ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672

7477 SENATE JUDICIARY

the Administrative Procedures Act, specifically the adjudicatory provision." He then added:

> I question whether this has any value in a bill designed to appreciate the fiscal management of the University of Alaska. In deleting the obligatory provision, I think it leaves a bill which (indiscernible) with the normal day-to-day functioning of the University. 134/

There was no further debate on the issue, and the motion to return the bill to second reading for purposes of Representative Carpenter's amendment was defeated. 135/ The House then proceeded to adopt the bill, with the one amendment that had been previously adopted. 136/ When the bill was returned to the Senate, the Senate concurred in the House amendments, and the final version of the bill was transmitted to the Governor as HCS SB 261 am H. 137/

This lengthy, yet important, description of the legislative history of AS 44.62.330(a)(45) shows beyond doubt that in passing the legislation, the Legislature had no intent whatsoever to make the APA applicable to the University's grievance procedures. Indeed, two themes that clearly emerge from the legislative history show just the opposite. First, in

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134/ Ex. 4 at 91.

135/ Id. at 92.

136/ Ex. 5, att. 14 at 1151.

137/ Ex. 4, att. 11 at 1152; Ex. 5, att. 1-c.

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enacting HCS SB 261 am H, the Legislature's ultimate goal was to insure public accountability and instill control and responsibility in the University's fiscal management procedures. As capsulized by then-Representative Cowper:

> Now, the bill itself, as it stands right now, is a good bill. I agree that the University of Alaska has got to become publicly accountable for the funds that it gets from public sources. You're right. That's the reason for the legislation. That's the reason all of us support it. 138/

At the same time that the legislators were imposing controls on the University's fiscal management procedures, they were acutely concerned that they not interfere in any manner with the Board of Regents' and president's constitutional and statutory powers to govern and manage the University in its day-to-day academic and administrative functions. The clear evidence supporting this crucial concern is overwhelming. First, from the outset, Senator Sackett, the original proponent of the bill, never intended to impinge upon the Board of Regents' sovereignty in governing the personnel matters and other internal affairs of the University. In a March 7, 1977 memorandum to Senator Sackett responding to the Senator's request for a draft bill, Billy G. Berrier, Director of the Legal Services Division, explained to Senator Sackett:

138/ Ex. 4 at 62.

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> As you have requested, we have drawn an act relating to accounting and fiscal matters of the University of Alaska which has the [e]ffect of providing that the accounting for the University will be done by the Department of Administration and that all of the fiscal controls applicable to any other unit of government are applicable to the university.
>
> As you have instructed, this bill does not impair in any way the management function of the university, except in the area of fiscal controls. This would not, for example, in any way infringe upon the powers of the board of regents in academic matters, in matters relating to selection, retention or dismissal of faculty and other employees, in matters relating to admission of students, or curriculum, or in matters relating to management of university property, except of course, as limited by the amounts appropriated and available for expenditure. 139/

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Thus, it was never Senator Sackett's intent, in proposing Senate Bill 261 in the first instance, to intrude into the internal management of the University in any way other than in fiscal controls.

Second, the legislators who considered the bill shared Senator Sackett's concerns. As stated by Representative Miles during the House debates:

> In the letter of intent, we specifically -- and I wholeheartedly concur -- that we specifically say that the Legislature doesn't want to move into the academic area, and it is the expressed intent of the Legislature that the establishment of policies, directives, etc., pertinent statutes, are clearly the responsibility of

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139/ Ex. 5, att. 16 (emphasis added).

> the Board of Regents and not that of the Executive or the Legislative branch.
>
> I don't foresee any commissioner down the pike or any executive getting into the policy decisions of the University. I think that would be a terrible thing, we are speaking to the financial procedures and the method of financial management of the University. 140/

In response to those comments, Representative Meekins added:

> Speaker, to add a little to what Representative Miles is just saying, I, too, am very concerned that no one interfere with the academic freedom of the University, and certainly this bill, in my opinion, does not do that. 141/

Two further statements made during the debates are particularly illuminating on the issue of the legislators' intent to focus solely on the fiscal aspects of the University and to stay out of the internal management functions of the Board of Regents. As Representative Rudd so stated:

> I think it is very important to remember that we don't have any business telling the University who is going to teach and what they are going to teach and where they are going to teach it, but we do have business, because we have been elected by the people of the state, to make sure that the state funds are used correctly, that they are not misused, and that the records are kept so that they are understandable to us and to the rest of the people of the state. . . . 142/

140/ Ex. 4 at 49-50.

141/ *Id*. at 51.

142/ Ex. 4 at 60.

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Representative Miles further added, immediately prior to the passing of the bill:

> Mr. Speaker, I think if there is any question on intent of the bill, it is very, very carefully spelled out in the letter of intent, which says that the Legislatura does not want to get into the policy decisions of the University.

Thus, as can be so clearly seen from the legislative history, the Legislature had no intent to interfere with the Board of Regents' sovereign power to manage and govern the internal affairs of the University. Accordingly, there was no intent to have the administrative adjudication provisions of the APA apply to the University's grievance proceedings, proceedings that are clearly matters of internal management.

The second theme that emerges from a review of the legislative history is that the Legislature was attempting, by passing this bill, to treat the University of Alaska in the same manner as state agencies with respect to fiscal management controls. For example, as mentioned earlier, Senator Tillion saw the purposes of the bill as requiring the University to conduct its fiscal management procedures "the same as every other component of the state government. . . ." 143/ Similarly, Representative Meekins stated:

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143/ Ex. 4 at 32.

SENT BY:General Counsel ; 2-27-92 ; 12:05PM ; Fairbanks Alaska→ 3[illegible]

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> We are just trying to make the University fall under the same procedures and be treated as any other state agency. 144/

Another document associated with HCS SB 261 am H sheds further light on the legislative intent to treat the University as other state agencies are treated for purposes of fiscal management. As then-Attorney General Avrum M. Gross reported to Governor Hammond prior to the Governor's approval of the bill:

> In effect, the bill places the university in a position analogous to all executive branch agencies for purposes of fiscal management while maintaining the University's constitutional academic a[u]tonomy. The underlying concept was developed jointly by the legislature and the executive branch, and the bill follows the concept developed. 145/

Thus, it is abundantly clear that one of the legislature's main goals in passing this bill was to insure that the University would be treated as other state agencies are treated with respect to fiscal controls. Even if one were to assume that the Legislature intended this similar treatment to extend to personnel matters, which is an assumption that is not supported by any evidence, that would still not have the effect of requiring the application of the APA to University's grievance proceedings for, as is discussed in detail below, the internal personnel matters of state agencies are not subject to the

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144/ Id. at 51.

145/ Ex. 5, att. 17.

administrative adjudication provisions of the APA, but instead are governed by the State Personnel Act. 146/ Accordingly, the administrative adjudication provisions of the APA simply do not apply to the University's grievance procedures.

In summary, upon reviewing the entire legislative history of the bill ultimately adopted by the Legislature to amend the APA to include the University, there can be no doubt that the Legislature had no intention whatsoever for the administrative adjudication provisions of the APA to apply to the University's grievance proceedings. The bill amending the APA to include the University was directed solely to requiring the University to become publicly accountable for the funds that it received from public sources. It had no effect at all on the University's internal day-to-day functioning, and indeed, there is much evidence that the Legislature was very careful to stay out of the Board of Regents' powers to govern the University. Accordingly, it must be concluded that the language of AS 44.62.330(a)(45) specifying that the APA would not apply to the University if its "inclusion is inconsistent with the provisions of AS 14.40" meant that the administrative adjudication provisions of the APA would not apply to the University in areas such as internal personnel management, where the Board of Regents and the president have plenary powers to govern and manage the

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146/ AS 39.25.010 - .220.

University under AS 14.40. Accordingly, the APA, by its own terms, does not apply to the University's grievance proceedings.

2. The APA, by its nature, does not apply to the University's grievance proceedings.

As shown above, the administrative adjudication provisions of the APA, by their own terms, do not apply to the University's grievance proceedings. A close look at the substantive provisions of the statute show as well that, for at least four reasons, the provisions do not apply to the University's grievance procedures. First, the administrative adjudication provisions of the APA are directed only toward an agency's actions in dealing with third parties in the granting or denying of a right, authority, license, or privilege. Second, the administrative adjudication provisions of the APA apply only where an agency statute expressly provides for a hearing and adjudication. Third, a University grievance proceeding is not a "procedure" within the meaning of AS 44.62.330(a). Finally, the administrative adjudication provisions of the APA apply only where one raises adjudicative issues, not legislative matters as plaintiffs have done here. Accordingly, the University is entitled to judgment as a matter of law on this issue.

A close reading of the APA shows clearly that the Legislature meant for the administrative adjudication provisions of that statute to apply only to agency actions in dealing with third parties in granting or denying "a right, authority,

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license, or privilege. . . ." 147/ For example, the administrative adjudication provisions apply to numerous professional examining boards that grant or deny occupational licenses, such as the Board of Chiropractic Examiners 148/, the Board of Dental Examiners 149/, the Board of Examiners in Optometry 150/, the State Medical Board 151/, the Boards of Nursing 152/, Pharmacy 153/, and Public Accountancy 154/, and the Real Estate Commission. 155/ The administrative adjudication provisions also apply to such agencies as the Department of Public Safety, with respect to the suspension or revocation of a security guard's license, 156/ the Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors, 157/ and the Alaska Commission

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147/ AS 44.62.330, .370.

148/ AS 44.62.330(a)(2).

149/ Id. at (a)(3).

150/ Id. at (a)(6).

151/ Id. at (a)(8).

152/ Id. at (a)(10).

153/ Id. at (a)(11).

154/ Id. at (a)(12).

155/ Id. at (a)(14).

156/ Id. at (a)(23).

157/ Id. at (a)(27).

on Postsecondary Education with respect to the denial of applications and revocation of authorizations and permits. 158/ Obviously, as this list shows, the adjudication provisions of the APA were clearly meant to apply only to agencies acting in their regulatory or licensing capacities, not to intra-agency personnel matters.

A similar result was reached by the Supreme Court of Arkansas in Arkansas Livestock & Poultry Commission v. House, 159/ where the court was asked to decide whether the discharge of an employee of the Arkansas Livestock & Poultry Commission was subject to the state's Administrative Procedures Act. In reaching the conclusion that it was not, the court stated:

> It seems too obvious for serious argument that the Administrative Procedure Act . . . was never designed nor intended to create supervisory responsibility by the judicial branch of state government over the day-to-day actions of the executive branch, including the hiring and firing of personnel, but rather, to establish procedures for hearings and notice (which meet due process requirements) in those functions of the executive branch which are basically adjudicatory or quasi-judicial, particularly with respect to rule making, the renewal or revocation of licenses, and where, under law, an agency of the State must make orders based on the adjudication process. . . . It hardly need be said that firing employees is clearly an

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158/ Id. at (a)(43).

159/ 634 S.W.2d 388 (Ark. 1982).

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> administrative act and not a matter that involves the quasi-judicial function of an agency. If firing is subject to judicial review then we can think of no logical reason why hiring should not be also. And if hiring is, it follows that promotion would also come under our purview, and so on and so on.
>
> . . . Obviously, when and under what circumstances an agency employee should be terminated is not a judicial function, but a basic and perfunctory part of the administrative routine of an agency in its discharge of public business and nothing would be more inimical to the separation of powers than for the judicial branch to claim the power to monitor such decisions. 160/

Here, as in the Arkansas Livestock case, "it seems too obvious for serious argument" that the administrative adjudication provisions of Alaska's APA were not intended to apply to the day-to-day internal management actions of state agencies, but rather to their official actions in dealing with third parties in granting or denying rights, authorities, licenses, or privileges. 161/ Accordingly, the administrative adjudication provisions do not apply to the University's grievance proceedings.

160/ Id. at 389; see also Abramson v. Board of Regents, University of Hawaii, 548 P.2d 253, 263 (Hawaii 1976) (administrative adjudication provisions of state APA that apply to the "determination of legal rights, duties, or privileges" not applicable to university's instructor's denial of tenure).

161/ See also Klein v. State Board of Education, No. 6391 (Ala. Civ. App. June 1, 1988), 1988 Ala. Civ. App. Lexis 179 (APA applicable to contested cases, not to University personnel matters).

A second alternative reason for not applying Alaska's APA to the University's grievance proceedings is that Alaska's APA applies only where a particular agency statute provides for a hearing and adjudication. In McCarrey v. Commissioner of Natural Resources, 162/ the Alaska Supreme Court had the opportunity to determine exactly the type of proceedings to which the adjudicative provisions of the APA applied. There, the holder of a state grazing lease from the Division of Lands of the Department of Natural Resources claimed that the administrative adjudication provisions of the APA should have been applied to the termination of her grazing lease, since AS 44.62.330(a) made those provisions applicable to the "Division of Lands under the Alaska Lands Act where applicable." 163/ The Supreme Court rejected this contention because it found no indication in the Alaska Lands Act that the application of the administration adjudication provisions of the APA was required. 164/ In reaching that conclusion, the Court analogized Alaska's APA to the Federal Administrative Procedure Act, 165/ noting that

> The adjudicatory provisions of the Federal Administrative Procedure Act apply only "in every case of adjudication required by

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162/ 526 P.2d 1353 (Alaska 1974).

163/ See AS 44.62.330(a)(9).

164/ 526 P.2d at 1357.

165/ 5 U.S.C. § 500 et seq.

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> statute to be determined on the record after opportunity for an agency hearing. . . ." In order for this provision to be operative, the particular agency statute in question must expressly provide for a hearing and adjudication. 166/

Since the Alaska Lands Act did not require a determination on the record after an opportunity for an agency hearing, the Alaska APA did not apply to the termination of the leaseholder's lease.

As established in McCarrey, the administrative adjudication requirements of Alaska's APA apply only where a particular agency statute expressly provides for a hearing and adjudication on the record. Since neither Title 14 nor any other statute provides for a hearing to be determined on the record in faculty grievance proceedings, the administrative adjudication provisions of the APA simply do not apply to the University's grievance proceedings.

A third reason that the administrative adjudication provisions of the APA do not apply to the University's grievance proceedings is that those proceedings are not "procedures" within the meaning of AS 44.62.330. As noted earlier, that section states that the "procedures" of the listed boards, commissions, etc. shall be conducted under the administrative adjudication provisions of the statute. To determine whether a faculty

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166/ 526 P.2d 1357 n.17.

grievance proceeding is a "procedure" of a state agency subject to the APA and therefore covered by the APA, it is helpful to turn to AS 44.62.640, the definition section of the APA. Subsection (a)(3) of that provision states that

> "regulation" means every rule, regulation, order or standard of general application . . . adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or <u>to govern its procedure, except one which relates only to the internal management of a state agency</u>; . . . whether a regulation, regardless of name, is <u>covered by this chapter</u> depends in part on whether it affects the public or is used by the agency in dealing with the public. <u>167</u>/

It could hardly be argued, and indeed is firmly established by the Alaska State Personnel Act, that rules concerning employee grievances "relate to the internal management of state agencies." <u>168</u>/ Therefore, rules governing faculty grievances relate to the internal management of the University and are not "covered" by the APA. If faculty grievance rules are not "covered" by the APA, then they do not "govern [the University's] procedure" for purposes of AS 44.62.330. Therefore, they are not part of the "procedure" of a state agency subject to the administrative adjudication requirement of Alaska's APA.

