months in jail and a \$1,000 fine. Livestock, poultry, fish and game are exempted; in case hasenpfeffer lovers wonder, rabbits are classified as livestock.

### New ECS report surveys state plans for tuition programs

A new survey of state programs to help parents pay for their children's college education reports that 11 states (up from nine in 1988) have passed laws giving parents the opportunity to invest with the state a certain sum of money now in exchange for guaranteed payment of their children's tuition in the future. Three of these 11 states—Florida, Michigan and Wyoming—are already selling contracts. The survey is available at \$5 per copy from the Education Commission of the States Distribution Center, 1860 Lincoln St., Suite 300, Denver, CO 80295.

### Rhode Island grants tax exemption to witches' coven

In Rhode Island, a witches' coven has been granted a state sales tax break on the grounds that it is a church. In a reversal of an earlier ruling, the state exempted the Rosegate Coven, a.k.a. Our Lady of the Roses Church, from the sales tax on equipment and supplies for the church. Tax department officials decided that the witches had specific doctrines and a system of prayer, and were a nonprofit group not set up for the purpose of avoiding taxes.



### Bush administration appoints legislators to executive posts

The Bush administration has named several state legislators to executive posts, among them John Turner, ex-president of the Wyoming Senate, director of the Fish and Wildlife Service; Deborah Anderson, former speaker of the South Dakota House, director of the Office of Intergovernmental Affairs; Paul Coverdell, ex-minority leader of the Georgia Senate, director, Peace Corps; Susan Engeleiter, ex-minority leader of the Wisconsin Senate, administrator of the Small Business Administration; Tom Stroock, vice president of the Wyoming Senate, ambassador to Guatemala; and Mary McClure of South Dakota, ex-Senate president pro tem, special assistant to the president for intergovernmental affairs. (Senator McClure is currently on leave because of an illness in her family.)

### U.S. Supreme Court allows states to sue on workplace hazards

The U.S. Supreme Court, by declining in October to review an Illinois court ruling in *Asta vs. State of Illinois*, left the states free to prosecute corporate officials for workplace hazards that are also regulated by the federal Occupational Safety and Health Act (OSHA). The Illinois Supreme Court ruling of a year ago resulted in the reinstatement of criminal charges of aggravated battery against officers of the Chicago Magnet Wire Corporation. The firm and its executives had been indicted by a Chicago grand jury on charges of "knowingly and recklessly" failing to protect workers from hazardous chemicals, allowing injuries to 42 employees. Industry representatives have expressed concern that state criminal prosecution of corporate officers for injuries or deaths resulting from workplace conditions frustrates the operation of OSHA regulations. The state of Illinois, however, argued that federal law does not pre-empt state prosecution for murder or aggravated battery that happens to occur in the workplace and does not "immunize employers as a class from criminal prosecution."

### Fatalities are up since speed limits rose to 65 mph

After Congress permitted states to raise the speed limit to 65 mph on rural interstate highways in 1987, 40 states did so. And in those 40 states, traffic fatalities on rural interstates have increased 21 percent in two years, according to the National Highway Traffic Safety Administration. Fatality rates on other roads showed only minor changes.

Alaska State Legislature  
Representative Niilo Koponen

Pouch V  
Juneau, Alaska 99811  
(907) 465-4992

House District 21

119 N. Cushman, Suite 207  
Fairbanks, Alaska 99701  
(907) 456-8172

\* Position Paper \*  
HB 286

This legislation would reinforce the legislative findings in AS 18.60.010 which state that "...personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, the people of the state in terms of loss of production, wage loss, medical expenses and disability compensation payments."

According to the latest available statistics, Alaska has the third highest rate of occupational injuries in the nation. House Bill 286 is designed to reduce the incidence of work related hazards by increasing penalties for serious workplace safety violations. At present, the maximum amount that can be levied for a serious violation is \$1,000. The same violation in the state of Washington carries a \$50,000 fine.

Alaska's already small penalty is further reduced by the federal Occupational Safety and Health Administration (OSHA), taking into consideration such factors as the size of the employer's business, good faith of the employer and previous history of violations. Last year's average fine after such adjustments was \$192. This penalty structure has been unchanged for 18 years.

This bill will triple the allowable level of fines. In addition, it makes the fines applicable to those who knowingly violate the law. Current statutes require the state to prove willful violation.

HB 286 is intended to encourage businesses to conform to workplace safety laws and regulations. As businesses adjust to a tight economic environment, it is important that worker health and safety not be sacrificed. There is no reason why an employer cannot abide by the standards established by federal and state statutes.

It is my sincere hope that this legislation will result in fewer injuries, fewer fines and lower workers' compensation insurance costs. The rising number of injuries and fatalities to Alaskan workers testifies to the insufficiency of our present statutes. So long as it is cheaper to pay the fine than to correct a dangerous situation we cannot expect improvement.

COMPARISON OF 1987 ALASKA AND NATIONAL  
OCCUPATIONAL INJURY AND ILLNESS INCIDENCE RATES

	<u>Alaska Rate</u>	<u>National Rate</u>
Oil and Gas Extraction	9.0	8.3
General Building Construction	17.5	14.2
Heavy Construction	19.4	14.5
Special Trade Construction	15.0	15.0
Canned and Cured Fish Processing	35.2	26.4
Fresh/Frozen Fish Processing	35.3	18.8
Logging Camps and Contractors	51.8	19.3
Trucking and Warehousing	17.7	12.3
Water Transportation	13.2	12.9
Tranportation by Air	13.9	14.3
All Private Industries	10.9	8.3

TABLE A-11  
Incidence rates of Occupational Injuries and Illnesses  
Comparison of all States - Private Sector  
1983 to 1987

