ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
8130 HOUSE STATE AFFAIRS

395

HB 148

Alaska State Legislature

REPRESENTATIVE
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House District 33

While in Juneau
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House Of Representatives

M E M O R A N D U M

TO: Representative Al Vezey
Chair, House State Affairs Committee

FROM: Representative Gene Therriault

DATE: March 10, 1993

RE: Scheduling of HB 148

I would like to request that HB 148, "An Act exempting the University of Alaska from the administrative adjudication provisions of the Administrative Procedure Act; and providing for an effective date" be scheduled for a hearing before the House State Affairs Committee.

The adjudication provisions of the administrative procedures act were not designed for employee or student grievances. They were established for citizens with grievances against the state boards and commissions. Traditionally, employee and student grievance procedures are built around a process that involves review by peer committees with several levels of appeal available.

The majority of University grievances are resolved with little or no expense at an early stage or review. This peer-review process characterizes the approach found in the university settings, and has proven to be a successful model at the University of Alaska for many decades. The procedure outlined in the APA would result in an extraordinary expense. The APA process requires that an outside hearing officer be assigned, at University expense, to hear any and all grievances that employees or students may choose to bring forward. The University should be treated like all other agencies and employers in the state and should be allowed to provide internal grievance processes subject to the due process provisions of the state and federal constitutions.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB148

Revision Date:

Department Affected: **University of Alaska**

Title: An Act Exempting U of A from the Administrative Procedure Act.

BRU: All

Component: All

Sponsor: Representative Therriault

Requestor: University of Alaska

COMPONENT SERIAL NO.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FD SOURCE						
FUNDING: (Thousands of Dollars)						
GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL FUNDING	0.0	0.0	0.0	0.0	0.0	0.0
POSITIONS:						
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

There is no cost associated with the passage of this legislation. However, if this legislation fails to pass, the costs to the University to administer faculty/staff and student grievances, could add tens of thousands of dollars in litigation costs each year.

Prepared by: Marsha Hubbard, Director — Phone: 474-7593

Division: Statewide Budget Office — Date: 3/8/93

Approved by: Brian Rogers, Vice President for Finance

Agency: University of Alaska — Date: 3/8/93

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

Position Paper

University of Alaska

Statewide System

HB 148 Exempt UA Grievance from APA

In June 1991, the Alaska Supreme Court overturned a Superior Court decision and found that because the University of Alaska was not specifically excluded from the adjudication procedures of the Alaska Administrative Procedures Act (APA), it must implement grievance procedures pursuant to APA, or "...seek a remedy from the legislature."

The APA adjudication procedures apply to boards and commissions listed in Sec. 44.62.330, in third party actions dealing with the granting or denying "...a right, authority, license, or privilege...." For instance, when an individual is denied a real estate license, that person is entitled to a hearing before the Real Estate Commission through the process outlined in this statute. The quasi-judicial proceedings included in the APA are not intended for employee or student grievances, but rather for what are essentially licensing decisions and disputes involving state boards and commissions.

The University was included in the APA in 1977 at a time when the University was facing intense legislative criticism for its inability to adequately account for its funds. The same bill included the University in the Fiscal Procedures Act provisions of AS 37.05 and the Executive Budget Act provisions of AS 37.07. The legislation stated that the administrative adjudication procedures would be applicable to the University of Alaska, "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40.", the statutes defining the authority and responsibilities of the Board of Regents and the president of the University of Alaska.

The record shows that legislators felt the constitutional and statutory provisions were sufficient to assure that the Board of Regents would retain their authority to manage all internal functions of the University, and this new legislation would effect only the fiscal management and accounta-

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bility. The Supreme Court, however, did not consider legislative intent, and because the University is not specifically exempt from the APA adjudication provisions, and because the referenced statutory language in AS 14.40 does not specifically grant the Board the authority to establish grievance procedures, the Court directed the University to comply with the adjudication provisions set out in the APA or to seek the appropriate legislative action for clarification.

The University is seeking a clear exemption from the requirements in AS 44.62.330(a)(45). The APA grievance procedures do not apply to any employee group in the state. Provisions in the state statutes covering collective bargaining require that grievance procedures be part of all collective bargaining contracts, and non-covered state employees are included in grievance procedures established within their specific agencies and departments.