Finally, even assuming that the administrative adjudication provisions of the APA could possibly apply to the

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<u>167</u>/ AS 44.62.640(a)(3).

<u>168</u>/ AS 39.25.140.

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University's grievance proceedings, which the University denies, it is clear that, under the APA, plaintiffs in this case would still not be entitled to the APA trial-type hearing that they seek. This is so because the administrative adjudication requirements of the APA are intended to apply only where adjudicative facts are raised that require a quasi-judicial proceeding for determination, not where mere legislative matters are at issue.

The distinction between adjudicative and legislative matters is best illustrated by an Attorney General's opinion written in 1960 addressing the question whether the administrative adjudication requirements of the APA applied to the hearing required under the Alaska Banking Code in passing upon applications for bank charters and certificates of authority for branch banks. 169/ The Attorney General observed that "chapter 1 [the rule making provisions] of the Administrative Procedure Act sets forth the procedure which must be followed when an agency exercises its quasi-legislative power." 170/ He then stated that

> Chapter 2 [the administrative adjudication provision] provides for adjudication and the kind of hearing which would be designated as a trial. A trial would not be necessary or desirable in a quasi-legislative proceeding. This is recognized in the statute by the provision for a different kind of hearing

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169/ 1960 Op. Att'y Gen., No. 7.

170/ *Id.* at 3.

based upon argument in Chapter 1 which is made applicable to quasi-legislative proceedings. Therefore, it is believed that Chapter 2 was intended to be applicable to quasi-judicial proceedings and not quasi-legislative proceedings. 171/

The Attorney General concluded that "[a trial-type] hearing would not be required under the Administrative Procedure Act unless there was an issue of adjudicative fact which could be determined under Chapter 2 of the Act." 172/ In distinguishing between adjudicative and legislative facts, the Attorney General stated:

> Adjudicative facts are the facts about the parties and their activities, businesses and properties. Adjudicative facts . . . are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.
>
> Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Yet people who are not necessarily

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171/ Id. at 4-5 (emphasis added).

172/ Id. at 5.

> parties, frequently the agencies and their staffs, may often be the masters of legislative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues of that legislative facts. 173/

In this case, plaintiffs are seeking a trial-type hearing in connection with their grievance concerning the University's interim policy on rank. As discussed above, however, that grievance does not challenge the applicability of the policy to plaintiffs, but rather challenges the basic wisdom and fairness of the University's policy. Seeking a determination on that issue raises legislative, not adjudicative, facts. The establishment of a uniform policy does not turn on facts involving particular activities or circumstances of the plaintiffs, but involves instead considerations of the "good government" and "good of the University," matters which are uniquely committed to the discretion of the Board of Regents. The administrative adjudication provisions of the APA therefore simply would not apply to such a quasi-legislative determination.

In summary, a review of the substantive procedures of the administrative procedures of the administrative adjudication provisions of the APA clearly shows that they were never intended to be applied to the University's grievance proceedings. First,

173/ Id. at 2-3(quoting 1 Davis, Administrative Law Treatise at 413 (1958)).

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the provisions were clearly meant to apply only to the actions of the enumerated agencies in dealing with third parties in the granting or denying of rights, authorities, licenses, or privileges. Second, the administrative adjudication provisions do not apply to University's grievance proceedings because there is no express provision in Title 14 or elsewhere that provides for a hearing and adjudication on the record in connection [illegible] such matters. Third, a University grievance proceeding is not a "procedure" within the meaning of AS 44.62.330 because it relate[illegible] solely to the internal management of the University. Finally, even assuming that the provisions could apply to the University's grievance proceedings, they would not apply in this particular case since plaintiffs raise only legislative issues before the Council and not adjudicative issues. Accordingly, the University is entitled to judgment as a matter of law on this issue.

3. <u>The University has broad explicit and implied constitutional and statutory powers in the area of personnel management that were not intended to be circumscribed by the APA</u>.

As clearly shown above, a careful review of the terms and the nature of the APA shows that the administrative adjudication provisions of that statute were not intended to be applied to the University's grievance proceedings. A similar review of the constitutional and statutory powers of the University further shows that the University has very broad powers in the area of personnel management that were not intended

MAR-31-92 TUE 15:16 FAX NO. 9077381055 P.02

AFT

federation of teachers

2533 providence, anchorage, alaska 99508-4670, (907) 562-2660

alaska community colleges'

american fed. of teachers, local 2404, america fed. of labor — congress of industrial organizations

March 31, 1992

To: Senate Judiciary Committee
Senator Halford, Chair
Senator Rodey, Vice Chair
Senators Adams, Collins, Frank, Members

From: ACCFT 2404 (Alaska Community College Federation of Teachers)

Re: Senate Bill exempting the University of Alaska from the Administrative Procedures Act

The ACCFT 2404 represents some 300 faculty members who teach the community college programs statewide for the University of Alaska. The enclosed packet demonstrates the long and expensive history of the proposed legislation.

Last week faculty from Anchorage, Valdez, Ketchikan and elsewhere voiced opposition to this identical House bill (HB 549) before the House HESS committee. We encourage your review of those testimonials in your deliberations.

ACCFT takes exception to the University portrayal of who we represent and what our stance is on this legislation. We are not persuaded by its economic cost arguments. As was stated in hearings before the Superior and Supreme Court the Universi ty might not have any costs for grievances if they treated their employees fairly and with due process protected. That echoes our sentiments.

The ACCFT 2404 is opposed to the proposed legislation to exempt the university from state law and Supreme Court decision If enacted no employee of the University of Alaska would be provided a fair and equitable method of resolving grievances with the University. Right now, the only protection staff and student's have is the enclosed Supreme Court decision.

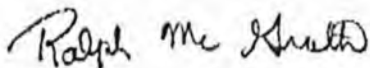
This packet contains the following:

1. Summary Sheet.
2. Legislative proposal sheet, developed by University. Note: The University claims our membership is 9 regardless of the fact that the Arbitrator has ruled the collective bargaining agreement followed our 300 members into the "merged institution". The University claims support for this legislation from faculty. The ACCFT 2404 and the Southeast Faculty Senate are opposed.

3. Resolution from Southeast Faculty Senate in opposition to the Bill which passed unanimously.
4. Copy of Aden Superior Court order (originating issue).
5. Copy of Supreme Court decision regarding McGrath and Mohr. (and 130 faculty statewide).
6. News story regarding Supreme Court Decision.

Should you have futher questions or concerns we would be happy to assist.

Sincerely,



Ralph Mc Grath, President
ACCFT

To: Senator Pat Rodey and Senate Judiciary Committee

Information regarding SB441 exempting University of Alaska from the Administrative Procedures Act

1. Explanatory summary sheet.
2. University Legislative Proposal Form (note university states students and faculty will support this legislation).
3. Resolution from Southeast faculty senate passed unanimously opposed to SB 441 and HB 549.
4. Copy Aden decision. (originating issue).
5. Copy Supreme Court decision regarding McGrath aned Mohr (and 130 other faculty)
6. News story related to Supreme Court decision.

The University of Alaska has requested a bill exempting it from the Alaska Administrative Procedures Act. This is not good legislation and it has a long and expensive history.

The University of Alaska was sued by a Professor named Aden, the gist of the litigation revolved around the fact that Ms. Aden was denied tenure--she grieved the issue; however the grievance procedure in place did not afford Ms.Aden basic protections which are required under the Alaska Administrative Procedures Act and available to all other state employees. The court ruled the Administrative Procedure Act should have applied to the Aden grievance. Soon thereafter, and following the 1987 absorption of the community college teachers into the university, the university:

1. unilaterally repudiated the existing collective bargaining agreement between the University of Alaska and the Alaska Community Colleges' Federation of Teachers 2404 (the union for the community college teachers). The union contract contained a grievance procedure which paralleled the Administrative Procedures Act.

2. Merged the 300 community college teachers into the university personnel procedures and grievance policy while simultaneously denying 130 of them tenure and/or proper placement into the job title grids.

The ACCFT 2404 filed a grievance on behalf of its 130 injured members. Naturally, the University refused to recognize the grievance procedure in the union contract--so the grievance was filed under the university's grievance policy. Since the final determinator of the university's grievance procedure is the President of the University---the same person who remanded the 300 community college teachers to the university personnel procedures and the inappropriate job title grids--a university greivance committee recommended to the then President of the university Donald O'Dowd--that the existing grievance procedure-was inadequate and the Administrative Procedures Act should apply. Donald O'Dowd rejected the recommendation of the committee and denied the grievance.

The ACCFT filed litigation--which ultimately went to the Alaska Supreme Court. On 6/26/91 in a 5-0 decision the Court ruled that the Administrative Procedures Act must apply to the University of Alaska grievance policy. (see attached).

The proposed legislation is not about students and their complaints about grades, cafeteria food and the like. The proposed legislation is an attempt on the part of the University of Alaska to deny all of its 3500 employees the protections that all other State employees have.

The University lost in Court and is now attempting to subvert the law through this legislation. Outside legal counsel, Tom Owens so far has been paid $88,641.00 to represent the University in this matter and has lost.

HB549
SB441

1992 LEGISLATIVE PROPOSAL FORM

DEPARTMENT: The University of Alaska

SUBJECT OF PROPOSED BILL: Exempt University of Alaska Grievance Policy from the Quasi-judicial proceedings of Administrative Procedures Act

SUMMARY OF INTENT: *Include what the problem is, how this proposal solves it, and how many incidents have occurred which necessitate this change.*

In May 1988, Ralph McGrath and Don Mohr filed a class-action type grievance on their own behalf and that of a number of other former community college faculty members who are now on the UAA faculty. The grievants specifically requested that the matter be heard pursuant to the Alaska Administrative Procedures Act (AAPA). The UAA Grievance Council denied that request, and in September 1988 Mr. McGrath, et al, filed a complaint against the University for declaratory judgment and injunctive relief ordering the University to conduct the grievance hearing in accordance with the AAPA. Following thorough briefings by both parties, Judge Brian Shortell issued an order in March 1989 holding that the University is not required to conform its grievance hearings with the procedural requirements of the AAPA. Plaintiffs appealed this decision to the Alaska supreme court, and in June 1990, the Supreme Court overturned the earlier decision opining that since the University was not specifically excluded from the requirements of the AAPA, it was, therefore, required to implement grievance procedures pursuant to the AAPA.

The University is seeking a clear exemption from the requirements in AS 44.62.330 (a)(45). The AAPA grievance procedures do not apply to any employee group in the state, and there is a substantial body of evidence from legislative hearings that there was no intent that the AAPA be applied to University grievance procedures. The quasi-judicial proceedings included in the AAPA are not intended for employee or student grievances, but rather for citizen grievances against state boards and commissions. Employee and student grievance procedures are traditionally built around a process of peer review and consideration with appeal rights at several levels all the way to the President. The majority of University grievances are resolved at an early stage of review, and are done so at little or no cost to the grievant or to the University. The imposition of the AAPA procedures, however, will now impose a quasi-judicial proceeding on all university grievances, including the utilization of a formal hearing officer. The additional cost, complexity and formality of the AAPA requirements are contradictory to the resolution of student and employee grievances, and are contradictory to the collegial approach that characterizes a university setting.

ESTIMATED FISCAL IMPACT:

Operating: Without Legislation -- $200,000/year Capital: None

WHAT OTHER DEPARTMENTS WILL BE AFFECTED BY THIS PROPOSAL: None

WHO WILL SUPPORT THIS BILL: University faculty, staff and students

WHO WILL OPPOSE THIS BILL: Possible: Alaska Community College Federation of Teachers (ACCFT). (The ACCFT is a collective bargaining unit that represented faculty assigned to the states' community colleges. They currently represent the 9 faculty at Prince William Sound Community College)

BRIEFLY OUTLINE ANY PRECEDENTS FOR THIS PROPOSAL IN ALASKA OR OTHER STATES. As stated above, there is no employee group in the state that uses the AAPA model for grievance procedures. The quasi-judicial proceedings are expensive, cumbersome, and ill-suited to employee dispute resolution.

IF A SUBSTANTIALLY SIMILAR BILL HAS BEEN DRAFTED AND NOT INTRODUCED, OR INTRODUCED AND NOT PASSED, PLEASE GIVE LAWLOG OR BILL NUMBER:

Sept 20, 1991
Date

Jerome Komisar
Jerome Komisar, President
University of Alaska Statewide System

Governor's Office Notes:

3-27-92

Attachment 6A

It has come to our attention that the administration of University of Alaska, through the Governor's Office, has requested the introduction of a bill to exempt the University from the administrative abjudication provisions of the Administrative Procedure Act. The Faculty Senate of the University of Alaska Southeast categorically opposes such an action, and has passed the following resolution.

"WHEREAS the University of Alaska is currently bound by the abjudication provisions of the Administrative Procedure Act,

WHEREAS the Act provides an equitable venue for resolution of disputes,

WHEREAS the exemption of the University from the Act's abjudication provisions would substantially disadvantage appellants in challenging University policies, procedures and decisions,

BE IT RESOLVED that the Faculty Senate of the University of Alaska Southeast categorically opposes any legislation which would grant the University exemption from said provisions of the Administrative Procedure Act, and calls on all members of the Alaska State Legislature to reject the attempt by the University to diminish the appellant rights of its employees."

Sincerely,

Michael Baran

President, UAS Faculty Senate

Note - per P.S. Campus Rep

Passed 26-0

Fri - UAS Fac. Senate

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

LOIS ADEN,

Plaintiff,

vs.

UNIVERSITY OF ALASKA,

Defendant.

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT

AUG 25 1987

Clerk of the Trial Courts
By ________ Deputy

Case No. 3AN-85-17179 Civil

ORDER REGARDING ADMINISTRATIVE HEARING

On October 1, 1986, this Court ordered that Plaintiff must exhaust her administrative remedies with Defendant University of Alaska's Grievance Council before litigating UAA's non-retention decision before the Court. At that time, the Court also ordered further briefing on the issue of whether Alaska's Administrative procedures Act, AS 44.62.330 - .630(APA) applies to such grievance proceedings.

On February 2, 1987 the Court, having reviewed those supplemental briefings, found that Defendant University of Alaska's Grievance Procedure must follow the requirements of the APA. Thus, the Court ordered Defendant UAA to modify the Grievance procedure, as set out in the University of Alaska Regents' Policy §04.04.01 and University of Alaska Regulation §04.04.01, to comport with the requirement of the APA.

Since the parties were still unable to agree upon an administrative hearing procedure, the Court, on May 11, 1986, further ordered each party to submit a proposed order setting forth the administrative hearing procedure which each party desired this Court to adopt. Having reviewed those proposals, the Court Hereby Orders as follows:

1. The administrative hearing of Plaintiff's grievance of the University's non-retention decision shall be conducted in accordance with the procedures set forth

below. These procedures are based on the University of Alaska Regents' Policy §04.04.01, but have been modified to comport with the requirements of the Alaska Administrative Procedures Act.

2. Plaintiff shall have 20 days from the date of this order to file a written grievance in accordance with University of Alaska Regulation §04.04.01(c).

3. The preliminary investigation provided for in Regulation §04.04.01(d) and the option of dismissing the grievance provided for in Regulation §04.04.01(e) shall be omitted, and Plaintiff's grievance shall proceed directly to hearing.

4. Plaintiff's grievance shall be heard by a five member Grievance Council, selected as provided for in Policy §04.04.01(c).