	1983	1984	1985	1986	1987
USA	7.6	8.0	7.9	7.9	8.3
Alabama	7.9	8.3	8.4	8.7	
Alaska	10.6	10.3	10.7	10.2	10.9
Arizona	9.3	9.5	9.2	8.9	9.0
Arkansas	8.1	8.0	8.0	8.4	
California	9.1	9.3	9.1	8.9	8.8
Colorado	--	--	--	--	--
Connecticut	8.0	8.3	8.3	8.2	
Delaware	5.3	5.5	5.6	6.0	
Florida	8.7	8.9	8.8	8.8	
Georgia	--	--	--	--	--
Hawaii	10.6	10.0	9.6	9.5	9.8
Idaho	--	--	--	--	--
Illinois	--	--	--	--	--
Indiana	7.3	7.7	7.7	8.2	
Iowa	7.8	8.1	8.2	8.4	
Kansas	7.5	7.7	7.7	7.6	
Kentucky	7.6	8.3	8.3	8.4	
Louisiana	7.4	7.9	7.3	7.0	
Maine	11.0	13.2	12.5	12.9	
Maryland	7.6	7.8	7.9	7.8	
Massachusetts	--	--	--	--	--
Michigan	6.8	7.6	8.0	8.2	
Minnesota	7.3	7.7	7.6	7.3	
Mississippi	--	8.0	7.8	8.0	
Missouri	7.5	8.0	7.9	8.5	
Montana	--	8.5	8.0	8.2	
Nebraska	8.4	8.8	7.9	8.1	
Nevada	9.0	9.0	8.5	8.4	9.4
New Hampshire	--	--	--	--	--
New Jersey	--	--	--	--	--
New Mexico	7.8	8.7	8.4	7.7	
New York	--	--	--	--	--
North Carolina	6.8	7.2	7.4	7.2	
North Dakota	--	--	--	--	--
Ohio	--	--	--	--	--
Oklahoma	8.9	9.8	9.5	8.1	
Oregon	9.8	10.6	10.5	10.7	10.9
Pennsylvania	--	--	--	--	--
Rhode Island	8.3	8.4	8.9		
South Carolina	6.7	6.9	7.1	6.9	
South Dakota	--	--	--	--	--
Tennessee	7.9	8.6	8.2		
Texas	--	--	--	--	--
Utah	8.5	9.2	8.5	9.1	
Vermont	9.2	10.0	9.1	8.9	
Virginia	7.0	7.6	7.3	7.6	
Washington	9.7	9.9	9.4	9.8	10.6
West Virginia	6.7	7.2	7.2	7.7	
Wisconsin	--	--	--	--	--
Wyoming	7.9	8.6	7.4	7.6	
American Samoa	2.5	3.0	3.6	3.2	2.6
Guam	2.7	2.8	3.6	3.7	3.6
Puerto Rico	4.2	3.9	3.8	3.9	
Virgin Islands	2.8	2.4	2.4	2.4	

SOURCE: Bureau of Labor Statistics.

-- = Publishable Rate Unavailable.

X = 1987 data not available at time of publication.

TABLE A-3  
Incidence Rates of Recordable Occupational Injuries and Illnesses  
Industry Data Time Series, Alaska 1978 to 1987