Employee and student grievance procedures, which incorporate constitutionally required due process protections, 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 APA 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 APA requirements are contradictory to the resolution of student and employee grievances, and are contradictory to the collegial approach that characterizes a University setting.

If this legislation is not passed, it is anticipated that the University will have to pay approximately $200,000 per year for hearing officers, and associated costs involved with this complex process.

A "grandfather" clause is included with the legislation that provides the APA procedures be utilized for all grievances filed prior to the final passage of this legislation.

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TO: Representative Gene Therriault

FROM: William R. Kauffman, Vice President and General Counsel

DATE: March 8, 1993

RE: Applicability of the Adjudication Provisions of the Administrative Procedures Act, AS 44.62.330 - 44.62.630, to the University of Alaska

This memorandum provides a synopsis of the history associated with the University's inclusion in the administrative adjudication provisions of the Administrative Procedures Act, AS 44.62.330 - 44.62.630 and the effects of that inclusion on University operations. I believe it will become clear why the passage of HB 148 is so crucial to the effective management of the University.

The University was included in the Administrative Procedures Act (APA) in 1977 at a time when the University was facing intense legislative criticism for its' inability to adequately account for its funds. The same bill included the University in the Fiscal Procedures Act provisions of AS 37.05 and the Executive Budget Act provisions of AS 37.07. The legislation provided that the administrative adjudication procedures would be applicable to the University of Alaska "except to the extent that its inclusion is inconsistent with the provisions of AS 14.40.", the statutes defining the authority and responsibilities of the Board of Regents and the president of the University of Alaska. The legislative record indicates little interest in the APA's applicability but instead reflects legislative interest in the fiscal regulations. In a memorandum to Senator Sackett responding to the Senator's request for a draft bill that was to become SB 261, Billy G. Berrier, Director of the Legal Services Division, explained to Senator Sackett:

> As you have requested, we have drawn an act relating to accounting and fiscal matters of the University of Alaska which has the effect 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 amounts appropriated and available for expenditure.

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.

When SB 261 was first discussed on April 13, 1977, Senator Holman, then chair of the Legislative Budget and Audit Committee, spoke almost entirely about the financial problems of the University and the need for legislation to require the University to conform to accounting and budgetary practices of those of other state agencies. As the bill was discussed during committee hearings and floor sessions, the record indicates considerable concern that there be no interference with the Board's power to manage and govern the internal affairs of the University. As you will see below, however, the legislative history and intent were not considered relevant by the Supreme Court. The court's decision, put simply, is that because the University is not specifically excluded from the adjudication provisions of the APA, their internal review procedures must comply with the adjudication provisions set out in the APA. The effect of this ruling has been to dismantle the internal peer-review grievance procedures that have been in place at the University for decades and to require the implementation of costly and cumbersome procedures requiring the use of expensive outside hearing officers, and a complex hearing process that was never intended for employee or student grievances.

In reviewing the adjudication provisions of the APA (Attachment #1), it is noteworthy that those agencies to which the adjudication provisions are applicable by provision of AS 44.62.330, 27 are essentially occupational licensing entities. Seven relate to what I characterize as health and safety issues such as the "Department of Health and Social Services, under AS 47.35, relating to Boarding and Foster Homes for Children" (AS 44.62.330(a)(24)) and seven other entities such as the Alaska Public Offices Commission (AS 44.62.330(a)(39)), and the Department of Transportation and Public Facilities "as to functions relating to aeronautics and communications" (AS 44.62.330(a)(16)). The last category also includes the University of Alaska in the global manner referenced at the outset. Frankly, I can find no application of the administrative adjudication procedures to any other entity with the same breadth as the university's provision.

It was not until 1987 that the University was first viewed by a court to fall within the administrative adjudication provisions of the Administrative Procedures Act. In the case of *Aden v. University of Alaska*, Third Judicial District Superior Court Judge Douglas J. Serdahely ordered the University to grant a faculty member whose contract had not been renewed a grievance hearing under procedures modified to comport with the elements of the APA. Please note the issue before Judge Serdahely was the decision of the University to not reappoint a person whose appointment with the University had expired. It was not a case of terminating or firing someone in the middle of an appointment or in breaking tenure. Instead, it was for a person who basically had no vested property right in continued employment. As a result of the decision, a modified APA hearing was held and the hearing panel found against Ms. Aden. She appealed to the superior court and the appeal was dismissed on December 15, 1989. The cost to the University for the APA hearing was approximately $44,000 for the University's attorney and the hearing officer. Despite Judge Serdahely's decision, the University continued to use its established grievance procedure for the resolution of disputes in all other cases.