5. The hearing shall be presided over by a hearing officer appointed by the Governor in accordance with AS 44.62.350. Such a hearing officer shall have all the powers and duties of an administrative hearing officer under the Administrative Procedures Act.

6. In accordance with AS 44.62.450(c), any party may seek disqualification of the hearing officer or a member of the Grievance Council by filing a written challenge, stating with specificity the grounds for such a request. If a party seeks to disqualify a Grievance Council member, the other members shall determine the issue.

7. The Grievance Council will convene a hearing within 30 days of the filing of Plaintiff's written grievance or within 30 days of the beginning of the fall term, whichever is later. The time for convening a hearing will be tolled for a review of any challenge for cause of a council member or hearing officer. The Grievance Council shall complete the hearing as promptly as is reasonably possible.

8. As provided for by AS 44.62.430, before the hearing begins the Grievance Council shall issue subpoenas

at the request of a party in accordance with the rules of civil procedure. After the hearing begins, either the Grievance Council or the hearing officer may issue subpoenas.

9. As provided in University of Alaska Regulation 504.04.01(f), and in accordance with AS 44.62.460, the parties at the Grievance Council hearing shall have the right to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues, even though that matter was not covered in the direct examination; to impeach any witness regardless of which party called him/her to testify; to rebut evidence; and to be advised by counsel. The Court modifies ~~In accordance with~~ this section (to allow) the parties ~~do not have the right~~ to have (at their own expense) legal counsel make formal appearance, examine witnesses, or address the Council.

10. In accordance with 44.62.450(d), the proceedings at the hearing shall be recorded at defendant's expense. The Grievance Council shall be responsible for ensuring that this is done.

11. In accordance with 44.62.500 and in modification of Policy 504.04.01(g), the Grievance Council shall render a decision in this matter. Any member of the Council who has not heard the evidence may not vote on the decision. The Hearing Officer shall be present at all deliberations to advise and assist the Grievance Council.

12. In the event the Grievance Council recommends that Plaintiff's grievance should be denied for untimeliness, the Council shall still hear the grievance and make findings and recommendations on the merits.

DATED at Anchorage, Alaska, this 27th day of August, 1987.

I certify that on 8-27-87 a copy of this document was sent to:
☐ CSED ☒ Attorney(s) of Record Johnson, Carruth
☐ Plaintiff ☐ Defendant
☐ Other
☐ the secretary(s) of record
Date Deputy Clerk

DOUGLAS J. SERDAHELY

(11) (cont'd) The final decision herein may be rendered by the Chancellor of the University, provided that the Chancellor has "heard" the evidence herein, meaning listened to or read the record, exhibits and arguments, and has had the benefit of the recommendations, findings and conclusions ...

Notice: This is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

RALPH McGRATH and DON MOHR, Appellants,	Supreme Court No. S-3418
v.	Superior Court No. 3AN-S88-08936 Civil
UNIVERSITY OF ALASKA, Appellee.	OPINION
	[No. 3708 - June 21, 1991]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Brian C. Shortell, Judge.

Appearances: Robert A. Royce, Jermain, Dunnagan & Owens, Anchorage for Appellants. Thomas P. Owens, Jr. and C. Ann Courtney, Owens & Turner, P.C., Anchorage, William R. Kauffman, Fairbanks, for Appellee.

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

RABINOWITZ, Chief Justice.

I. FACTS AND PROCEEDINGS

The University of Alaska ("University") is a statewide institution which operates both four-year universities and community colleges. In 1987, the University undertook a

system-wide restructuring and eliminated the separate administration of the community colleges. Previously, the faculty at the community colleges had been represented by the Alaska Community Colleges' Federation of Teachers, Local 2404, and covered by a collective bargaining agreement. This agreement had no rank or tenure provisions. After the restructuring, the community colleges' faculty was offered an opportunity to transfer to the combined faculty of the University of Alaska. In the combined faculty, the community college faculty would not have union representation and the employees would be subject to the same rank and tenure system as their colleagues at the University of Alaska.

All members of the community colleges' faculty were offered an opportunity to transfer to the combined faculty, and all but one accepted. The University's Board of Regents adopted a policy "to provide the guidelines for faculty appointment, tenure, academic ranks, and salary for faculty in the transition." The policy provided that former full-time community college faculty with seven full years of service were eligible to receive tenure; those with four to six years were eligible to receive two-year contracts; and those with fewer years of service were eligible to receive one-year contracts. No former community college faculty member was offered a full-professorship; the highest rank offered was associate professor.

Many community college faculty members were dissatisfied with their rank and tenure assignments. Associate Professor Don Mohr, as a representative of the community colleges' faculty union,

filed an informal grievance on behalf of faculty members who claimed that they were wrongly denied tenure. Similarly, Associate Professor Ralph McGrath requested a change in the rank assignments. Thereafter, the two professors filed a formal grievance on behalf of themselves and seventy-three other former community college faculty members.

At the time Mohr and McGrath filed their initial complaints, the University of Alaska's administration had not yet established grievance procedures for the newly integrated institution. The Anchorage campus chancellor adopted an interim grievance procedure, which mirrored the procedures previously used by the Anchorage campus. The chancellor then appointed an interim grievance council ("council") to implement the interim procedures.

The council conducted a preliminary investigation and determined that a grievance hearing should proceed. Additionally, the council recommended that the University hold this formal grievance hearing in accordance with the provisions of Alaska's Administrative Procedure Act ("APA"), AS 44.62.330-.650.

However, the president of the University rejected the council's recommendation that the grievance be processed in accordance with the APA. Instead, it [illegible] termined that the grievance would be processed under the Board of Regents' Policy, see 04.04.01 (June 4, 1987), and the interim grievance procedures. Under the Board of Regents' policy, the council was required to recommend dismissal or hold a hearing on the grievance within thirty days of its filing, and then forward a recommendation to the

chancellor for decision. The chancellor's decision was then appealable to the president.

The council notified McGrath and Mohr that it was ready to go forward with the hearing and that procedures would not be governed by the APA. Rather than proceeding with the hearing before the council, McGrath and Mohr then filed a complaint in superior court, seeking a declaratory judgment and mandatory injunction to require the University to conduct the grievance hearing under the APA. They contended that the APA procedures were required and that the contemplated grievance procedures denied them due process.

Thereafter, the plaintiffs and the University filed motions for summary judgment. The superior court held that the APA did not apply to the grievance proceedings in the instant case.[1]

II. DISCUSSION

A. Do the provisions of the APA govern the grievance proceedings in this case?

Article 8 of the APA deals with administrative adjudication. AS 44.62.330(a) provides, in part, that "[t]he procedure of the state boards, commissions, and officers listed in this subsection . . . shall be conducted under AS 44.62.330-

1. Summary judgment was granted in this case on the basis of stipulated facts and exhibits. De novo review is the applicable standard of review on an appeal from a grant of summary judgment. Kollodge v. State, 757 P.2d 1028, 1032 (Alaska 1988). There is no genuine issue of material fact; rather, this appeal concerns statutory interpretation, which involves our own independent judgment. Waller v. Richardson, 757 P.2d 1036, 1039 n.4 (Alaska 1988).

44.62.630. This procedure, including, but not limited to . . . conduct of hearings . . . shall be governed by this chapter. . . ." AS 44.62.330(a)(45) lists the University of Alaska as a covered entity, with the proviso "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40."

McGrath and Mohr argue that AS 44.62.330(a)(45) mandates that their grievances be processed in accordance with procedures called for by the APA. The University advances numerous arguments in support of the superior court's grant of summary judgment and its holding that the APA is inapplicable to the proceedings in question.[2] More particularly, the University contends that the legislative history of AS 44.62.330(a) demonstrates that the

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2. The University emphasizes that the superior court reasoned, in part, as follows in reaching its decision:

> (1) AS 44.62.330(a)(45) requires the University to comply with the procedural requirements of the APA "except to the extent that [the APA's] inclusion is inconsistent with the provisions of AS 14.40;" (2) AS 14.40 specifically authorizes the Board to "adopt reasonable rules, orders and plans . . . for the good government of the University;" (3) the Alaska Legislature did not intend the University to be required by law to conduct the APA grievance procedures if the University were to adopt valid, adequate, and fair grievance procedures of its own; (4) under AS 14.40.170(b)(1), grievance procedures adopted by the Board need only be "reasonable," and the procedures instituted by the University meet this test of reasonableness; and (5) to the extent that the APA would require the University to hold substantially more extensive, time consuming, and expensive procedures than would be required under the validly adopted and reasonable University grievance procedures, application of the APA would be inconsistent with AS 14.40.170(b)(1).

legislature never intended to interfere with the Board of Regents' independent power to manage and govern the internal affairs of the University; that the University's grievance procedures are reasonable; that application of the APA to the University's grievance proceedings would be inconsistent with AS 14.40; that the APA by its very nature does not apply in the circumstances of this case; that grievance procedures are not "procedures" within AS 44.62.330; that the APA only applies to "adjudicative facts" not to "legislative facts;" and that the statutory framework governing personnel matters for state agencies and other public employees shows that the APA does not apply to the University's grievance procedures.

We have reviewed all of the University's contentions listed above and conclude that they should be rejected. Therefore, the APA's procedures must govern any grievance hearings in the case at bar.

(i) Applicability of the APA

As noted at the outset, AS 44.62.330-.630 governs the adjudicative procedures of the University "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40." AS 44.62.330(a)(45). The University notes that under AS 14.40.170(b)(1), the Board of Regents may "adopt reasonable rules, orders and plans . . . for the good government of the university. . . ." The University then argues that since its rules governing grievance procedures are reasonable, an application of

the APA procedures to its grievance proceedings would be inconsistent with the authority of the Board to manage the University. More specifically, the University contends that the APA procedures are inconsistent with AS 14.40 because they are more extensive and costly than its own reasonable grievance procedures, and therefore they are precluded under AS 44.62.330(a)(45).

We think these contentions are adequately and correctly answered by Judge Serdahely's opinion Aden v. University of Alaska, No. 3AN-85-17179 Civil (Alaska Super., Feb. 2, 1987). In rejecting contentions similar to those advanced by the University in the instant case, Judge Serdahely held the following:

> The Court concludes that AS 44.62.330 et seq. does apply to Defendant University of Alaska and that Defendant's grievance proceedings must comply with the provisions of such Act.
>
> In so ruling, the Court notes that on its face, the APA applies to Defendant University of Alaska. AS 44.62.330(45) [sic] expressly provides that the provisions of the Act apply to the "University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40." Having reviewed the provisions of AS 14.40, particularly including the powers and duties of the University President as defined in AS 14.40.210-.220, the Court concludes that there is nothing inconsistent between such provisions and the APA. Clearly, the President's power to appoint professors and assistants, and to define and supervise the duties of such persons, are not inconsistent with the APA hearing procedure which is designed to guarantee due process to persons adversely affected by administrative action, such as adverse employment or personnel action.

(ii) Does the APA govern intra-agency adjudications, such as employee grievance hearings?

Three arguments advanced by the University of Alaska converge here. The University contends that the statutory framework governing personnel matters for state agencies and public employees shows that the APA does not apply to University grievance proceedings; that grievance procedures are not procedures within AS 44.62.330; and that the APA applies only to adjudicative facts, not legislative facts.

The University correctly observes that the State Personnel Act, AS 39.25.010-.220, "governs personnel matters for all state employees in non-exempt service positions." AS 39.25.090. Neither those state employees in non-exempt service positions nor state employees covered by the Public Employment Relations Act ("PERA"), AS 23.40.070-.260, are covered by the APA procedures when grievance proceedings are implicated.[3] Therefore, the University concludes that the "the Legislature intended

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3. The personnel division of the Department of Administration administers the State Personnel Act. AS 39.25.030. The labor relations agency administers PERA. AS 23.40.090; AS 23.40.170. Neither of these agencies are enumerated under the APA. AS 44.62.330(a). However, hearings conducted pursuant to either of these statutes contain considerable procedural protections. See AS 39.25.170-.176; 2 AAC 10.400-.440. PERA applies to the University when the University has a collective bargaining agreement. See Alaska Community Colleges' Fed'n of Teachers v. University of Alaska, 669 P.2d 1299 (Alaska 1983). Hearings conducted under that agreement would be conducted pursuant to 2 AAC 10.400-.440. The University concludes that where no collective bargaining agreement exists, hearings should be conducted pursuant to internal policy. We think a more logical conclusion is that where no collective bargaining agreement exists, hearings should be conducted pursuant to the APA.

University employees to have only the same rights as state and other public employees in personnel matters. . . ."

University employees, however, are exempt from the State Personnel Act. AS 39.25.110(5). Thus, they do not receive the protection of grievance rules promulgated by the Director of Personnel under AS 39.25.150(16). Consequently, the exclusion of other state personnel from the APA does not, in our view, conclusively demonstrate that University personnel should be similarly excluded.

The University relies on two statutes in support of its argument that intra-agency grievance proceedings are not the type of proceedings meant to be included within AS 44.62.330. First, the APA's definition of "regulation" excludes anything which "relates only to the internal management of a state agency." AS 44.62.640(a)(3). Second, the State Personnel Act establishes procedures for amendment of personnel rules affecting non-exempt state employees. AS 39.25.140. Subsection (e) of this section states, "[t]he rules adopted under this chapter relate to the internal management of state agencies and their adoption is not subject to the Administrative Procedure Act." While the State Personnel Act does not apply to University employees, the University argues, by analogy, that a blanket legislative intent exists not to have the APA apply to employment matters.

We believe these arguments are fundamentally flawed. Both statutes refer to the application of the APA to an agency's rulemaking authority, i.e. the adoption of rules. Neither statute

applies to an agency's adjudicatory functions. If adjudication and rulemaking were coextensive, these statutes would be controlling here. However, the two functions differ significantly. Rulemaking procedures are designed to ensure a fair and open adoption of policy; adjudication procedures are intended to ensure a fair application of policy to parties.[4] Thus, the fact that rulemaking procedures do not apply to internal personnel rules does not indicate that the protections of the APA's adjudicatory procedures are inapplicable to individual personnel decisions.

The APA outlines the manner in which a hearing "to determine whether a right, authority, license or privilege should be revoked, suspended, limited, or conditioned" is initiated. AS 44.62.360. It similarly informs as to how a hearing "to determine whether a right, authority, license or privilege should be granted, issued or renewed" is initiated. AS 44.62.370. From these provisions, the University concludes that the APA only covers hearings which concern rights, authorities, licenses, and privileges, and that this does not include "intra-agency personnel matters." In support of this argument, the University cites cases from other jurisdictions, holding that their respective

4. See Wickersham v. State, Commercial Fisheries Entry Comm'n, 680 P.2d 1135, 1139, 1143-44 (Alaska 1984). See also R. Cass & C. Diver, Administrative Law 325 (1987) ("There is no doubt, however, that the procedures requisite for decisions addressing many members of an affected class on grounds generally applicable classwide are minimal in comparison to the procedures constitutionally required for individualized determinations.").

administrative procedure acts are inapplicable to agency personnel decisions.[5]

The University further contends that the APA adjudication procedures are inapplicable because McGrath is not grieving "adjudicative facts," but rather "legislative facts." As one court explained, "agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact.' Adjudicatory hearing procedures are used in

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5. In Abramson v. Board of Regents, Univ. of Hawaii, 548 P.2d 253 (Hawaii 1976), the plaintiff who was denied tenure and sued asserted, in part, a denial of her rights under the Hawaii APA. Id. at 255. This portion of her claim was rejected because the coverage of that act was limited to "'a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.'" Id. at 263. Accord Klien v. State Bd. of Educ., 547 So. 2d 549, 551-52 (Ala. Civ. App. 1988), cert. quashed by Ex parte Klein 547 So. 2d 554 (Ala. 1989). However, Alaska's APA has no such limitation. Therefore, this authority is not on point here.