Industry	SIC Code	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
TOTAL PRIVATE AND PUBLIC SECTOR.....		9.4	9.2	9.1	9.2	9.5	9.9	9.7	10.1	9.6	10.1
TOTAL PRIVATE SECTOR.....		10.0	10.1	10.4	10.0	10.3	10.6	10.3	10.7	10.2	10.9
MINING.....		15.2	14.0	12.1	15.4	14.8	11.5	10.5	9.4	8.1	8.9
Oil and Gas Extraction.....	13	15.7	13.7	12.4	15.8	15.3	11.8	10.6	9.7	8.2	9.0
Petroleum & Gas Production.....	131	..	..	2.5	7.3	6.7	5.1	2.8	2.6	2.1	3.5
Oil & Gas Field Services.....	138	22.6	23.0	23.8	24.9	24.6	19.6	22.0	17.4	14.8	15.2
CONSTRUCTION.....		16.4	16.4	16.5	17.2	19.4	17.6	16.9	19.4	16.2	17.1
General Building Contractors.....	15	17.1	14.3	16.5	19.8	19.6	21.6	17.7	19.5	17.6	17.5
Residential Buildings.....	152	16.5	11.9	15.1	15.6	16.5	17.7	13.4	15.4	18.0	17.0
Nonresidential Buildings.....	154	18.0	16.8	18.0	23.7	21.9	26.0	22.0	22.9	17.3	17.7
Heavy Construction Contractors.....	16	14.2	16.6	17.3	15.1	20.9	14.9	15.7	18.9	16.5	19.4
Highway and Street Construction.....	161	9.7	18.8	19.2	17.8	27.6	19.0	19.8	16.6	20.8	14.4
Heavy Construction, Except Hwy.....	162	16.4	15.1	16.4	14.0	16.8	12.9	13.9	20.3	14.3	22.8
Special Trade Contractors.....	17	17.6	17.4	15.9	17.8	17.9	17.7	17.1	19.8	16.9	15.0
Plumbing, Heating & Air Condit.....	171	14.6	14.8	16.7	18.8	17.0	25.6	23.3	18.9	16.0	14.4
Electrical Work.....	173	17.0	10.8	16.5	15.4	16.6	13.2	14.3	16.4	15.9	15.4
Misc Special Trade Contractors.....	179	..	23.1	16.3	21.6	18.6	14.6	20.6	23.6	15.9	12.6
MANUFACTURING.....		21.4	24.1	23.3	19.1	17.9	23.2	23.0	26.3	28.3	29.5
Food and Kindred Products.....	20	21.8	25.7	26.7	22.2	20.2	29.5	25.0	32.5	33.7	34.5
Misc Food Prep & Kindred Prod.....	209	22.3	26.0	26.9	22.5	20.8	30.1	25.7	32.9	33.4	35.3
Canned & Cured Fish & Seafoods..	2091	18.7	23.5	21.4	19.9	18.6	21.4	25.0	30.3	34.3	35.2
Fresh/Froz Pkgd Fish & Seafoods...	2092	27.4	29.2	31.7	24.6	21.8	32.9	26.1	33.9	33.0	35.3
Lumber & Wood Prod Except Furniture	24	31.8	31.0	32.5	26.8	26.9	31.2	43.0	38.6	50.9	48.5
Logging Camps & Contractors.....	241	38.6	39.1	37.3	27.2	30.8	35.7	45.6	45.0	56.6	51.8
Printing, Publishing & Allied Ind...	27	..	..	2.5	3.1	5.7	6.3	6.2	5.1	6.5	5.8
TRANSPORTATION AND PUBLIC UTILITIES...		11.4	11.4	12.2	11.6	10.7	11.4	12.1	11.3	11.3	10.9
Local & Interurban Passenger Transit	41	..	5.1	4.8	6.7	4.9	..	7.1	6.3	11.3	12.8
Trucking and Warehousing.....	42	21.6	20.6	21.7	17.8	14.0	20.7	24.2	17.4	19.5	17.7
Trucking, Local and Long Distance..	421	21.5	21.0	22.1	18.0	13.8	19.8	23.9	17.5	19.7	17.9
Water Transportation.....	44	18.6	16.0	16.2	16.6	11.7	11.9	10.8	16.2	10.7	13.2
Transportation by Air.....	45	15.2	12.4	13.2	13.6	12.7	10.7	14.2	16.0	13.3	13.9
Communication.....	48	3.0	6.9	9.1	8.4	8.6	9.6	5.7	6.7	6.2	4.5
Electric, Gas and Sanitary Services..	49	15.5	14.6	14.6	13.9	14.8	16.4	19.4	16.0	16.2	15.5
WHOLESALE AND RETAIL TRADE.....		8.2	7.9	7.7	8.0	9.3	10.2	9.9	10.0	8.9	9.3
WHOLESALE TRADE.....		12.2	11.4	10.9	9.8	9.6	12.3	11.7	10.9	8.0	9.4
Durable Goods.....	50	12.2	11.6	8.5	7.9	7.4	8.9	9.7	8.9	5.8	7.7
Non-durable Goods.....	51	8.1	11.0	15.4	12.8	13.4	18.0	15.1	14.4	11.5	11.5
RETAIL TRADE.....		7.4	6.9	6.8	7.4	9.3	9.6	9.5	9.8	9.2	9.3
Building Materials & Garden Supplies	52	8.9	6.2	9.4	12.3	13.7	20.5	17.7	17.6	11.3	12.7
Lumber & Bldg Materials.....	521	..	..	..	..	17.2	25.5	22.6	21.3	12.4	..
General Merchandise Stores.....	53	9.2	8.8	6.0	7.1	8.2	12.3	10.4	9.3	10.7	10.8
Food Stores.....	54	9.5	8.9	10.1	8.5	11.8	9.7	15.8	15.5	18.0	15.6
Auto Dealers and Service Stations...	55	10.2	8.5	9.5	8.9	8.1	10.4	10.5	10.8	8.3	8.7
Apparel and Accessory Stores.....	56	3.4	2.7	2.1	2.4	1.0	1.0	1.5	2.5	0.4	3.3
Furniture, Home furnishings.....	57	..	..	..	..	4.8	3.5	4.4	5.2	6.4	5.8
Eating and Drinking Places.....	58	6.6	7.2	6.5	8.1	11.2	9.8	6.6	8.5	8.3	8.9
Miscellaneous Retail.....	59	4.7	3.9	2.9	5.1	5.5	6.4	6.6	5.9	4.3	3.6
FINANCE, INSURANCE AND REAL ESTATE		0.7	1.4	1.3	1.5	1.5	2.0	1.7	2.1	3.3	2.8
Banking.....	60	1.1	2.1	1.9	2.2	1.8	2.9	2.1	2.6	2.6	3.3
Credit Agencies.....	61	..	..	..	..	1.5	1.1	1.6	0.7	1.7	3.2
Real Estate.....	65	0.8	0.1	2.8	1.9	2.3	2.1	2.4	4.1	4.9	2.7
Holding & Other Investment Offices..	67	0.3	1.8	0.0	..	0.7	1.3	1.3	2.3	..	3.5
SERVICES.....		4.3	4.0	4.3	4.3	4.4	4.7	5.1	5.5	5.4	6.5
Hotels and Other Lodging Places.....	70	5.5	7.9	9.5	6.8	7.0	9.9	11.0	10.0	13.4	13.6
Personal Services.....	72	0.6	1.3	2.5	2.8	1.7	4.1	5.3	6.3	1.7	3.7
Business Services.....	73	7.2	3.3	6.7	3.7	6.7	3.9	3.4	2.6	4.5	5.0
Automotive Services.....	75	..	..	..	7.5	8.4	8.2	6.6	9.9	6.3	11.2
Health Services.....	80	4.0	3.7	3.6	5.4	4.1	5.5	7.9	8.9	6.3	8.0
Legal Services.....	81	0.5	1.0	0.2	..	0.3	0.1	0.1	0.8	1.1	0.7
Social Services.....	83	4.3	4.9	3.5	3.9	3.7	4.2	3.5	7.3	3.0	3.7
Membership Organizations.....	86	2.9	2.9	3.1	3.0	2.8	3.0	0.7	1.8	4.0	5.8
Miscellaneous Services.....	89	2.9	1.8	2.8	3.0	2.0	1.1	2.6	2.6	2.8	2.7
STATE AND LOCAL GOVERNMENT.....		7.1	6.3	6.9	6.5	6.7	7.3	7.7	8.1	7.7	7.3
STATE GOVERNMENT.....		6.2	3.8	3.3	4.7	4.6	5.5	5.5	5.2	6.0	6.0
LOCAL GOVERNMENT.....		8.1	8.7	6.3	8.1	8.6	8.7	9.5	10.5	9.0	8.4

See footnotes at end of section.  
.. = Publishable rate unavailable.

45 H.E.

TABLE A-1  
Incidence Rates of Recordable Occupational Injuries and Illnesses  
U.S. Private Sector, Select Industries, 1970 to 1987