The University of Alaska interprets McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974), as holding that "the APA applies only where a particular agency statute provides for a hearing and adjudication." This, however, overstates the holding. The APA's adjudicatory chapter only includes the "Division of Lands under Alaska Land Act where applicable." AS 44.62.330(a)(9) (emphasis added). The land act gave the commissioner discretion to terminate grazing leases; hence, we held that application of the APA was not required. McCarrey, 526 P.2d at 1356. Where not similarly limited, however, the APA would apply across the board. McCarrey quotes from the federal APA, which, like the Hawaii APA, is limited to cases where "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing." 526 P.2d at 1356 n.17 (quoting 5 U.S.C.A. § 554 (1967)). Alaska's APA as it applies to the University has no such limitation; indeed, it specifically applies "notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed." AS 44.62.330(a). Thus, the fact that the adjudicatory provisions of the APA do not apply to termination of a grazing lease does not dictate that they are inapplicable to University of Alaska grievance procedures.

individual cases where the outcome is dependent on the resolution of particular 'adjudicative facts.'" Independent Bankers Ass'n of Georgia v. Board of Governors of Fed. Reserve Sys., 516 F.2d 1206, 1215 (D.C. Cir. 1975).[6]

The limitation of administrative adjudicatory hearings to adjudicatory facts is not made explicit in the APA.[7] Nevertheless, the distinction has been recognized. See Wickersham v. State, Commercial Fisheries Entry Comm'n, 680 P.2d 1135, 1143-47 (Alaska 1984) (refusing to apply the more relaxed public notice requirements of rulemaking procedures to adjudicatory procedures which involve individual rights). The structure of the APA, which establishes separate procedures for rulemaking and adjudications, suggests that Alaska has implicitly limited adjudicative functions

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6. In Independent Bankers, the United States Court of Appeals for the District of Columbia Circuit adopted the following distinction:

> Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

516 F.2d at 1215 n.26 (quoting 1 K. Davis, Administrative Law Treatise § 7.02 at 413 (1958)).

7. Cf. California Code, Government Code §§ 11000-11529 at § 11500(f) (West 1980), which defines "adjudicatory hearing" to mean "a state agency hearing which involves the personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual. . . ."

to adjudicatory facts and rulemaking functions to legislative facts. Compare AS 44.62.010-.320 with AS 44.62.330-.630. See also AS 44.62.640(a)(3) (defining regulation). Further, the distinction is one which must be made in order to determine whether an administrative entity has made an adjudicatory decision for purposes of Appellate Rule 602(a)(2). See Kollodge v. State, 757 P.2d 1028, 1033 (Alaska 1988); Ballard v. Stich, 628 P.2d 918, 920 (Alaska 1981). Finally, the bifurcation of administrative functions along the legislative/adjudicative facts distinction is recognized in both federal and other state courts.[8]

The formal grievance complaint filed by both McGrath and Mohr does not explicitly distinguish between legislative facts and administrative facts. The grievance complaint alleges "[i]nappropriate placement of former community college faculty in rank . . . . Inappropriate denial of tenure for certain former community college faculty . . . . Discriminatory treatment by UA administration against grievants."

Upon remand, it will be left to the parties and the grievance council to identify any claims of McGrath and Mohr involving legislative facts, as such issues are not controlled by the adjudicative provisions of the APA.

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8. See 1 K. Davis, Administrative Law Treatise § 7.06 (1958) and cases cited therein. Ballard defined the test for determining when an agency is engaging in adjudication as "functional." 628 P.2d at 920. "Whenever an entity which normally acts as a legislative body applies policy to particular persons in their private capacities, instead of passing on general policy or the rights of individuals in the abstract, it is functioning as an administrative agency within the meaning of Appellate Rule [602(a)(2)]." Id.; Kollodge, 757 P.2d at 1033.

B. Does application of the APA to University of Alaska's grievance proceedings impermissibly circumscribe explicit and implicit constitutional and statutory grants of power to the University in the area of personnel management?

As to this issue, we again refer to and adopt the reasoning of Judge Serdahely in Aden v. University of Alaska. In rejecting the same argument as the University makes in the case at bar, Judge Serdahely stated,

> Nor does the Court find that the application of the APA to Defendant's grievance procedure violates provisions of Alaska's Constitution establishing the University of Alaska and its Board of Regents. Likewise, the Court is unpersuaded that requiring Defendant to comply with the APA in connection with its grievance procedure constitutes unconstitutional or impermissible interference with the internal affairs or academic freedom of the University. In this Court's view, the University's academic freedom is strengthened, rather than undermined, by the existence of a grievance procedure for adverse employment decisions which comports with the basic requirements of the APA and due process. Ultimately, if Defendant seeks to be exempted from the workings of the APA, it must seek such remedy from the Legislature, not this Court.

(Emphasis added).

3708

III. CONCLUSION

The judgment of the superior court is **REVERSED** and the matter is **REMANDED** for further proceedings consistent with this opinion.[9]

ORDER

Pursuant to Appellate Rules 508(e) and (f) (1), attorney fees of $1,000 are awarded to appellant and

The appellant shall serve and file with this court an itemized and verified cost bill by 7-1-[illegible]. Entered by direction of Justice [illegible]

Dated 6-19-[illegible] Deputy: [illegible]

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9. Our resolution of the appeal has made it unnecessary to address any of the other issues and arguments raised by the parties.

On remand, we suggest that it would not be inappropriate for the grievance council to integrate the adjudicatory provisions of the APA into its grievance procedures by following the hearing procedures outlined by Judge Serdahely in his August 25, 1987 "Order Regarding Administrative Hearing," which was entered in the <u>Aden</u> case.

3708

Ralph McGRATH and Don Mohr, Appellants,

v.

UNIVERSITY OF ALASKA, Appellee.

No. S-3418.

Supreme Court of Alaska.

June 21, 1991.

Following merger of state community college system into state university system, professors filed grievance regarding tenure status. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., affirmed university's determination that Administrative Procedure Act was not applicable to grievance, and appeal was taken. The Supreme Court, Rabinowitz, C.J., held that Alaska Administrative Procedure Act was applicable to University of Alaska employee grievance proceedings.

Reversed and remanded.

1. Administrative Law and Procedure ⇐5

Colleges and Universities ⇐8(1)

Alaska Administrative Procedure Act was applicable to University of Alaska employee grievance proceedings; Act procedures were not inconsistent with authority of Regents to manage University. AS 44.62.330–44.62.650.

2. Administrative Law and Procedure ⇐441

Claims involving legislative as opposed to adjudicative facts, are not controlled by adjudicative provisions of Administrative Procedure Act. AS 44.62.330–44.62.650.

Robert A. Royce, Jermain, Dunnagan & Owens, Anchorage for appellants.

Thomas P. Owens, Jr. and C. Ann Courtney, Owens & Turner, P.C., Anchorage, William R. Kauffman, Fairbanks, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

RABINOWITZ, Chief Justice.

I. FACTS AND PROCEEDINGS

The University of Alaska ("University") is a statewide institution which operates both four-year universities and community colleges. In 1987, the University undertook a system-wide restructuring and eliminated the separate administration of the community colleges. Previously, the faculty at the community colleges had been represented by the Alaska Community Colleges' Federation of Teachers, Local 2404, and covered by a collective bargaining agreement. This agreement had no rank or tenure provisions. After the restructuring, the community colleges' faculty was offered an opportunity to transfer to the combined faculty of the University of Alaska. In the combined faculty, the community college faculty would not have union representation and the employees would be subject to the same rank and tenure system as their colleagues at the University of Alaska.

All members of the community colleges' faculty were offered an opportunity to transfer to the combined faculty, and all but one accepted. The University's Board of Regents adopted a policy "to provide the guidelines for faculty appointment, tenure, academic ranks, and salary for faculty in the transition." The policy provided that former full-time community college faculty with seven full years of service were eligible to receive tenure; those with four to six years were eligible to receive two-year contracts; and those with fewer years of service were eligible to receive one-year contracts. No former community college faculty member was offered a full-professorship; the highest rank offered was associate professor.

Many community college faculty members were dissatisfied with their rank and tenure assignments. Associate Professor Don Mohr, as a representative of the com-

Supreme Court Ruling

munity colleges' faculty union, filed an informal grievance on behalf of faculty members who claimed that they were wrongly denied tenure. Similarly, Associate Professor Ralph McGrath requested a change in the rank assignments. Thereafter, the two professors filed a formal grievance on behalf of themselves and seventy-three other former community college faculty members.

At the time Mohr and McGrath filed their initial complaints, the University of Alaska's administration had not yet established grievance procedures for the newly integrated institution. The Anchorage campus chancellor adopted an interim grievance procedure, which mirrored the procedures previously used by the Anchorage campus. The chancellor then appointed an interim grievance council ("council") to implement the interim procedures.

The council conducted a preliminary investigation and determined that a grievance hearing should proceed. Additionally, the council recommended that the University hold this formal grievance hearing in accordance with the provisions of Alaska's Administrative Procedure Act ("APA"), AS 44.62.330–.650.

However, the president of the University rejected the council's recommendation that the grievance be processed in accordance with the APA. Instead, it was determined that the grievance would be processed under the Board of Regents' Policy, *see* 04.04.01 (June 4, 1987), and the interim grievance procedures. Under the Board of Regents' policy, the council was required to recommend dismissal or hold a hearing on the grievance within thirty days of its filing, and then forward a recommendation to the chancellor for decision. The chancellor's decision was then appealable to the president.

The council notified McGrath and Mohr that it was ready to go forward with the hearing and that procedures would not be governed by the APA. Rather than proceeding with the hearing before the council, McGrath and Mohr then filed a complaint in superior court, seeking a declaratory judgment and mandatory injunction to require the University to conduct the grievance hearing under the APA. They contended that the APA procedures were required and that the contemplated grievance procedures denied them due process.

Thereafter, the plaintiffs and the University filed motions for summary judgment. The superior court held that the APA did not apply to the grievance proceedings in the instant case.[1]

II. DISCUSSION

A. *Do the provisions of the APA govern the grievance proceedings in this case?*

Article 8 of the APA deals with administrative adjudication. AS 44.62.330(a) provides, in part, that "[t]he procedure of the state boards, commissions, and officers listed in this subsection ... shall be conducted under AS 44.62.330–44.62.630. This procedure, including, but not limited to ... conduct of hearings ... shall be governed by this chapter...." AS 44.62.330(a)(45) lists the University of Alaska as a covered entity, with the proviso "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40."

McGrath and Mohr argue that AS 44.62.330(a)(45) mandates that their grievances be processed in accordance with procedures called for by the APA. The University advances numerous arguments in support of the superior court's grant of summary judgment and its holding that the APA is inapplicable to the proceedings in question.[2]

1. Summary judgment was granted in this case on the basis of stipulated facts and exhibits. *De novo* review is the applicable standard of review on an appeal from a grant of summary judgment. *Kollodge v. State*, 757 P.2d 1028, 1032 (Alaska 1988). There is no genuine issue of material fact; rather, this appeal concerns statutory interpretation, which involves our own independent judgment. *Waller v. Richardson*, 757 P.2d 1036, 1039 n. 4 (Alaska 1988).

2. The University emphasizes that the superior court reasoned, in part, as follows in reaching its decision:

(1) AS 44.62.330(a)(45) requires the University to comply with the procedural require-

More particularly, the University contends that the legislative history of AS 44.62.-330(a) demonstrates that the legislature never intended to interfere with the Board of Regents' independent power to manage and govern the internal affairs of the University; that the University's grievance procedures are reasonable; that application of the APA to the University's grievance proceedings would be inconsistent with AS 14.40; that the APA by its very nature does not apply in the circumstances of this case; that grievance procedures are not "procedures" within AS 44.62.330; that the APA only applies to "adjudicative facts" not to "legislative facts;" and that the statutory framework governing personnel matters for state agencies and other public employees shows that the APA does not apply to the University's grievance procedures.

We have reviewed all of the University's contentions listed above and conclude that they should be rejected. Therefore, the APA's procedures must govern any grievance hearings in the case at bar.

(i) Applicability of the APA

[1] As noted at the outset, AS 44.62.-330-.630 governs the adjudicative procedures of the University "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40." AS 44.62.-330(a)(45). The University notes that under AS 14.40.170(b)(1), the Board of Regents may "adopt reasonable rules, orders and plans ... for the good government of the university...." The University then argues that since its rules governing grievance procedures are reasonable, an application of the APA procedures to its grievance proceedings would be inconsistent with the authority of the Board to manage the University. More specifically, the University contends that the APA procedures are inconsistent with AS 14.40 because they are more extensive and costly than its own reasonable grievance procedures, and therefore they are precluded under AS 44.-62.330(a)(45).

We think these contentions are adequately and correctly answered by Judge Serdahely's opinion *Aden v. University of Alaska*, No. 3AN-85-17179 Civil (Alaska Super., Feb. 2, 1987). In rejecting contentions similar to those advanced by the University in the instant case, Judge Serdahely held the following:

> The Court concludes that AS 44.62.330 *et seq.* does apply to Defendant University of Alaska and that Defendant's grievance proceedings must comply with the provisions of such Act.
>
> In so ruling, the Court notes that on its face, the APA applies to Defendant University of Alaska. AS 44.62.330(45) [sic] expressly provides that the provisions of the Act apply to the "University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40." Having reviewed the provisions of AS 14.40, particularly including the powers and duties of the University President as defined in AS 14.40.-210-.220, the Court concludes that there is nothing inconsistent between such provisions and the APA. Clearly, the President's power to appoint professors and assistants, and to define and supervise the duties of such persons, are not inconsistent with the APA hearing procedure which is designed to guarantee due process to persons adversely affected by administrative action, such as adverse employment or personnel action.

ments of the APA "except to the extent that [the APA's] inclusion is inconsistent with the provisions of AS 14.40;" (2) AS 14.40 specifically authorizes the Board to "adopt reasonable rules, orders and plans ... for the good government of the University;" (3) the Alaska Legislature did not intend the University to be required by law to conduct the APA grievance procedures if the University were to adopt valid, adequate, and fair grievance procedures of its own; (4) under AS 14.40.170(b)(1), grievance procedures adopted by the Board need only be "reasonable," and the procedures instituted by the University meet this test of reasonableness; and (5) to the extent that the APA would require the University to hold substantially more extensive, time consuming, and expensive procedures than would be required under the validly adopted and reasonable University grievance procedures, application of the APA would be inconsistent with AS 14.40.170(b)(1).

(ii) Does the APA govern intra-agency adjudications, such as employee grievance hearings?

Three arguments advanced by the University of Alaska converge here. The University contends that the statutory framework governing personnel matters for state agencies and public employees shows that the APA does not apply to University grievance proceedings; that grievance procedures are not procedures within AS 44.-62.330; and that the APA applies only to adjudicative facts, not legislative facts.