Industry	SIC Code	Incidence Rate for Total Cases (per 100 workers) 5/									
		1970	1979	1980	1981	1982	1983	1984	1985	1986	1987
TOTAL PRIVATE SECTOR.....		9.4	9.5	8.7	8.3	7.7	7.6	8.0	7.9	7.3	8.3
AGRICULTURE.....		11.6	11.7	11.9	12.3	11.0	11.9	12.0	11.6	11.2	11.2
MINEING.....		11.5	11.4	11.2	11.6	10.5	8.4	9.7	8.4	7.4	8.5
Oil and Gas Extractions..... 13		13.9	13.6	13.8	14.1	12.1	9.8	11.8	10.1	8.1	8.3
Petroleum & Gas Production..... 131		4.4	5.4	3.8	4.1	4.1	3.5	3.0	2.7	2.6	2.5
Oil & Gas Field Services..... 138		20.0	18.9	19.3	19.7	16.8	14.3	12.2	15.0	13.6	16.8
CONSTRUCTION.....		16.0	16.7	15.7	15.1	14.6	14.4	15.5	15.2	15.2	14.7
General Building Contractors..... 15		15.9	16.3	15.5	15.1	14.1	14.4	15.4	15.2	14.9	14.3
Residential Buildings..... 152		13.3	13.0	11.9	11.9	10.3	11.9	12.6	12.3	12.5	12.9
Nonresidential Buildings..... 154		19.2	19.7	19.4	18.5	17.1	17.3	18.9	18.7	17.9	18.5
Heavy Construction Contractors..... 16		16.6	16.6	16.3	14.9	15.1	15.6	14.9	14.5	14.7	14.5
Highway and Street Construction..... 161		15.2	15.5	15.8	14.0	13.4	14.3	14.4	13.8	13.9	14.3
Heavy Construction, Except Hvy.... 162		17.2	17.1	16.6	15.3	15.7	15.9	15.1	14.8	15.1	14.7
Special Trade Contractors..... 17		15.8	16.0	15.5	15.2	14.7	14.8	15.8	15.4	15.6	15.0
Plumbing, Heating & Air Condit.... 171		16.9	17.0	16.2	15.7	15.3	15.7	16.4	15.7	16.1	16.4
Electrical Work..... 173		14.0	14.8	14.2	14.0	13.9	13.7	14.4	14.3	15.2	13.8
Misc. Special Trade Contractors... 179		16.9	17.5	16.3	17.1	15.9	15.1	15.4	16.5	15.7	14.0
MANUFACTURING.....		13.3	13.3	12.2	11.5	10.2	10.0	10.6	10.4	10.6	11.9
Food and Kindred Products..... 20		13.4	13.9	13.7	12.8	12.7	12.5	12.7	12.7	12.5	12.7
Misc. Food Prep. & Kind. Prod.... 209		16.3	16.4	15.3	15.0	14.2	14.1	14.3	14.7	14.3	15.1
Canned & Cured Fish & Seafoods.. 2091		22.3	24.4	20.2	22.6	17.8	17.1	--	--	19.1	16.4
Fresh/Froz. Pkgd. Fish & Seafoods.. 2092		20.4	22.0	19.4	18.6	17.1	17.9	17.3	19.2	18.2	18.8
Lumber & Wood Prod. except Furniture 24		22.6	20.7	14.8	17.6	16.9	18.3	19.6	18.5	14.9	14.9
Lumber Camps & Contractors..... 241		25.8	24.3	22.7	19.3	20.4	21.5	21.7	20.0	19.1	19.3
Paper and Allied Products..... 26		13.3	13.5	12.7	11.6	10.6	10.0	10.4	10.2	10.5	12.8
Printing, Publishing & Allied Ind... 27		6.9	7.1	6.9	6.7	6.6	6.6	6.5	6.3	6.5	6.7
TRANSPORTATION AND PUBLIC UTILITIES...		10.1	10.0	9.4	9.0	8.5	8.2	8.8	8.6	8.2	8.4
Local & Interurban Passenger Transit 41		4.7	9.3	9.5	9.3	9.3	9.7	9.0	9.4	9.3	9.2
Trucking and Warehousing..... 42		16.2	15.8	14.9	14.7	14.2	13.3	14.5	13.9	13.1	12.3
Trucking, Local and Long Distance. 421		16.3	15.7	14.8	14.7	14.2	13.3	14.6	14.0	13.2	12.3
Water Transportation..... 44		14.4	14.1	14.3	12.5	11.4	10.8	11.2	11.0	12.7	12.9
Transportation by Air..... 45		13.4	13.7	13.3	12.5	12.6	12.7	13.1	13.1	13.0	14.3
Communication..... 48		2.7	2.9	2.8	2.7	2.8	2.9	2.7	2.9	2.7	2.8
Electric, Gas and Sanitary Services. 49		9.0	8.0	8.6	8.3	7.6	7.2	7.4	6.9	6.8	7.6
WHOLESALE & RETAIL TRADE.....		7.9	8.0	7.4	7.3	7.2	7.2	7.4	7.4	7.7	7.7
WHOLESALE TRADE.....		8.9	8.8	8.2	7.7	7.1	7.0	7.2	7.2	7.2	7.4
Durable Goods..... 50		8.6	8.6	7.8	7.3	6.7	6.4	6.7	6.5	6.3	6.7
Non-durable Goods..... 51		9.3	9.1	8.7	8.3	7.8	7.9	8.0	8.2	8.7	8.5
RETAIL TRADE.....		7.5	7.7	7.2	7.1	7.2	7.3	7.5	7.5	7.8	7.8
Building Materials & Garden Supplies 52		9.8	9.5	8.4	8.3	8.4	8.5	9.6	9.8	10.2	10.2
General Merchandise Stores..... 53		9.1	9.8	9.3	9.0	9.3	9.7	9.4	10.0	10.4	10.0
Food Stores..... 54		10.7	11.7	10.6	10.4	10.3	10.4	10.8	10.4	10.7	10.9
Auto Dealers and Service Stations... 55		8.0	7.9	7.2	6.8	6.9	6.8	7.0	6.9	7.1	6.8
Apparel and Accessory Stores..... 56		2.3	2.6	2.3	2.2	2.5	2.4	2.8	2.6	2.9	3.2
Furniture, Home Furnishings..... 57		5.1	4.7	4.7	4.3	3.9	3.7	4.3	4.2	4.9	4.6
Gating and Drinking Places..... 58		7.5	7.6	6.9	7.3	7.6	7.8	7.8	8.2	8.2	8.3
Miscellaneous Retail..... 59		3.8	3.8	3.5	3.5	3.7	3.6	3.9	3.7	4.3	4.3
FINANCE, INSURANCE AND REAL ESTATE...		2.1	2.1	2.0	1.9	2.0	2.0	1.9	2.0	2.0	2.0
Banking..... 60		1.5	1.7	1.5	1.6	1.7	1.6	1.6	1.6	1.6	1.6
Credit Agencies..... 61		1.1	1.3	1.1	1.3	1.1	1.3	1.4	1.2	1.2	1.3
Insurance..... 63		1.9	2.0	1.7	1.8	1.9	1.8	1.7	1.8	1.9	1.8
Real Estate..... 65		4.9	4.7	4.4	4.0	4.4	4.4	4.5	4.2	4.4	4.7
Building & Other Investment Offices. 67		--	--	1.7	1.8	1.9	1.7	--	2.3	--	1.5
SERVICES.....		5.5	5.5	5.2	5.0	4.9	5.1	5.2	5.4	5.3	5.3
Hotels and Other Lodging Places..... 70		9.2	9.1	8.9	8.8	9.0	9.2	9.8	10.0	10.0	10.6
Personal Services..... 72		3.5	3.2	2.9	2.8	3.1	2.9	2.9	2.9	3.3	3.1
Business Services..... 73		4.9	5.0	4.4	4.6	4.4	4.7	4.9	4.7	4.9	4.6
Automotive Services..... 75		8.2	8.0	7.5	7.6	7.6	7.1	6.9	6.5	6.8	6.7
Health Services..... 80		4.8	4.4	4.4	4.1	3.9	4.3	4.1	4.1	4.6	4.3
Legal Services..... 81		--	--	0.6	0.4	0.5	0.5	0.5	0.6	0.6	0.8
Social Services..... 83		4.8	4.9	5.1	5.2	5.0	5.3	5.3	6.0	5.4	5.9
Membership Organizations..... 86		--	--	1.4	2.3	--	2.6	--	--	--	--
Miscellaneous Services..... 89		1.9	2.2	1.4	1.6	1.3	1.8	1.4	1.7	1.4	1.6