The University correctly observes that the State Personnel Act, AS 39.25.010-.220, "governs personnel matters for all state employees in non-exempt service positions." AS 39.25.090. Neither those state employees in non-exempt service positions nor state employees covered by the Public Employment Relations Act ("PERA"), AS 23.40.070-.260, are covered by the APA procedures when grievance proceedings are implicated.[3] Therefore, the University concludes that the "the Legislature intended University employees to have only the same rights as state and other public employees in personnel matters...."

University employees, however, are exempt from the State Personnel Act. AS 39.25.110(5). Thus, they do not receive the protection of grievance rules promulgated by the Director of Personnel under AS 39.25.150(16). Consequently, the exclusion of other state personnel from the APA does not, in our view, conclusively demonstrate that University personnel should be similarly excluded.

The University relies on two statutes in support of its argument that intra-agency grievance proceedings are not the type of proceedings meant to be included within AS 44.62.330. First, the APA's definition of "regulation" excludes anything which "relates only to the internal management of a state agency." AS 44.62.640(a)(3). Second, the State Personnel Act establishes procedures for amendment of personnel rules affecting non-exempt state employees. AS 39.25.140. Subsection (e) of this section states, "[t]he rules adopted under this chapter relate to the internal management of state agencies and their adoption is not subject to the Administrative Procedure Act." While the State Personnel Act does not apply to University employees, the University argues, by analogy, that a blanket legislative intent exists not to have the APA apply to employment matters.

We believe these arguments are fundamentally flawed. Both statutes refer to the application of the APA to an agency's rulemaking authority, i.e. the adoption of rules. Neither statute applies to an agency's adjudicatory functions. If adjudication and rulemaking were coextensive, these statutes would be controlling here. However, the two functions differ significantly. Rulemaking procedures are designed to ensure a fair and open adoption of policy; adjudication procedures are intended to ensure a fair application of policy to parties.[4] Thus, the fact that rulemaking procedures do not apply to internal personnel rules does not indicate that the protections of the APA's adjudicatory procedures

3. The personnel division of the Department of Administration administers the State Personnel Act. AS 39.25.030. The labor relations agency administers PERA. AS 23.40.090; AS 23.40.170. Neither of these agencies are enumerated under the APA. AS 44.62.330(a). However, hearings conducted pursuant to either of these statutes contain considerable procedural protections. *See* AS 39.25.170-.176; 2 AAC 10.400-.440. PERA applies to the University when the University has a collective bargaining agreement. *See Alaska Community Colleges' Fed'n of Teachers v. University of Alaska*, 669 P.2d 1299 (Alaska 1983). Hearings conducted under that agreement would be conducted pursuant to 2 AAC 10.400-.440. The University concludes that where no collective bargaining agreement exists, hearings should be conducted pursuant to internal policy. We think a more logical conclusion is that where no collective bargaining agreement exists, hearings should be conducted pursuant to the APA.

4. *See Wickersham v. State, Commercial Fisheries Entry Comm'n*, 680 P.2d 1135, 1139, 1143-44 (Alaska 1984). *See also* R. Cass & C. Diver, *Administrative Law* 325 (1987) ("There is no doubt, however, that the procedures requisite for decisions addressing many members of an affected class on grounds generally applicable classwide are minimal in comparison to the procedures constitutionally required for individualized determinations.").

are inapplicable to individual personnel decisions.

The APA outlines the manner in which a hearing "to determine whether a right, authority, license or privilege should be revoked, suspended, limited, or conditioned" is initiated. AS 44.62.360. It similarly informs as to how a hearing "to determine whether a right, authority, license or privilege should be granted, issued or renewed" is initiated. AS 44.62.370. From these provisions, the University concludes that the APA only covers hearings which concern rights, authorities, licenses, and privileges, and that this does not include "intra-agency personnel matters." In support of this argument, the University cites cases from other jurisdictions, holding that their respective administrative procedure acts are inapplicable to agency personnel decisions.[5]

The University further contends that the APA adjudication procedures are inapplicable because McGrath is not grieving "adjudicative facts," but rather "legislative facts." As one court explained, "agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact.' Adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular 'adjudicative facts.'" *Independent Bankers Ass'n of Georgia v. Board of Governors of Fed. Reserve Sys.*, 516 F.2d 1206, 1215 (D.C.Cir.1975).[6]

The limitation of administrative adjudicatory hearings to adjudicatory facts is not made explicit in the APA.[7] Nevertheless, the distinction has been recognized. *See Wickersham v. State, Commercial Fisheries Entry Comm'n*, 680 P.2d 1135, 1143–47 (Alaska 1984) (refusing to apply the more relaxed public notice requirements of rulemaking procedures to adjudicatory procedures which involve individual rights). The structure of the APA, which establishes separate procedures for rulemaking and

5. In *Abramson v. Board of Regents, Univ. of Hawaii*, 548 P.2d 253 (Hawaii 1976), the plaintiff who was denied tenure and sued asserted, in part, a denial of her rights under the Hawaii APA. *Id.* at 255. This portion of her claim was rejected because the coverage of that act was limited to "'a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.'" *Id.* at 263. *Accord Klein v. State Bd. of Educ.*, 547 So.2d 549, 551–52 (Ala.Civ.App.1988), *cert. quashed by Ex parte Klein* 547 So.2d 554 (Ala.1989). However, Alaska's APA has no such limitation. Therefore, this authority is not on point here.

The University of Alaska interprets *McCarrey v. Commissioner of Natural Resources*, 526 P.2d 1353 (Alaska 1974), as holding that "the APA applies only where a particular agency statute provides for a hearing and adjudication." This, however, overstates the holding. The APA's adjudicatory chapter only includes the "Division of Lands under Alaska Land Act *where applicable*." AS 44.62.330(a)(9) (emphasis added). The land act gave the commissioner discretion to terminate grazing leases; hence, we held that application of the APA was not required. *McCarrey*, 526 P.2d at 1356. Where not similarly limited, however, the APA would apply across the board. *McCarrey* quotes from the federal APA, which, like the Hawaii APA, is limited to cases where "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing." 526 P.2d at 1356 n. 17 (quoting 5 U.S.C.A. § 554 (1967)). Alaska's APA as it applies to the University has no such limitation; indeed, it specifically applies "notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed." AS 44.62.330(a). Thus, the fact that the adjudicatory provisions of the APA do not apply to termination of a grazing lease does not dictate that they are inapplicable to University of Alaska grievance procedures.

6. In *Independent Bankers*, the United States Court of Appeals for the District of Columbia Circuit adopted the following distinction:

> Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

516 F.2d at 1215 n. 26 (quoting 1 K. Davis, *Administrative Law Treatise* § 7.02 at 413 (1958)).

7. *Cf.* California Code, Government Code §§ 11000–11529 at § 11500(f) (West 1980), which defines "adjudicatory hearing" to mean "a state agency hearing which involves the personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual...."

adjudications, suggests that Alaska has implicitly limited adjudicative functions to adjudicatory facts and rulemaking functions to legislative facts. *Compare* AS 44.62.-010–.320 *with* AS 44.62.330–.630. *See also* AS 44.62.640(a)(3) (defining regulation). Further, the distinction is one which must be made in order to determine whether an administrative entity has made an adjudicatory decision for purposes of Appellate Rule 602(a)(2). *See Kollodge v. State,* 757 P.2d 1028, 1033 (Alaska 1988); *Ballard v. Stich,* 628 P.2d 918, 920 (Alaska 1981). Finally, the bifurcation of administrative functions along the legislative/adjudicative facts distinction is recognized in both federal and other state courts.[8]

The formal grievance complaint filed by both McGrath and Mohr does not explicitly distinguish between legislative facts and administrative facts. The grievance complaint alleges "[i]nappropriate placement of former community college faculty in rank.... Inappropriate denial of tenure for certain former community college faculty.... Discriminatory treatment by UA administration against grievants."

[2] Upon remand, it will be left to the parties and the grievance council to identify any claims of McGrath and Mohr involving legislative facts, as such issues are not controlled by the adjudicative provisions of the APA.

B. *Does application of the APA to University of Alaska's grievance proceedings impermissibly circumscribe explicit and implicit constitutional and statutory grants of power to the University in the area of personnel management?*

As to this issue, we again refer to and adopt the reasoning of Judge Serdahely in *Aden v. University of Alaska.* In rejecting the same argument as the University makes in the case at bar, Judge Serdahely stated,

> Nor does the Court find that the application of the APA to Defendant's grievance procedure violates provisions of Alaska's Constitution establishing the University of Alaska and its Board of Regents. Likewise, the Court is unpersuaded that requiring Defendant to comply with the APA in connection with its grievance procedure constitutes unconstitutional or impermissible interference with the internal affairs or academic freedom of the University. In this Court's view, the University's academic freedom is strengthened, rather than undermined, by the existence of a grievance procedure for adverse employment decisions which comports with the basic requirements of the APA and due process. *Ultimately, if Defendant seeks to be exempted from the workings of the APA, it must seek such remedy from the Legislature, not this Court.*

(Emphasis added).

III. CONCLUSION

The judgment of the superior court is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.[9]

8. *See* 1 K. Davis, *Administrative Law Treatise* § 7.06 (1958) and cases cited therein. *Ballard* defined the test for determining when an agency is engaging in adjudication as "functional." 628 P.2d at 920. "Whenever an entity which normally acts as a legislative body applies policy to particular persons in their private capacities, instead of passing on general policy or the rights of individuals in the abstract, it is functioning as an administrative agency within the meaning of Appellate Rule [602(a)(2)]." *Id.; Kollodge,* 757 P.2d at 1033.

9. Our resolution of the appeal has made it unnecessary to address any of the other issues and arguments raised by the parties.

On remand, we suggest that it would not be inappropriate for the grievance council to integrate the adjudicatory provisions of the APA into its grievance procedures by following the hearing procedures outlined by Judge Serdahely in his August 25, 1987 "Order Regarding Administrative Hearing," which was entered in the *Aden* case.

METRO
WEDNESDAY
SECTION B June 26, 1991

Anchorage Daily News Wednesday, June 26, 1991.

Faculty wins hearing in tenure case

Court finds teachers denied forum for complaints during merger with UAA

Chief Justice Rabinowitz

By PETER BLUMBERG
Daily News reporter

Former Anchorage Community College faculty members absorbed into the University of Alaska in a 1987 merger have won their case before the state Supreme Court in a longstanding controversy over academic rank and tenure.

The high court, in reversing a 1988 Superior Court ruling, asserts that about 73 faculty members were deprived of a proper forum for airing complaints that the merger unfairly denied them tenure when they gave up their community college positions.

The university offered to address the complaint under its own grievance procedures, but refused to honor the faculty members' request for a formal hearing governed by Alaska's Administrative Procedure Act, according to court documents.

Two faculty members, Ralph McGrath and Don Mohr, then asked the court to order an administrative hearing, but their case was dismissed by Superior Co[urt] Judge Brian Shortell.

The Supreme Court, in [a] 5-0 opinion written by Ch[ief] Justice Jay Rabinowitz, sa[id] McGrath, Mohr and all oth[er] former community colle[ge] instructors denied tenure [are] entitled to an impart[ial] hearing under the Admin[is]trative Procedure Act.

In that hearing, the [in]structors will be guarante[ed] the right to be represent[ed] by lawyers, as well as t[he] right to use documents a[nd]

Please see Page B-3, TENU[RE]

TENURE: Staff victory

Continued from Page B-1

witnesses to make their case before a hearing officer, said Robert Royce, the attorney for McGrath and Mohr.

"It comes down to basic fairness in the procedures," Royce said. "They will now have a better chance and will be better protected."

No hearing date has been scheduled. McGrath, president of the community college faculty members' union, said he is unsure how many of the 73 instructors who initially complained about the tenure process are still employed by the university.

In the merger, all community college instructors were allowed to keep their jobs, but only those with seven years of employment were offered tenure, and none was offered full professorship, according to court papers.

April 2, 1992

Honorable Rick Halford, Chair
Honorable Pat Rodey, Vice Chair
Honorable Virginia Collins
Honorable Steve Frank
Honorable Al Adams

Senate Judiciary Committee:

As an employee with the University of Alaska, Anchorage campus, I urge you to vote no on SB 441. This bill would exempt all University of Alaska employees from the protection of the Administrative Procedures Act.

The State Supreme Court unanimously ruled that the University must adhere to the Administrative Procedures Act. I feel this bill is an attempt by the University to circumvent the Supreme Court Ruling. I also feel I have the right to be protected under the APA as are all other state employees.

Thank you for considering my views on this issue.

Sincerely,

Art Schneider
Box 458
Girdwood, AK 99587

Alaska Public
Employees Association
Federation of Public Employees

APEA/AFT
AFL-CIO

340 N. Franklin, Juneau, AK 99801 (907) 586-2334 FAX: 463-4980

TESTIMONY BEFORE THE
ALASKA STATE SENATE JUDICIARY COMMITTEE
March 31, 1992

Honored Members of the Senate Judiciary Committee:

APEA strongly opposes SB 441.

The Administrative Procedures Act was created by the legislature for the purpose of ensuring due process to persons adversely affected by administrative action, such as adverse employment or personnel actions. With SB 441, the Governor is suggesting that the University of Alaska be permitted to disregard these due process concerns. No justifiable policy reason has been presented for departing from the same set of rules the rest of the State follows.

When the state community college system merged into the state university system, the Alaska Supreme Court addressed the issue of the applicability of the APA to a grievance brought by community college instructors in McGrath v. University of Alaska, 813 P.2d 1370 (Alaska 1991). The Supreme Court held that the use of the APA was appropriate and, in fact, "... the University's academic freedom is strengthened, rather than undermined, by the existence of a grievance procedure for adverse employment decisions which comports with the basic requirements of the APA and due process."

Please do not permit the undoing of this well reasoned decision. Vote against SB 441.

Sincerely,

Joan Wilkerson

Joan Wilkerson
Southeast Regional Manager

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825 College Road
Fairbanks, AK 99701
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31 March 1992

ATTN: Alaska Senate Judiciary Committee

SUBJ: SENATE BILL 441 -- A bill to exempt the University of Alaska from certain provisions of the Alaska Administrative Procedures Act

We the undersigned faculty members of the University of Alaska Southeast Ketchikan Campus, would like to take this opportunity to express our objection to granting the University of Alaska any exemption to the Alaska Administrative Procedures Act.

The University would have you believe that the Administrative Procedures Act imposes an unreasonable financial burden on the University. On the contrary, we feel that the modest cost of compliance is a very small price to pay for ensuring University employees the protections of due process.

The committee should also be aware that the Regional Faculty Senate of the University of Alaska Southeast, representing over fifty full-time faculty members, voted unanimous opposition to the proposed exemption on Friday, 27 March 1992.

Respectfully:

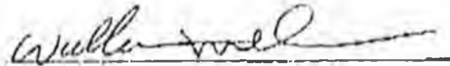
Terri M. Bille, Instructor of Computer Science
[signature], Assoc. Prof of Libr. Science
[signature], Welding Inst.
Christine Harrington, Assist. Prof. of English
Priscilla Schulte, Asso. Prof. Anthropology - Sociology

Members of the Faculty,
Ketchikan Campus
University of Alaska Southeast.