# Alaska State Legislature

Legislative Research Agency



P.O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 465-3991  
Fax: (907) 463-3351

December 15, 1989

## MEMORANDUM

TO: Representative Dave Donley

FROM: Patricia Young *PM*  
Legislative Analyst

RE: Criminal Prosecution of Employers for Workplace Safety Violations  
Research Request 90.085

You asked this agency for information on criminal prosecution of executives of California companies in which safety violations have occurred. You also wished to know why companies in Scandinavian countries consistently have fewer workplace deaths and serious injuries than their American counterparts. Lastly, you requested copies of model workplace safety programs recognized by any states or by the federal government which could be adapted for use by Alaska companies.

### Background Information

The Occupational Safety and Health Act (OSH Act, 29 U.S.C. 651-668), passed by Congress in 1970, was thought to be a landmark measure which would ensure safe working conditions throughout the United States.<sup>1</sup> To this end, the Occupational Safety and Health Administration (OSHA) was given broad authority and responsibility to establish appropriate standards and to enforce them through civil and criminal penalties.<sup>2</sup>

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<sup>1</sup>Although the OSH Act covers most workplace situations, mining operations, nuclear plants, and railroads are covered by other regulatory measures.

<sup>2</sup>States have the option of being governed by federal OSHA regulations or developing their own. State plans must be as or more effective and must provide workers with at least the same rights and protections as does the federal program.

Representative Donley  
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According to John Hynan, OSHA counsel of general legal advice, criminal penalties were originally thought to be less effective than civil penalties (i.e., fines) in abating workplace hazards. Therefore, fines have generally been levied for violations. OSHA has authority to seek criminal prosecutions only in cases of willful violation of a standard resulting in a death, falsification of records, or giving advance notice of an OSHA inspection. Criminal penalties are not available to OSHA in cases of injuries or illnesses which do not result in fatalities.

In general, OSHA may assess maximum civil and criminal fines of no more than \$10,000 and maximum jail sentences of no more than six months. Penalties are doubled for second convictions. Since passage of the Comprehensive Crime Control Act of 1984 (18 U.S.C 3571), under limited circumstances the maximum fine for a misdemeanor resulting in a fatality may be increased to \$250,000 for an individual defendant and \$500,000 for an organization which is a defendant. However, union representatives, among others, contend that the penalties are inadequate to deter violations. They point out that, unlike jail time, fines are easily passed on as business expenses, and they note that other regulatory acts provide for substantial fines as well as substantial terms of imprisonment for knowingly putting a person in imminent danger of death. For example, in such cases, the Resource Conservation and Recovery Act, which deals with hazardous waste, provides for up to \$250,000 in fines or 15 years' imprisonment<sup>3</sup>

Statistics of job-related fatalities and illnesses tend to support union arguments. A recent special report, *Occupational Safety and Health: 7 Critical Issues for the 1990s*, published by the Bureau of National Affairs (a leading publisher of information on government and public policy issues), quotes studies showing that between 7,000 and 20,000 people die each year in the U.S. in job-related accidents, and that job-related diseases may account for as many as 50,000 to 70,000 deaths annually.<sup>4</sup> However, from 1970 through February of 1988, only 42 cases had been referred by OSHA to the Department of Justice for possible criminal action. Of those, 14 were prosecuted, resulting in ten convictions. Until this year, no one had ever been incarcerated for a criminal violation of the OSH Act. According to Mr. Hynan, this year, one person went to jail.

Believing that current OSHA regulations do not adequately protect workers, state and local prosecutors in many parts of the country are resorting to their

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<sup>3</sup>House Committee on Government Operations, *Getting Away With Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations*, 100th Congress, 2d session, 1988, House Report 100-1051, (Attachment A).

<sup>4</sup>*Occupational Safety and Health: 7 Critical Issues for the 1990s* (Washington D.C.: BNA, 1989), p. 2. Copies of this report are available for inspection in this agency's library and in the Legislative Library.

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own police powers to criminally prosecute employers for serious OSHA violations and for willful conduct resulting in death or serious injury. The Los Angeles County District Attorney's Office, for example, has a unit which focuses specifically on criminal prosecutions for occupational violations. Several states, including Illinois, Michigan, New York, North Carolina, Texas and Wisconsin, have filed criminal suits in particularly egregious cases.

A critical question in these cases has been whether federal workplace safety laws preempt states and local jurisdictions from using states' historic police powers to prosecute employers for acts which are crimes under state laws. According to Jan Chatten-Brown, assistant district attorney in Los Angeles, although state convictions have been challenged on issues of preemption, supreme court rulings in Illinois, Michigan Texas, and Wisconsin have upheld states' rights to prosecute employers with criminal laws of general application, such as those against murder, manslaughter, and assault. The Illinois Supreme Court ruling in *State of Illinois v. Chicago Magnet Wire Corporation* was appealed to the U.S. Supreme Court, which denied a hearing of the case and, thus, upheld the lower court's decision that the state is not preempted from prosecuting. In addition, it is the opinion of the U.S. Department of Justice that

. . . nothing in the OSH Act or its legislative history . . . indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability.<sup>5</sup>

Although OSHA has taken no stand on whether state and local actions are appropriate, such actions appear to be an increasingly accepted trend. Attachment B includes a list of prosecution contacts in 17 states--Appendix D of the BNA report--as well as various articles related to this issue.

#### Workplace Safety in Scandinavian Countries

The Occupational Safety and Health Law Center, a public interest firm, monitors workplace legislation in the U.S. and abroad. According to J. Davitt McAteer, executive director, Scandinavian countries--which have labor governments of long standing--are highly unionized. As a whole, these governments have taken workplace health and safety very seriously and have adopted preventive approaches to industrial accidents and illnesses. Many

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<sup>5</sup>Letter from Thomas M. Boyd, U.S. assistant attorney general, Office of Legislative and Intergovernmental Affairs, to Tom Lantos, Chairman, Subcommittee on Employment and Housing, U.S. House Committee on Government Operations, published in *Occupational Safety and Health: 7 Critical Issues for the 1990s*, BNA, appendix B.