[signature] Haugen - Assistant Prof of Education
Margaret Lynne, Assoc. Professor of Office Adm.
[signature], Assistant Professor, Economic Development

To: Rick Cook
Senate Judiciary Committee

The following resolution was passed by unanimous vote at the regular meeting of the Faculty Senate of the University of Alaska Southeast on Friday, March 27, 1992



Wallace M. Olson
President-elect
Faculty Senate
University of Alaska Southeast

RESOLUTION

It has come to our attention that the administration of University of Alaska, through the Governor's Office, has requested the introduction of a bill to exempt the University from the administrative abjudication provisions of the Administrative Procedure Act. The Faculty Senate of the University of Alaska Southeast categorically opposes such an action, and has passed the following resolution.

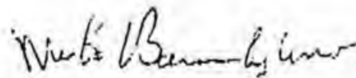
"WHEREAS the University of Alaska is currently bound by the abjudication provisions of the Administrative Procedure Act,

WHEREAS the Act provides an equitable venue for resolution of disputes,

WHEREAS the exemption of the University from the Act's abjudication provisions would substantially disadvantage appellants in challenging University policies, procedures and decisions,

BE IT RESOLVED that the Faculty Senate of the University of Alaska Southeast categorically opposes any legislation which would grant the University exemption from said provisions of the Administrative Procedure Act, and calls on all members of the Alaska State Legislature to reject the attempt by the University to diminish the appellant rights of its employees."

Sincerely,



Michael Baran

President, UAS Faculty Senate

SB
443

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. ______________

Revision Date: ______________

Department Affected: Department of Law

Title: "An Act relating to the taking of fish and game for subsistence..."

BRU: Legal Services

Component: Operations

Sponsor: Request of the Governor

Requestor: Governor's Office

COMPONENT SERIAL NO. | | | 9 | 3 |

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	85.0	85.0	85.0	45.0	45.0	
TRAVEL	5.0	5.0	5.0	3.0	3.0	
CONTRACTUAL	17.6	17.6	17.6	12.6	12.6	
SUPPLIES	2.4	2.4	2.4	2.4	2.4	
EQUIPMENT	6.5					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	116.5	110.0	110.0	63.0	63.0	-0-

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND	116.5	110.0	110.0	63.0	63.0	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME	1.0	1.0	1.0	-0-	-0-	-0-
PART-TIME				1.0	1.0	-0-
TEMPORARY						

Estimate of current year impact: ______________

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared By: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: February 20, 1992

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: February 20, 1992

Distribution (by preparer): Le... & Impacted Agency(ies).
Rev 10/7/91

DEPARTMENT OF LAW FISCAL NOTE

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. __________

This bill provides a broad statutory framework that gives subsistence use of fish and game a preference over other consumptive uses of the state's fish and game resources. The bill establishes subsistence dependence standards, defines several terms that have been subject to litigation, and provides a rational scheme for determining those Alaskans whose reliance upon fish and game for subsistence purposes is actual and substantial. The bill also directs the Department of Fish and Game and the Boards of Fish and Game to take affirmative action in situations where a stock or population is not sufficient to provide for both subsistence and nonsubsistence uses, and to formulate plans for recovery of the resource sufficient to provide for all users, if possible.

The bill uses individual eligibility requirements to determine qualification for the subsistence preference. While the bill uses community characteristics to determine the paperwork requirements for qualification, an individual's demonstrated actual and substantial reliance on fish and game in the last twelve months is what determines ultimate qualification as a preferred subsistence user. Urban residents who meet the requirements will also be preferred users. This is an abrupt departure from the state's previous (rural versus urban) attempts to provide a subsistence preference. Furthermore, the bill represents a fair and manageable way of complying with the spirit of ANILCA, without violating special provisions in Alaska's constitution requiring equal access to fish and game and management according to the sustained yield principle.

Because of the controversies that have surrounded and continue to surround subsistence, this bill will be vigorously challenged in court if it is enacted. Although the bill will eliminate many uncertainties that currently involve subsistence, the bill will have a significant, ongoing fiscal impact on the Department of Law over the first four of five years of implementation. That is because the department must defend the bill against court challenges, assist the Boards of Fisheries and Game in drafting, and then reviewing, a substantial body of evolving regulations, and also advise and defend the Department of Fish and Game in disputes resulting from adverse preference qualification determinations. Consequently, the Department of Law will require the additional services of an attorney.

Position Title	Attorney IV	No. of Positions	1	Range / Step	24A	Barg. Unit	PX
Time Status	PFT	Staff Months	12	Location	Anchorage	Election District	7 through 15

TYPE OF EXPENDITURE	Amount
Salary	64,056
Benefits	20,969
Premium Pay	
Other	
Total Personal Services	85,025
Travel	5,000
Contractual	17,600
Commodities	2,400
Equipment	6,500
Other	
Total Cost	116,525
FUNDING SOURCE FOR TOTAL COST	
Federal Receipts 1002	
G.F. Match 1003	
General Fund 1004	116,525
I-A Receipts 1007	
CIP Receipts 1061	
Other	

Justification

Implementation of the subsistence preference law will require the full-time services of an attorney to handle: (1) court chalklenges of the law; (2) drafting and reviewing of a substantial body of regulations; and (3) representation of ADF&G and the Fish and Game Boards in disputes resulting from adverse preference qualification determinations. All of this work will require journey-level services of an Attorney IV.

Request For New Position

AGENCY Department of Law

BRU Legal Services

COMPONENT Operations

Page 1 of 2

Revised Date:

FY 93

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. ___

Revision Date: ______________

Department Affected: Fish and Game

Title: An Act relating to the taking of fish and game for subsistence

BRU: Subsistence

Component: Subsistence

Sponsor: Rules Committee

Requestor: ______________

COMPONENT SERIAL NO. | | 4 | 8 | 3 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	229.9	222.4	218.4	193.8	200.3	206.8
TRAVEL	8.5	7.5	6.5	5.5	5.5	5.5
CONTRACTUAL	27.5	25.5	23.5	22.0	22.0	22.0
SUPPLIES	2.5	2.5	2.5	2.5	2.5	2.5
EQUIPMENT	17.0	3.0	3.0	2.5	2.5	2.5
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	285.4	260.9	253.9	226.3	232.8	239.3
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND	285.4	260.9	253.9	226.3	232.8	239.3
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	285.4	260.9	253.9	226.3	232.8	239.3

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME	3.0	3.0	3.0	3.0	3.0	3.0
PART-TIME	3.0	3.0	2.0	1.0	1.0	[illegible]
TEMPORARY						

Estimate of current year impact: No impact in FY 92

ANALYSIS: (Attach a separate page if necessary.) See attached analysis.

Prepared By: Robert Bosworth, Director

Phone: 465-4147

Division: Division of Subsistence

Date: 2/20/92

Approved by Commissioner: [illegible]

Agency: Department of Fish and Game

Date: [illegible]

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. OSC., & Impacted Agency(ies).

Rev 10/7/91

FISH AND GAME FISCAL NOTE
SUBSISTENCE

FISCAL NOTE ANALYSIS: Division of Subsistence

Development of a Subsistence Permitting Program:

OVERVIEW:
The Governor's subsistence bill creates a new system by which subsistence qualification criteria are applied to individual applicants in the urbanized areas of Alaska, and in some smaller communities where the economy is not based on subsistence. This individual application system is expected to draw in excess of 10,000 applicants in the first year or two, and a lesser number of applicants thereafter. Implementation of the proposed subsistence permitting program is anticipated to have a cost of $285,378 for the first year. FY 93. By FY 98, the cost is expected to have dropped to $239,342 as the permitting system assumes a normal regulatory presence and acceptance. A subsistence application program staff, with initial support from other Division of Subsistence staff, will have responsibility for the preparation, distribution, scoring, and issuing of subsistence permits. In addition, the staff will review applications for completeness and accuracy, evaluate responses, and hold findings of fact in disagreements involving issuance of permits.

PROCESS:
The unit charged with issuing subsistence permits will consist of a core of four individuals: a hearing officer, an analyst/programmer, a data processing clerk, and a clerk typist. Duties of the staff relate to two primary functions, (1) the mechanics of issuing permits and (2) the rectification of disagreements. The issuance of permits requires the design and printing of applications, a distribution system to provide the public with ready access to the applications, a means to rapidly evaluate applications, and issue permits to qualified applicants. The rectification of disagreements over the issuance of permits requires a systematic process in which applicants have adequate recourse to resolving disputes prior to seeking judicial relief.

To provide the applicant with the greatest opportunity of receiving the benefits to which they are entitled, the permitting system provides a series of safe guards. The oversight process begins with receipt of the application and its initial review. Applications lacking vital information or incomplete responses will be returned with letters of explanation. Applicants who do not receive a permit as confirmation of meeting the subsistence criteria will receive notification of their rejection and the opportunity to provide additional support to their claim of subsistence priority. If the unsuccessful applicant provides additional support, the application will be re-evaluated and the applicant informed of the results. Should the applicant still be rejected, they may seek an appearance before the hearing officer in order to determine the facts of the case. If the hearing officer still decides against the applicant, the applicant can appeal to the Commissioner of Fish and Game. In the event the Commissioner affirms the original denial, the decision would be final for the Department and the applicant could appeal to the state Superior Court.

CORE STAFFING:
Hearing Officer: The hearing officer (HO) is a range 21 employee with responsibilities for determining findings of facts. This position will design and implement the necessary procedures to see that the intent of the legislation is met and that applicants who are denied a subsistence permit are assured of due process. The position receives clerical support from the clerk typist position and investigative support from the analyst programmer position.

Analyst Programmer III: The analyst programmer (A/P III) is a range 17 with responsibilities for the design of the application, creation of the necessary data management procedures and programs, and the

collection of administrative information relevant to the applicant. Using hunting license and permit information within the Department of Fish and Game, the programmer will provide the hearing officer with data relevant to applications in dispute. The position will also undertake a random review of successful awardee to ensure that the system is meeting its objective of providing a subsistence priority to qualified applicants. The analyst/programmer will have co-responsibility with the hearing officer for preparation of documentation on applicant cases. The position will provide immediate supervision of the data processing clerk and those functions of clerk exclusive of the hearing process.

Data Processing Clerk II: The data processing clerk II (DPC II) is a range 9 with responsibilities for the accurate review and entry of information provided by the applicant. Following data entry, the position will archive all materials in accordance with administrative procedures. As required, the data processing clerk will provide support for the distribution of applications and permits.

Clerk III: The clerk III is a range 9 with responsibilities for maintaining administrative functions of the unit, responding to public inquiries, and facilitating the activities of the hearing officer through the recording and preparation of transcripts of all hearings.

SUPPORT STAFF:
During the initial years of the program, the unit will draw upon some staff resources of the Division of Subsistence. The Division's current research director and AP IV will develop and analyze options for the subsistence application and scoring system for presentation to the Boards of Fisheries and Game, who are authorized in the bill to finalize the application and scoring system. These and other support functions will be subsumed within the Division's current budget. Subsistence Resource Specialist (SRS) IIs and clerical staff will provide regional support in facilitating the public's awareness of the process and responding to inquiries of local residents. In the first year, eight months of SRS support is provided. This drops to four months in the second year, and a single month in the third year. After the third year, the permitting process will involve only the core, four-member staff.

BUDGET--Division of Subsistence:

FY 93
The initial budget provides for three full time employees: the analyst/programmer III, the data processing clerk II, and the clerk III. This group will prepare and distribute the application forms, respond to public inquiries, and score the applications received. The hearing officer will be brought onto staff immediately prior to the receipt of applications. With the subsistence permitting unit based in Anchorage, additional regional support to respond to public inquiries will be provided by subsistence resource specialists (SRS) and clerical staff (C III) in other regions of the state. Funding in the amount of four months each is provided for each of the two employee classes. Total personnel costs are projected at $22[illegible].

A travel budget of $8,500 provides opportunities for program outreach in affected portions of the state and the appearance of the hearing officer for hearings as required.

Contractual services for the printing and distribution of applications, permits, and other correspondence and communications totals $27,500. Total contractual expenses are $27,500.

Providing for office expendibles will entail $2,500 per year. The creation of a new organization requires the acquisition of the necessary equipment and furniture to allow the staff to perform their required functions. Seventeen thousand dollars ($17,000) is designated to meet this one-time need for equipment.

The total budget for the first year of operation is $300,378.

FY 94:
Staff expenses during the second year decline to $222,416 as the additional SRS and clerical support is reduced. An additional $3,000 reduction occurs for lines 200 and 300 (travel and services) as the number of applicants declines. Equipment expenses decline to $3,000. The total cost of implementing the program in the second year is $260,916, a reduction of over 8% from the previous year.

FY 95:
Further personnel savings accrue during the third year as outside support is reduced to a single month of SRS time. Travel and services decline by an additional $3,000. Supplies and equipment expenses are unchanged from the previous year. The total cost of program implementation in the third year is $253,921, a reduction of 2.5% from the previous year.

FY 96:
The third year is projected to show a decline of nearly $25,000 in personnel costs from the previous year as outside assistance is eliminated and the hearing officer position reduced to half-time as the need for additional rectification declines. Supplies and services decline by another $2,500. The total program cost for the year is $226,315, a 10% reduction from the prior year.

FY 97 and FY 98:
No additional personnel savings are projected as the program is managed by three and a half full time employees. All other expenditures remain stable. In FY 97, the budget is $232,828, and in FY 98 it is $239,342. The modest increment is due to personnel longevity charges.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. __

Revision Date: ____

Department Affected: Fish and Game

Title: An Act relating to the taking of fish and game for subsistence

BRU: Boards

Component: Board Services

Sponsor: Rules Committee

Requestor: ____

COMPONENT SERIAL NO. 1 2 0 4

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	9.0	9.4	8.0	3.0	3.0	3.0
TRAVEL	180.0	187.5	160.0	85.0	85.0	85.0
CONTRACTUAL	90.0	93.5	90.0	37.0	37.0	37.0
SUPPLIES	1.8	1.9	1.6	.5	.5	.5
EQUIPMENT	0					
LAND & STRUCTURES	0					
GRANTS, CLAIMS	0					
MISCELLANEOUS	0					
TOTAL OPERATING	280.8 .0	292.3 .0	259.6	125.5	125.5	125.5 0.0

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND	280.8	292.3	259.6	125.5	125.5	125.5
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	280.8	292.3	259.6	125.5	125.5	125.5

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Laird Jones *Laird A. Jones*

Phone: 465-4110

Division: Division of Boards

Date: 2/20/92

Approved by Commissioner: [signature]

Agency: Department of Fish and Game

Date: 2/20/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. OSC., & Impacted Agency(ies).

Rev 10/7/91

FISH AND GAME FISCAL NOTE
BOARDS/BOARD SERVICES

DIVISION OF BOARDS
FISCAL NOTE FOR SUBSISTENCE BILL

ANALYSIS

The Board of Fisheries and the Board of Game meeting individually and together as the Joint Board would require approximately seventy days of meetings over a three year period to implement the new subsistence bill. In future years, the new bill would add approximately ten days to the overall board schedule. This estimate is based on board consideration of rural designations and customary and traditional use during the 1980s. It is important to note that since 1989 both boards have deferred most proposals dealing with subsistence in anticipation of legislation that would allow for a defensible approach to proposals. Over this same time period there have been reductions in the Division of Boards budget that have reduced the capability of the boards to meet. With the advent of new subsistence legislation, the boards will have to deal with subsistence issues as well as maintaining a full workload in other regulatory areas.

The items in the proposed legislation requiring the greatest effort on the part of the boards, in descending order, are:

(1) "The boards shall by regulation, jointly identify and delineate areas of the state, utilizing game management unit, portion of game management unit, or community, as follows:
(1) areas where the human population of each community is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area, and that are not part of an urban area.
(2) communities where the human population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy,culture, and way of life of the community, and that are not part of an urban area." 20 DAYS

(2) "Upon receipt of recommendations from the commissioner, the Boards of Fish and Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally used for subsistence in the areas and communities of the state identified by the boards under (e)(1) and (e)(2) of this section." 40 DAYS

(3) "Upon receipt of a recommendation from the commissioner, the boards shall, by regulation, adopt procedures by which the commissioner shall determine the qualification of subsistence users to subsistence hunt and fish in a specific subsistence use area." 10 DAYS

COSTS - FY93

Personal Services: overtime for existing staff	9.0	
Travel: travel and per diem for board members, Boards staff, and advisory committee meetings	180.0	
Contractual: meeting space, printing and postage for proposal books, telephone and legal notice of meetings	90.0	
Supplies: office supplies	1.8	
TOTAL		280.8

COSTS - FY94:

Personal Services	9.4	
Travel	187.5	
Contractual	93.5	
Supplies	1.9	
TOTAL		292.3

COSTS - FY95:

Personal Services	8.0	
Travel	160.0	
Contractual	90.0	
Supplies	1.6	
TOTAL		259.6

COSTS - FUTURE YEARS

Personal Services	3.0	
Travel	85.0	
Contractual	37.0	
Supplies	.5	
TOTAL		125.5

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO.

Revision Date:
Department Affected: Public Safet
Title: "An Act relating to the taking of fish and game for subsistence."
BRU: Fish & Wildlife Protection
Component: Enforcement & ISU
Sponsor: Rules
Requestor: Governor
COMPONENT SERIAL NO. 4 9 0

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)
No fiscal impact is anticipated.

Prepared By: Captain Conrad G. Seibel
Phone: 269-5509
Division: Fish & Wildlife Protection
Date: 2/20/92
Approved by Commissioner: [signature] for Richard L. Burton
Agency: Department of Public Safety
Date: 2/20/92

Distribution (by preparer): Le ... & Impacted Agency(ies).
Rev 10/7/91

PUBLIC SAFETY FISCAL NOTE
FISH AND WILDLIFE PROTECTION

Thursday, March 5, 1992

The Governor gave a brief statement concerning SB 443. Main points included the Subsistence Advisory Council members, the direction they took and the direction he wants the Legislature to take. He stressed that this piece of legislation is not the ideal piece for any one group or person but it is legislation which protects the resources, the interests of every group and can pass.

Senator Adams asked if the AFN could make a remark. Senator Jones declined stating they were not taking testimony today. Senator Adams then asked if he could make a statement. Senator Jones okay'd and Adams proceeded to read AFN's position himself.

McKie Campbell went through the bill section by section with the committee.

Friday, March 6, 1992

The Resources committee met without a quorum. Campbell continued through the bill.

Saturday, March 7, 1992

Today was the beginning of public testimony. Below are the comments.

Julie Kitka, Anchorage, AFN President
- does not support the bill
- wants long term protection for survival of their people
- does supports state getting management back of its resources
- needs amended constitution
- the guarantee to rural is less than the current Federal policy
- protection by exemption of certain species
- does not like individual qualifications
- the F & G Board has too much power

Don Mitchell, Anchorage, Attorney
- if bill passes we'd be in our current situation still
- not constitutional, conflicts w/ McDowell

no Attorney General comments or overview of this bill

Dick Bishop, Fairbanks, AK Outdoor Council
- opposes legislation
- will monitor however
- preference to place of residency is unfair
- bill does not protect resources
- opposes any constitutional amendment
- unconstitutional

Mike Swenson, Sitka
- supports the bill
- meed to get management back to Alaska

Pete Schaffer, Kotzebue
- Opposes (creates bureaucratic nightmare)

Benny Nageak, Barrow, Eskimo Walrus Committee
- opposes the bill
- Must amend the constitution

George Yaska, Fairbanks, Dir. of Wildlife and Parks
- opposes bill
- too much power to the board
- presumption of living in a rural area in too broad

Robin Samuelson, Dillingham
- opposes bill
- too broad & political
- pg. 7(i) - where are you going to find a commissioner that will take this on. One shouldn't have such discretionary power.

Grace Johnson, Nome
- the bill will be okay with a few changes
- prefers a constitutional amendment

Marvin Clark,
- wait for the court ruling
- equal opportunity of all

Nick
- blends lifestyle and residency better than current law
- supports

Bob Polasky, Anchorage, RURAL CAP
- opposes bill
- clearly does not comply with Fed law
- eliminates entire areas of state for subsistence use

Susie Erlich (?), Kotzebue, NW Arctic Borough
- opposes the bill
- agrees with Sen. Adams
- bill is not forcible not implementable

Greg,?, Director of Natural Resources
- opposes
- present form is totally unworkable

John Ottness, Ketchikan
- basic agreement with the legislation

Ted Smith, Bristol Bay
- opposes
- agrees with AFN and Adams

Eileen Nobert, Nome
- opposes the bill
- board is too powerful

Jack Polster, Homer
- bill needs to be reviewed
- does the bill define right or grant of privilege?

Warren Olson, Anchorage
- repeal 86 subsistence law

Walter Sampson, Kotzebue
- opposes bill
- please listen to the people

Paul Gregory, Bethel
- does not understand the bill's individual requirements

Terry Hefferly, Dillingham, Bristol Bay Native Assoc.
- opposes the bill in present form

Matthew Nickoli, Anchorage
opposes the bill as written
need a constitutional amendment

Myron Matting, Bethel, Village Council President
opposes the bill
does not recognize subsistence livelihood of Native people

Matthew ?, Nome
Supports AFN stance

Theo Matthews, Soldotna, UFA, Cook Iintel Comm. Salmon Fisherman
supports 443 as is!
was a member of the task force
defines the wording very well

Kayla Phinoway, Kotzebue
opposes the bill

Jordon Eto, Kotzebue
opposes the bill
not in support of Native interests

Vern Kudrick (?), Nome
opposes bill

Eugene Smith, Kotzebue
opposes the bill

Lorena Williams, Kotzebue area
opposes

General Notes from todays meeting:

According the McKie this bill gives the Board less discretion than current law. Their role is more defined and offers more guidance. He also stated that AG Cole believes the bill is constitutional.

After the meeting: Mckie said that if the bill does not pass this session there is a very good chance the Legislature will be back this summer.

WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 21, 1992

The Honorable Richard I. Eliason
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to subsistence.

Among the fifty states, only Alaska has a significant portion of its population who, in large part, live off the land. Subsistence is unique and special to Alaska. Because of the importance of subsistence to Alaska, both the United States Congress and past Alaska legislatures, have passed laws giving a preference to subsistence over other consumptive uses of the same resources.

Despite the general agreement that subsistence should have a preference, there has been monumental disagreement on how that preference should be implemented. For too many years, Alaskans on different sides of the subsistence issue have talked about each other, but never to each other. The effect of conflicting court opinions, federal Alaska National Interest Lands Conservation Act mandates, and legislative gridlock have produced a crisis in the management of our fish and game. We have a current situation where everyone loses.

For the past year, an outstanding group of citizens has been meeting steadily to try to resolve this problem. There are nine members of the Governor's Subsistence Advisory Council and all of Alaska owes a debt to them. The members are:

The Honorable Jay S. Hammond, Port Alsworth
Mr. Dick Bishop, Fairbanks
Mr. John James Burns, Fairbanks
Mr. Mitch Demientieff, Nenana
Mr. Eric Forrer, Juneau
Mr. Matthew Iya, Nome
Mr. Byron Mallott, Juneau
Mr. Theo Matthews, Kenai
Mr. Gene Peltola, Bethel

These nine members represent all sides of the subsistence issue. While some members were nominated by specific groups, I asked each member to participate as an individual.

The group had a goal that is simple to define, but very difficult to achieve: it was to find the best possible subsistence solution for Alaska. Many observers thought that was an impossible dream, that the members could never agree. There were times during meetings, when that appeared to be true, but the council members did not give up. Today I am introducing subsistence legislation that the council drafted. Every part of this legislation is the result of consensus among the members.

The legislation is not what any one member, any one group, nor I, by myself, would have drafted. It is legislation that protects the resource, the interests of every group, and can pass. In designing this statute, great emphasis has been placed on how it will actually work. Extensive time has been spent with the Alaska Departments of Fish and Game (ADF&G) and Law.

The legislation is designed for species protection, to function with a minimum of disruption for users, for ease of administration by the Board of Fisheries and the Board of Game, for management by the ADF&G, enforceability by the Department of Public Safety, and defensibility in court. The legislation will reduce the constant barrage of subsistence court cases by making the state's actions more defensible, but, much more importantly, by laying out clear guidelines for the boards and reducing the problems which caused people to sue.

A packet of material describing and explaining the bill will be provided to the Senate Secretary and Chief Clerk.

I realize the legislature has a constitutional responsibility to consider and, if necessary, amend bills to make them the best possible legislation. Neither I nor the council make any claim that this legislation is perfect, but every word in it has been the subject of hours or days of debate. The two things I ask of the legislature, are to maintain the goal of the advisory council by passing the best possible piece of subsistence legislation, and to act swiftly to solve the subsistence crisis and help heal Alaska.

Sincerely,

S/S Walter J. Hickel

Walter J. Hickel
Governor

WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 6, 1992

Mr. Mitch Demientieff
P. O. Box 249
Nenana, AK 99760

Dear Mitch,

For too many years, the politics of subsistence divided our state. When the Subsistence Advisory Council first met, there were skeptics who said there was no solution. As we wrap up the proposed legislation and conclude the Council's final meeting, it is clear the skeptics were wrong.

You have served as a shining example of how Alaskans of good faith and good sense can work together and solve problems, no matter how tough. You have performed a tremendous service for Alaska.

In about a week and a half, I will introduce legislation you have helped to draft. As we conclude the Council's deliberations and begin the legislative process, I hope each of you will continue to be involved, both individually and on behalf of the interests you have so ably represented. I appreciate the Council's willingness to reassemble, if necessary, as we continue through the process and in two years to review how the law has functioned. Passage of subsistence legislation continues as a top priority for me. I want you and Kathleen to join me for a great party at the signing ceremony.

I know that there are parts of the draft that each Council member would do differently if it were left to him alone. Each of you will have to deal with friends and associates who will feel you should have prevailed on every point. I also understand that while some members were nominated by specific groups, each of you participated as individuals, and each interest group will have to make its own decision.

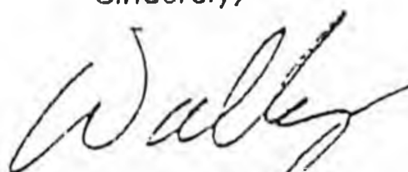
I asked you to draft the best possible subsistence legislation for Alaska, and I think you have done it. I sat at the table as meeting after meeting you hammered out the hard points and forged a document that works. Most important, you have proved that all users of our fish and game can work together for a common purpose.

GOVERNOR'S LETTER OF APPRECIATION TO
SUBSISTENCE ADVISORY COUNCIL

I have previously told you I feel the Council has made the most important contribution to Alaska of any group since the Constitutional Convention, and I meant it. Thank you for your service. We are all in your debt.

With warm regards.

Sincerely,



Walter J. Hickel
Governor

GOVERNOR'S SUBSISTENCE ADVISOR[illegible] COUNCIL

Mr. Dick Bishop
1555 Gus's Grind, Fairbanks, AK 99709
Phone: 455-6151 Fax # 451-2858

Mr. John James Burns
P.O. Box 83570, Fairbanks, AK 99708
Phone: 479-0204/2671 Fax: 479-4293/call before sending

Mr. Mitch Demientieff
P.O. Box 249, Nenana,AK 99760
Phone: HM 832-5521 WK 832-5461 Fax: 832-1077

Mr. Eric Forrer
P.O. Box 34383, Juneau, AK 99803
Phone: 789-2024/5237 Fax: 789-4146

The Honorable Jay S. Hammond
Port Alsworth, AK 99653
Phone: 781-2235 Fax: 781-2215 (Call 781-2211)

Mr. Matthew Iya
P.O. Box 948, Nome, AK 99762
Phone: 443-5682 Fax: 443-3708

Mr. Byron Mallott
102 Cordova Street, Juneau, AK 99801
Phone: WK 586-1512 HM 586-6937 Fax: 586-9214

Mr. Theo Matthews
P.O. Box 4649, Kenai, AK 99611
Phone: 283-3600/283-9540 Fax: 283-3306

Mr. Gene Peltola
P.O. Box 528, Bethel, AK 99559
Phone: 543-3321 Fax: 543-5277

Mr. McKie Campbell
P.O. Box 110001, Juneau, AK 99811-0001
Phone: 465-3500 Fax: 465-3454

A Brief Introduction to HB 552 and SB 443 (Subsistence)

How would the new law work?
Participation would be limited to qualified subsistence users. Qualification is based on a point system applied across the state with three different levels of presumption. The new system would provide that communities and areas in the state be classified into one of three groups, and apply presumptions as follows:

Group 1 consists of areas where the population of each community in the area is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life.
A person who hunts or fishes and lives in an area identified under group 1 is presumed to meet the subsistence eligibility standards. No permit or filing of a statement affirming the person's compliance with the standards is required.

Group 2 consists of communities where the population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life.
A person who hunts or fishes and lives in a community identified under group 2 is rebuttably presumed to meet the standards upon signing a statement affirming his or her compliance with the standards.

Group 3 consists of communities or urban areas where the population is 7,000 or greater or communities where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life.
A person who lives in a community or in an area identified under group 3 may qualify by applying to the Department of Fish and Game and demonstrating that he or she meets the qualification standards.

What are the qualification standards?
Qualification will be based on a weighted point system of 7 criteria. The boards will adopt the point system by regulation. Qualification requires more points than just meeting the minimums in the first four criteria, but anyone who fails to meet each of the minimums would be disqualified. The last three criteria do not have minimums. The seven criteria are:
(1) the quantity of fish and game consumed by the person in the preceding twelve months, with a mandatory minimum of 125 pounds;
(2) the number of species and groups of species of fish and game from the subsistence use area consumed by the person in the preceding twelve months, with a mandatory minimum set by the boards by region;

(3) the number of days in the preceding twelve months that the person engaged in taking fish or game in the subsistence use area or spent processing that fish or game, with a mandatory minimum of 30 days;
(4) the number of months in the preceding twelve months in which the applicant engaged in taking fish or game in the subsistence use area, with a mandatory minimum of four months;
(5) the number of weeks, in the preceding twelve months, during which the taking or processing of fish and game was the applicant's principal work effort, to a maximum of 26 weeks;
(6) the number of households, other than the person's household, with which the person shared or received fish and game in the preceding twelve months, with a maximum of 10 households; and
(7) whether the person's taking of fish and game occurred solely in the subsistence use area for which they are qualifying.

As indicated above, in group 3 communities a person must fill out an application and score sufficient points to demonstrate his or her eligibility; in group 2 communities, signature of a statement affirming the person's qualification creates a rebuttable presumption that the person is qualified; and in group 1 areas, no paper work is required and the presumption is that all persons who hunt or fish meet the minimum standards.