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potential problems have been systematically eliminated through careful workplace design. For example, the Volvo company is noted for its person-oriented assembly process. Machinery, equipment, and work environments are designed to fit and complement workers. By comparison, in the U.S., workers generally accommodate and adjust to machinery.

#### Model Workplace Safety Programs

None of the sources contacted for this memorandum were aware of any recognized model programs which include both penalties for violations and specific incentives for compliance with workplace standards. However, according to Bruce Hillenbrand, OSHA director of Federal and State Operations, OSHA's Voluntary Protection Programs (VPPs)--in effect since 1982--have been relatively successful in raising corporate concern for safety and health standards closer to the level of concern for quality control and production. Inclusion in these programs depends, among other things, on a company's safety record within the previous three years. Random OSHA inspections are eliminated under these programs because joint labor and management committees help to create self-policing situations. Detailed information on OSHA's VPPs will be forwarded to you upon its arrival.

According to Mr. McAteer, California's scheme is widely recognized as being one of the more well-developed, having gone substantially beyond the federal standards. Ms. Chatten-Brown is forwarding copies of California's enabling legislation, articles from a number of law journals, and a District Attorney white paper report on OSHA standards which includes recommendations for both increased penalties and incentives. This information will also be forwarded to you upon its arrival.

I hope this information is useful to you. Please call if you have any questions or need further information.

Attachments

Attachment A

U.S. House Committee on Government Operations,  
*Getting Away With Murder in the Workplace:*  
*OSHA's Nonuse of Criminal Penalties for Safety Violations,*  
100th Congress, 2d session, 1988, House Report 100-1051

**Union Calendar No. 619**

100th Congress, 2d Session - - - - - House Report 100-1051

**GETTING AWAY WITH MURDER IN THE  
WORKPLACE: OSHA'S NONUSE OF CRIMINAL  
PENALTIES FOR SAFETY VIOLATIONS**

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**SIXTY-SIXTH REPORT**

BY THE

**COMMITTEE ON GOVERNMENT  
OPERATIONS**



OCTOBER 4, 1988.—Committed to the Committee of the Whole House on  
the State of the Union and ordered to be printed

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(11)

## LETTER OF TRANSMITTAL

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HOUSE OF REPRESENTATIVES,  
Washington, DC, October 4, 1988.

Hon. JIM WRIGHT,  
Speaker of the House of Representatives,  
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's sixty-sixth report to the 100th Congress. The committee's report is based on a study made by its Employment and Housing Subcommittee.

JACK BROOKS, *Chairman.*

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## Union Calendar No. 619

100TH CONGRESS  
2d Session

HOUSE OF REPRESENTATIVES

REPORT  
100-1051GETTING AWAY WITH MURDER IN THE WORKPLACE:  
OSHA'S NONUSE OF CRIMINAL PENALTIES FOR SAFETY  
VIOLATIONS

---

OCTOBER 4, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. BROOKS, from the Committee on Government Operations,  
submitted the following

## SIXTY-SIXTH REPORT

BASED ON A STUDY BY THE EMPLOYMENT AND HOUSING SUBCOMMITTEE

On September 27, 1988, the Committee on Government Operations approved and adopted a report entitled "Getting Away With Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations." The chairman was directed to transmit a copy to the Speaker of the House.

## I. INTRODUCTION

At a March 19, 1987, hearing on the Occupational Safety and Health Administration's [OSHA] policy of exempting companies from inspections based on injury records, the Employment and Housing Subcommittee heard testimony about the tragedy of Stefan Golab, a 61-year-old immigrant worker who in 1983 died from inhaling cyanide fumes while working at the Film Recovery Systems plant in suburban Chicago.

Two months prior to Mr. Golab's death, an OSHA inspector visited the Film Recovery plant where the company was engaged in the business of reclaiming silver from used x-ray film, reviewed the company's injury records in the plant's front office, determined that the company's injury rate was below the national average, and left. Had the OSHA inspector come in and observed the conditions on the plant floor, he would have seen 70 boiling vats full of used film from which lethal cyanide vapors were being released, the floor covered with cyanide-contaminated solutions, warning

(1)

labels on cyanide containers painted over, and immigrant workers, many unable to speak English, unaware of the unsafe conditions. Had the OSHA inspector conducted a wall-to-wall inspection of the plant, the deadly cyanide exposure would easily have been detected.<sup>1</sup>

However, the story does not end there. Upon investigating Mr. Golab's death, OSHA inspected the plant and discovered numerous health and safety violations. OSHA issued a citation and fined the company \$4,855, which was subsequently bargained down to less than \$2,400.

By comparison, the Cook County State's attorney charged the company and its officials with criminal conduct. Company officials were convicted of murder and 14 counts of reckless conduct and were sentenced to 25 years in prison. The company was convicted of manslaughter and reckless conduct and fined \$24,000.

During the May 1986 Senate confirmation hearings on John Pendergrass to be Assistant Secretary of Labor for OSHA, Senator Paul Simon referred to a worker's death at the Film Recovery Systems plant and stated that in a precedent-shattering case the four owners of that plant had been found guilty of murder. Mr. Pendergrass commented:

You bring up a case that brings forth a passion, I think, in many people, it certainly does in me. . . . It was an inexcusable set of circumstances that would allow people to be exposed to things that would damage their health, such as happened there. As a personal opinion, I think the owners and managers got what they deserved.<sup>2</sup>

The criminal convictions of Film Recovery officers are now under appeal in the Illinois courts on the issue of whether State criminal prosecutions for workplace safety violations are preempted by Federal OSHA law.

The *Film Recovery* case, and others like it, prompted the Employment and Housing Subcommittee to hold a hearing on February 4, 1988, to examine OSHA's apparent nonuse of criminal sanctions for workplace safety violations and efforts by State and local prosecutors to fill the vacuum by utilizing historic police powers and enforcing State criminal laws against employers who knowingly and recklessly expose workers to toxic substances and dangerous working conditions, causing them serious injury or death.

## II. BACKGROUND

The Federal Government has been involved in worksite safety since the first Congress. In 1790, Congress passed legislation which allowed merchant seamen to refuse to serve on unsafe ships.