Where would people be able to go for subsistence hunting and fishing?
People would normally qualify for the subsistence use area in which they live, but could qualify for another area by application. Subsistence use would be on fish stocks and animal populations that have customarily and traditionally been used for subsistence. This would allow qualified subsistence users to hunt and fish as they have in the past. Group 3 areas would be closed to subsistence hunting and fishing, but urban residents who qualify as subsistence users would be able to subsistence hunt and fish in portions of the subsistence use area in which they live that are not classified in group 3 and thus closed to subsistence taking.

What are the advantages of this approach?
It protects the resource. It does not divide villages. It protects residents of regional centers from growing out of subsistence, and it allows the small minority of urban residents who are subsistence users to participate. It complies with our constitution. Most importantly, because this legislation has been worked out with the help of all sides, it will protect subsistence and subsistence users while reducing the division and political instability that has plagued this issue.

GOVERNOR'S SUBSISTENCE BILL

SECTION-BY-SECTION DESCRIPTION
February 21, 1992

Section 1

Section 1 of the bill sets out findings for, and the purpose and intent of the proposed new law.

Section 2

Section 2 sets out proposed new AS 16.05.268, which contains the crux of the new subsistence law. An analysis of the proposed new statute, by subsection, follows.

Proposed AS 16.05.268(a):

This subsection is very similar to existing AS 16.05.258(a). Under this new subsection, the Board of Fisheries and the Board of Game are to identify fish stocks and game populations that have been subject to customary and traditional subsistence use. The term "customary and traditional" is defined in proposed AS 16.05.940(36) (sec. 6 of the bill). The commissioner is to make recommendations to the boards concerning the identification of stocks and populations and whether they have been subject to customary and traditional subsistence use.

There are definitions of "fish stock" and "game population" in existing law; those definitions are left unchanged. Existing law also already requires the boards to identify the stocks and population used for subsistence.

The identification of fish stocks and game populations subject to subsistence regulations is a situation where all groups can potentially win. Identified stocks and populations are the ones on which allocation errors would infringe on subsistence. Identification of these stocks and populations will assure that the subsistence preference is protected.

The identification of subsistence stocks leaves those that are not identified to be harvested by all Alaskans under nonsubsistence regulations. Some of the fish and animals most important to sport users are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and recently transplanted (not reestablished) game; and some steelhead and trout stocks and brown bear populations. There are also fish stocks and game populations in areas of the state so remote from any village or community that there is no established use of them. As in existing

law, whether or not fish or game are or are not subsistence stocks and populations is a factual determination made by the boards.

Fish stocks and game populations in urban areas of the state or in areas where dependence upon subsistence is not a principal part of the economy, culture, and way of life of the area will not be subject to subsistence hunting under the statute. (See the discussion of subsecs. (f) and (g), below.) Fish and game in nonsubsistence areas will continue to be available under general hunting regulations and sport, personal use, and commercial fishing regulations. The subsection does not affect where subsistence users may live. They can live anywhere in the state. Subsistence use areas overlap areas closed to subsistence taking. Qualified subsistence users who live in an area of the state where there is no taking for subsistence in the immediate area would continue to have access to fish and game under subsistence regulations in areas proximate to the closed area and other areas of the state.

Proposed AS 16.05.268(b):

This proposed subsection is very similar to existing AS 16.05.258(b)(1). That existing statute requires the boards to determine "what portion" of the resource can be harvested consistent with sustained yield. Some had interpreted this as a requirement for an exact determination of the number of animals that could be harvested. Such an exact number is normally beyond calculation with the biological information that is available. The language in proposed AS 16.05.268(b) is designed to conform to the actual capabilities of the boards and the ability of the Department of Fish and Game to provide information to the boards, and omits language that could be interpreted to require a determination of exact numbers.

As in existing law, this subsection requires the boards to provide a preference for subsistence uses, although even subsistence use may be curtailed to protect stocks or populations and achieve sustained yield. Subsistence hunting and fishing regulations must provide a reasonable opportunity to participate. "Reasonable opportunity" is defined in proposed AS 16.05.268(o), discussed later.

The subsistence preference does not work like the Endangered Species Act, mandating limitation or closure of any other fishery or hunt that is believed to contain even a single member of the subsistence stock or population. The subsistence preference applies when a stock becomes a stock, in other words, wherever it becomes manageable as a unit. While this point may seem self-evident from the existing definitions of stock and populations, some have argued that the courts should eliminate all downriver and marine fisheries on certain fish stocks that spawn, for example, in

the headwaters of the Yukon. Management of mixed stocks and populations is far better left to the boards than to the courts.

Subsection (b) authorizes the boards to also adopt regulations allowing other consumptive uses of stocks and populations identified as subject to subsistence, after subsistence uses have been provided for. These regulations would provide for nonsubsistence harvest of the stock or population to the extent that the harvest does not interfere with reasonable opportunity for subsistence uses.

AS 16.05.268(b)(1):

Paragraph (b)(1) addresses the happy situation where fish and game is so plentiful that all subsistence uses and all other consumptive uses can be allowed. The board would provide for a reasonable opportunity for subsistence uses, and is permitted but not required to adopt separate subsistence regulations that differentiate subsistence uses from other consumptive uses. For example, if caribou in a subsistence use area were plentiful and the existing general bag limit was five caribou per hunter during a year-round season, and the Board of Game determined that such a bag limit and season provided a reasonable opportunity for subsistence use of caribou, no separate subsistence regulation would be required. If, at some time in the future, the general season or bag limit was changed by the board, the board would need to consider whether the change impinged on the reasonable opportunity for subsistence, and if so, would need to create a separate subsistence regulation at that time.

AS 16.05.268(b)(2):

This paragraph addresses the situation where a stock or population is sufficient to provide for all subsistence uses, but not all other consumptive uses. This is commonly known as "Tier I," and is the most common situation across the state. In this situation, the appropriate board would be required to adopt separate subsistence regulations that differentiate between consumptive uses and provide a preference for subsistence.

AS 16.05.268(b)(3):

This paragraph deals with the situation where a stock or population is sufficient to provide for all subsistence uses, but no other consumptive uses. In that case, this paragraph makes it clear that the appropriate board must eliminate all nonsubsistence uses in order to protect the subsistence preference.

AS 16.05.268(b)(4):

Paragraph (b)(4) describes what is commonly known as the " Tier II" situation, in which, to protect sustained yield, it is necessary to limit the harvest of a stock or population to a level that does not provide a reasonable opportunity for subsistence for all qualified subsistence users. This paragraph is very similar to language in existing AS 16.05.258(c), with several modifications to make it clearer.

This paragraph makes it explicit that other consumptive uses of a particular stock or population must be prohibited in a "Tier II" situation. If a board has eliminated all consumptive uses other than subsistence uses, and it is still necessary to reduce the subsistence harvest, then the board has to limit the number of subsistence users who may hunt or fish on the affected stock or population by applying three criteria: (1) customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of life; (2) the proximity of the domicile of the subsistence user to the resource; and (3) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

The three criteria are taken from existing AS 16.05.258(c)(1) - (3), but have been modified for clarity. Existing AS 16.05.258(c)(3) and Title VIII of ANILCA (Alaska National Interest Lands Conservation Act; P.L. 96-487) both use the phrase "availability of alternative resources" as the third criteria. Some have tried to interpret this as a question only of whether or not a person has access to a similar animal from a different population. The new language makes the intent and meaning clear.

Several additional points need to be made about this subsection. First, most of the Tier II hunts that occurred after the decision in McDowell v. State, 785 P.2d 1 (Alaska 1989) will no longer be in Tier II status. The need for most Tier II hunts will be eliminated by dramatically reducing the number of hunters eligible to participate in subsistence hunts. The effect of this will be to leave more game available under general hunting regulations.

Second, as in existing AS 16.05.258 and the federal law, the subsistence preference is only a preference over other consumptive uses. Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law, so long as they do not interfere with reasonable opportunities for subsistence.

Both the 1986 state law (AS 16.05.258) and Title VIII of ANILCA give a preference that is stock and population specific (Title VIII uses population to describe fish as well as game). This legislation is also stock or population specific. The state

definitions of fish stock, AS 16.05.940(15), and game population, AS 16.05.940(18), were enacted in 1978 and 1975 respectively, and both refer to species, subgroup, etc., that are "manageable as a unit." This bill is not intended to further limit the discretion the boards have in defining what fish or game is manageable as a unit.

Proposed AS 16.05.268(c):

Subsection (c) requires additional affirmative action from the department and the appropriate board in situations where a stock or population is not sufficient to provide for both subsistence and nonsubsistence uses. The department is instructed to formulate a plan for the recovery of the stock or population to provide for increased consumptive uses. There may be cases where the habitat of the particular stock or population or other limitations make an increase impossible. In those cases, the department would to simply report those facts in the plan. However, in cases where increases are feasible, the department would be required to develop a plan for achieving increased levels of the stock or population and to make recommendations to the appropriate board for regulations necessary to implement the plan.

The last sentence of subsec. (c) addresses the extreme situation, where stock or population levels are so low that all uses, including subsistence uses, have been eliminated to try to achieve sustained yield of the stock or population. When population levels begin to rise again, the appropriate board is to allocate to subsistence uses when there are enough animals to allow a hunt or fishery, and not ignore the subsistence preference by keeping the seasons closed until there are enough animals to provide for every kind of use. This does not mean that the boards must allow taking as soon as a minimal sustained yield is reached; the definition of "sustained yield" in this bill makes that clear. Subsection (c) is intended to prevent disregard of the subsistence preference in favor of other consumptive uses.

Proposed AS 16.05.268(d):

Subsection (d) establishes a game management subunit (GMSU) and its contiguous GMSU's as the subsistence use area for fish or game to be taken under subsistence regulations in that GMSU, unless the appropriate board establishes a different area. GMSU's are based on natural drainages and tend to fit natural travel and use patterns of most fish stocks and game populations.

The Department of Fish and Game has examined a large number of specific hunts and fisheries and the associated patterns of subsistence use. In general, a GMSU and the surrounding subunits provide an area properly sized to be consistent with the definition

of subsistence. Game management units and subunits tend to be larger in remote parts of the state, but that is consistent because, in those parts of the state, subsistence users have historically been able to travel farther in pursuit of resources without coming into conflict with other established groups of users.

GMSU-based subsistence use areas are large enough to provide access to subsistence resources even for subsistence users who live in areas closed to subsistence taking under subsection (a). The use of GMSU based subsistence use areas provides use areas that can be immediately implemented while the board examines use areas throughout the state and make adjustments as necessary. GMSU's which touch only in marine waters should not be considered contiguous.

<u>Proposed AS 16.05.268(e)</u>:

For some specific fish stocks or game populations, the appropriate board may decide that a subsistence use area established by GMSU is too small or is otherwise inconsistent with established patterns of taking and use of a particular fish stock or game population, or is too large and is inconsistent with travel limits and means inherent with the efficient and economical nature of subsistence. If the use pattern for a particular fish stock or game population changes over time, the board could adjust the boundaries of the use area.

In these cases the appropriate board should establish different boundaries for the particular stock or population which are large enough to include both where a particular stock or population is normally taken and where it is normally used, but not so large as to violate the definition of subsistence. The Board of Fisheries may wish to use fish districts to describe areas for specific fish stocks if a GMSU based area is not appropriate.

<u>Proposed AS 16.05.268(f), (g), and (h)</u>:

These subsections all deal with the classifying of areas and communities to facilitate the administrative determination of a person's qualification to subsistence hunt and fish. Residence in a particular community or area of the state does not determine a person's qualification to subsistence hunt and fish. It does, however, determine the amount of administrative paperwork the person will be required to submit.

<u>AS 16.05.268(f)</u>:

This subsection requires the boards jointly to look at all areas and communities in the state and to classify them, using communities and game management units or subunits, into one of three categories. Under subsec. (f)(1), the boards would identify areas where the population of each community in the area is less than 2,500 people. The 2,500 population figure came from information collected by the Department of Fish and Game and will include most rural villages and towns in Alaska. The population figures in this subsection also mesh with population breaks used by the federal government. In addition to the population requirement, the boards would also evaluate all the information it had about the communities and area, to determine whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area. To make this determination, the communities and area would be tested under the criteria set out in subsec. (g), which will be discussed in more detail below. The boards also must determine that the area is not part of an urban area. An area or community that is a suburb of a larger city or is so close to a larger city that there is little characteristic difference from the larger city will not qualify as a subsec. (f)(1) area. The status of such an area will be determined along with the boards' consideration of the larger city under subsec. (f)(2) or (f)(3).

It is anticipated that, as the boards evaluate the subsistence dependency of various areas, they will identify communities of under 2,500 in population that are not significantly dependent on subsistence. A community that is within a larger area of subsistence dependence may be specifically excluded from the otherwise qualified area. For example, if the boards identify a remote military installation that, as a community, does not depend on subsistence hunting and fishing, it would be excluded from classification under subsec. (f)(1) and would fit into the (f)(3) category.

Under subsec. (f)(2), the boards would identify communities with a population of 2,500 to 6,999 and then determine whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community, again using the criteria in subsec. (g). If a community does not meet the subsistence dependence standards of subsec. (g), it will be classified under subsec. (f)(3). The non-urban requirement would also apply to these communities. For example, if a community of 3,500 in population were part of or a suburb of a city of 7,000 or more in population, the smaller community would be classified under subsec. (f)(3).

Communities with a population of at least 7,000 and smaller communities that do not qualify under subsec. (f)(1) or (f)(2) because they do not meet the subsistence dependence standards of subsec. (g) will be classified under subsec. (f)(3). Communities of at least 7,000 in population have a large enough population to

support more business enterprises and services that tend to change the character of the community away from subsistence dependence.

It should be remembered that the classification of an area or community under subsecs. (f) and (g) does not determine the subsistence qualification of the individuals who reside in those areas or communities.

Proposed AS 16.05.268(g):

Under subsec. (g), the boards are given criteria to use in determining whether dependence upon subsistence use of fish and game is a principal characteristic of the economy, culture, and way of life of an area or community. The boards are to use these criteria to evaluate the subsistence dependence of the area or community in light of all the socio-economic characteristics of the area or community. The boards will evaluate all of the listed characteristics of the community, including characteristics they may add to the list under subsec. (g)(13), and decide whether dependence on subsistence is a principal defining characteristic of the community. Any factors added by the boards must be adopted as regulations and must be similar in spirit to the characteristics listed by the legislature. The authority to add new characteristics is permissive. The boards are not required to add new factors.

The use of the words "a principal characteristic" may be somewhat unusual, as "principal" is often used to signify the first or highest in rank. The language here is somewhat similar to the earlier language in the definition of "rural area" in AS 16.05.940(26), but that does not mean that the boards should make determinations under (g) as they did under the "rural" statutory definition and interpreting regulation, the former 5 AAC 99.012. While some of the criteria are similar to those in the former 5 AAC 99.012, the criteria are not the same and should be evaluated independently.

By using the phrase "a principal characteristic" as opposed to "the principal characteristic," it is intended that dependence on subsistence need not be the one dominant characteristic, but should be a very important, major, and substantial characteristic, and more than merely significant. Some communities that might have a more dominant characteristic, such as commercial fishing, might still meet the criteria if, in the boards' judgment, subsistence dependence is also a very important characteristic.

To qualify under subsec. (f)(1) or (f)(2) as a subsistence-dependent community or area, subsistence must be a principal characteristic of all three listed aspects of the community or area: (1) economy, (2) culture, and (3) way of life of the community or area. While the term "culture" is often associated in