<sup>1</sup> In response in part to this committee's report, "Here's the Beef: Underreporting of Injuries, OSHA's Policy of Exempting Companies From Programmed Inspections Based on Injury Records, and Unsafe Conditions in the Meatpacking Industry," H. Rept. 100-542, Mar. 30, 1988. Forty-second report by the Committee on Government Operations, OSHA has changed its inspection policy. OSHA investigators are now required to inspect "high hazard" areas of the workplace even though an examination of the employer's injury and illness records shows a below average rate.

<sup>2</sup> Hearing on Nomination of John A. Pendergrass to be Assistant Secretary of Labor for Occupational Safety and Health before the Senate Committee on Labor and Human Resources, 99th Cong., 2d sess., S. Hrg. 99-864 at 27-28 (1986).

Through the decades, Federal laws evolved to address workplace safety issues, often targeting particular groups such as child labor, occupations such as railway workers, and industries such as mining.

In 1970, Congress passed the Occupational Safety and Health Act (OSH Act, 29 U.S.C. 651-668) to bring Federal interests in worksite safety standards and their enforcement within one new agency at the Department of Labor. The Occupational Safety and Health Administration [OSHA] was charged with assuring, "... so far as possible, every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." [OSH Act, Sec. 2(b).] To accomplish this goal, OSHA was given broad authority and responsibility to establish health and safety standards, and to enforce them through civil and criminal penalties.

Since the establishment of OSHA, more than 100,000 workers have lost their lives because of unsafe working conditions. It is estimated that annually 7,000-11,000 workers are killed on the job<sup>3</sup> and thousands more die from the long-term effects of occupational illnesses.

OSHA is charged with inspecting worksites and identifying unsafe practices and equipment to ensure that they meet industry-specific and general health and safety standards. OSHA has the authority to issue citations for violations and assess penalties. In addition, the Secretary of Labor is authorized to seek an injunction in U.S. district court when a condition of immediate danger is clear to OSHA inspectors.

OSHA may assess civil penalties of \$1,000 for a serious violation (defined as one where there is a substantial probability that death or serious physical harm could result and the employer knew or should have known of the hazard) and up to \$10,000 for a willful violation (defined as one where an employer knew that a hazardous condition or violation existed and made no reasonable effort to correct it).

OSHA has authority to seek criminal prosecution for workplace violations in three situations:

- (1) a willful violation of a specific OSHA standard that results in death to an employee (maximum penalty is a \$10,000 fine plus 6 months imprisonment); [OSH Act, Sec. 17(e).<sup>4</sup>
- (2) giving advance notice of an OSHA inspection (maximum penalty is a \$1,000 fine plus 6 months imprisonment); [OSH Act, Sec. 17(f)].
- (3) knowingly making a false statement or supplying false documents to OSHA (maximum penalty is a \$10,000 fine plus 6 months imprisonment). [OSH Act, Sec. 17(g).]

Cases are referred by OSHA to the Department of Justice for possible criminal action. The criminal prosecution of cases requires the recommendation of the Justice Department and the agreement

<sup>3</sup> Preventing Illness and Injury in the Workplace. Office of Technology Assessment, Washington, D.C. (1985); Report of the National Safety Workplace Institute, Chicago, Illinois (1987).

<sup>4</sup> For a second conviction the maximum fine and term of imprisonment are doubled.

of the local U.S. attorney's office who is responsible for prosecuting the case.

Since the establishment of OSHA some 18 years ago, only 42 cases have been referred by OSHA for criminal prosecution.<sup>8</sup> Only 14 of those cases were prosecuted, resulting in 10 convictions, with fines or suspended sentences. Tr. 76, 83-88.<sup>9</sup> In the 18-year history of OSHA, no one has ever spent one day in jail for a criminal violation of the OSH Act.

During the 1980's, State and local law enforcement officials have with increasing frequency used the historic police powers of the State to prosecute company officials for knowingly and recklessly exposing employees to toxic substances, causing death and serious injuries. This stems from the State's interest in controlling conduct which endangers the lives of its citizens, whether it be recklessly operating an automobile or an automobile plant. In some cases where State and local prosecutors have obtained convictions against company officials and managers for acts against their employees that constitute crimes under State law, the convictions have been overturned on the ground that Federal worksite health and safety laws preempt a State from pursuing criminal actions.

### III. FINDINGS AND CONCLUSIONS

1. OSHA's record with respect to seeking criminal penalties for workplace safety violations and fatalities is dismal. Since its creation by Congress in 1970, OSHA has referred only 42 cases to the Justice Department for possible criminal action. Only 14 of those cases were prosecuted, resulting in 10 convictions, but no jail sentences. No one has ever spent a day in jail for violating the OSH Act. OSHA's record of criminal referrals is even bleaker when compared to the growing number of State and local prosecutions for workplace related fatalities and serious injuries. For example, since 1973 the State of California has prosecuted over 250 cases involving workplace related deaths, injuries, and illnesses, and in the past 8 years there have been 112 successful prosecutions.

2. The criminal penalty provisions of the OSH Act, as presently written and as enforced by OSHA, provides no deterrent to employers violating the statute. A company official who willfully and recklessly violates Federal OSHA laws stands a greater chance of winning a State lottery than being criminally charged by the Federal Government for workplace safety violations. The current system, which relies primarily on citations, abatement, fines, and education and training, is insufficient to ensure that every workplace is safe and healthful. The weak criminal sanctions in the Federal OSH Act are outdated and need to be strengthened and utilized more by OSHA to be a deterrent. In most areas of the law, the prospect of criminal prosecution and imprisonment has a substantial deterrent effect whereas civil fines can often be passed on as part of the cost of doing business.

3. While much of the failure by the Federal Government to seek criminal sanctions for violating Federal OSH laws stems from re-

<sup>8</sup> These figures are as of February 1, 1988.

<sup>9</sup> Tr. refers to the printed record of the February 4, 1988, subcommittee hearing on "Criminal Penalties for OSHA Violations."

luctance by OSHA to proceed, part of the blame rests with the Justice Department. The Justice Department has been slow to act on cases referred by OSHA. Some cases have been pending at the Justice Department, without a response, since 1985. With a few exceptions the Justice Department and the U.S. Attorney's Office have consistently declined to prosecute these types of cases. Since 1981, of the 17 cases referred by OSHA for criminal action, there has been one guilty plea, one indictment, and in two cases action is pending by the U.S. Attorney. In seven cases prosecution was declined by either the Justice Department or the U.S. Attorney. In the remaining six cases there has been no response from the Justice Department or the U.S. Attorney.

4. By "backing off" in the *Film Recovery* case because there was an ongoing criminal investigation by the State of Illinois, by inaction and silence, and by sending mixed signals, OSHA hasn't helped to resolve the issue of whether the Federal OSH Act preempts the traditional police power of the State to prosecute criminal acts that occur in the workplace. This confusion surrounding the preemption question has discouraged some State and local prosecutors from bringing criminal charges in egregious cases, and may have had the effect of shielding employers from responsibility for criminal conduct.

#### IV. RECOMMENDATIONS

1. OSHA should take an official position on the preemption question and should issue a policy statement. That position should be that the Federal OSH Act, as written, does not preempt the use of historic police powers by the States to prosecute employers for acts against their employees that constitute crimes under State law.

2. There is a need for a real partnership between the Federal Government and the States in pursuing criminal action in workplace safety cases, similar to the partnership that exists in prosecuting drug dealers. This partnership should be premised on cooperation, sharing information and coordinating investigations of workplace accidents and fatalities.

3. Congress should increase the criminal penalties provided by the OSH Act and expand the application of criminal sanctions to include violations which result in serious injuries. Criminal penalties do not now apply to willful safety violations unless there is a resulting fatality. Thus, an employer who willfully and recklessly exposes workers to mercury poisoning, causing permanent brain damage and other serious injury, is not criminally liable under the OSH Act unless a worker dies. Permanent brain damage is not enough to trigger criminal penalties.

4. There is no real program in place at OSHA to handle criminal investigations. OSHA should establish a special criminal investigation unit in its regional offices. Modeled after programs set up in some State and local prosecutors' offices, this new OSHA unit should have necessary expertise in criminal investigations and be available to respond to workplace fatalities 24 hours a day. A prompt response to a workplace fatality or serious injury and a thorough investigation are key elements in building a successful criminal case.

## V. DISCUSSION

## A. PYMM THERMOMETER

The *Pymm Thermometer* case dramatically illustrates the inadequacies of the present Federal regulatory scheme for dealing with workplace safety violations.

In January 1981, a worker at the Pymm Thermometer plant in Brooklyn, NY, wrote to OSHA:

Mercury is being used, gas and ovens. Please, we don't know how to describe any more violations, but we are sure there are more. Please send an inspector down to see for himself. We only make the minimum wage, so at least we will know our health is okay.

In March 1981, OSHA inspected the Pymm plant and found serious violations. No protective gear was being used to reduce workers' exposure to mercury—no respirator masks, no aprons, and no gloves. Work surfaces were covered with mercury, and even the areas where workers ate their lunch were contaminated with mercury. OSHA issued a citation, assessed a fine of \$1,400, and set a deadline of October 1981 for the company to clean up the factory. However, over the next few years, OSHA regularly extended the compliance deadline.

In 1984, the New York City Department of Health was alerted by a local doctor to elevated levels of mercury in the body of a Pymm worker. The NYC Health Department went to the Pymm factory, inspected it, conducted tests, found violations of the health code and discovered elevated levels of mercury in the workers.

In October 1985, tipped off by a former Pymm worker, an OSHA inspector discovered a hidden cellar operation at the Pymm plant—a cellar virtually without ventilation, filled with broken thermometers, with pools of mercury on the floor, and noxious vapors in the air, which produced permanent brain damage in one employee, Vidal Rodriguez, and exposed many others to serious health risks.

In 1986, OSHA issued citations against Pymm for exposing workers to dangerous levels of mercury and assessed fines of over \$100,000. To date, the company has paid just \$22,410 in fines, contesting the remainder.

Two months later, the Kings County (Brooklyn) district attorney, in cooperation with the New York State attorney general, brought a criminal prosecution, charging Pymm Thermometer, its owners and officers, William and Edward Pymm, with criminal assault and reckless endangerment for knowingly and continually exposing workers to a toxic substance, mercury.

Kings County District Attorney Elizabeth Holtzman explained:

The theory of the Pymm prosecution was that assaulting a worker with a toxic substance, such as mercury, is as serious and criminal as assaulting a person with a knife or gun. (Tr. 11.)

New York State Attorney General Robert Abrams told the subcommittee:

I can assure you, however, that the injured workers in these cases are fully aware that they have been the victims of violent crimes. People sometimes recover from the most terrible of beatings. People never recover from mercury poisoning. (Tr. 18.)

In November 1987, after a 4-week trial, the jury in the New York criminal prosecution returned a guilty verdict, finding the company and two of its executives guilty of assault and reckless endangerment by exposing workers to mercury. Under New York law these crimes are punishable by up to 15 years in prison. However, the guilty verdict was subsequently overturned by the trial judge on the ground that State prosecution was preempted by the Federal OSH Act. That decision is under appeal in the New York courts.

#### B. THE NEED TO BEEF UP CRIMINAL PROVISIONS OF THE FEDERAL OSH ACT

The criminal provisions of the OSH Act are limited to a willful violation of a standard that results in a fatality, falsification of records, and giving advance notice of an OSHA inspection. Criminal sanctions are not applicable to cases of injuries or illnesses that do not result in a death. Thus, in the case of *Pymm Thermometer* where a worker suffered permanent brain damage from mercury, OSHA could not statutorily pursue criminal prosecution. It is simply unacceptable to have death as the trigger point. In comparison, under the Mine Safety and Health Act (MSHA), death is not required for there to be criminal action.

Even in workplace safety violation cases where there is a fatality, under the OSH Act the maximum penalty is only a \$10,000 fine and 6 months' imprisonment. This "slap on the wrist" penalty is so low that motivation is taken from the Justice Department to pursue criminal prosecution in workplace safety cases. By contrast, the Resource Conservation and Recovery Act (RCRA), which deals with hazardous waste provides for a penalty of up to \$250,000 or up to 15 years' imprisonment for knowingly putting a person in imminent danger of death.

While the primary emphasis of the OSH Act is on civil not criminal penalties, there is a need to beef up and strengthen the criminal provisions of the statute.

The threat or imposition of jail time can have a substantial deterrent effect not achieved through other mechanisms. Jan Chaten-Brown, a special assistant for occupational safety and health protection in the Los Angeles district attorney's office, testified:

Civil penalties can simply be passed on as part of the cost of doing business. For a corporate officer to face even a few days of jail time is generally of greater consequence than long prison sentences for most criminals. (Tr. 43.)

Cook County State's Attorney Richard Daley told the subcommittee:

The fines being levied against corporations have not been enough to deter serious neglect and abuse. Corporations such as Film Recovery have protected themselves from fines by filing for bankruptcy. . . . Instead, we need