Subsequently, as a result of the restructuring of the University, two ACCFT union leaders filed a grievance in 1987 contesting the academic rank and tenure status of approximately 130 persons who received transfer opportunities to the restructured University of Alaska.

As a part of their grievance, they asserted the applicability of the APA to the university's grievance procedure. This matter was litigated initially in the superior court in Anchorage. While Judge Brian Shortell was first inclined to rule for Messrs. McGrath and Mohr, Judge Shortell was convinced by the university's review of the legislative history as researched by Juneau attorneys Avrum Gross and Susan Burke that the legislature did not intend for the provision to be applicable to the University in the manner suggested by the plaintiffs. Hence, the superior court granted the university's motion for summary judgment. On June 21, 1991, the Alaska Supreme Court reversed Judge Shortell in the case of *McGrath and Mohr v. University of Alaska* (Attachment #2). Notwithstanding the legislative history, the arguments of the University that such a procedure is inconsistent with the Board of Regents' independent authority to manage and govern the internal affairs of the University and the President's statutory authority with respect to employees, the court concluded that it found nothing in the provisions of AS 14.40 which are inconsistent with the application of the adjudicative procedures. The University also argued that neither state employees in the non-exempt service nor state employees covered by the Public Employment Relations Act are covered by the APA procedures for grievances, and therefore suggested that the legislature intended University employees to have the same rights as state and other public employees in personnel matters. The court, however, concluded that University employees are exempt from the State Personnel Act under AS 39.25.110(5). In conclusion, the court quoted with favor Judge Serdahely's decision in *Aden* when he said "[u]ltimately, if Defendant seeks to be exempted from the workings of the APA, it must seek such remedy from the Legislature, not this Court." As a result of the *McGrath* decision, the University of Alaska on September 10, 1991, amended its grievance procedure to incorporate the administrative adjudication procedures of the APA. Since that time, the University has concluded one hearing concerning the decision to not grant tenure, settled one academic promotion case, has two promotion cases pending, held one hearing on a nonretention, and has approximately seven other pending matters involving the APA hearing procedures. Curiously enough, the grievance that gave rise to the case was withdrawn by Messrs. McGrath and Mohr after the University reached a collective bargaining agreement with the Alaska Community Colleges Federation of Teachers, AFL-CIO, of which McGrath and Mohr are officers.

The application of the administrative adjudication provisions has now taken another turn. At the conclusion of the 1991-92 academic year, administration officials at the University of Alaska Anchorage had concerns about the conduct of faculty member Rose Odum. The dean advised Dr. Odum that her conduct was unprofessional and could result in her termination. A hearing was held before a panel of faculty and administrators to determine what, if any, action should be taken with respect to Dr. Odum. Dr. Odum appeared and was assisted, but not represented by counsel, in a proceeding which lasted over two days and included approximately 18 hours of testimony. The committee made a number of findings that Dr. Odum had engaged in unprofessional conduct and recommended that a letter of reprimand be placed in Dr. Odum's personnel file and that a plan of remediation be formulated. The dean, however, on receiving the recommendations of the committee, determined that Dr. Odum should be terminated. Subsequently, Ms. Odum sought a preliminary injunction against the termination in the superior court. The university contended that Ms. Odum was obligated to exhaust her administrative remedy which included an opportunity for a grievance hearing incorporating the administrative adjudication provisions of the APA in the university's grievance procedure. Ms. Odum, however, contended that procedure must be afforded before the termination decision. After the superior court denied the motion for the injunction, Dr. Odum petitioned the supreme court for review. The Alaska Supreme Court accepted the appeal on the question of

whether there is a right under the Alaska Constitution to have representation by counsel in a pre-termination hearing and whether the administrative adjudication provisions of the APA must be afforded at the pre-termination hearing level, as opposed to a post-termination proceeding. On January 29, 1993, the supreme court answered the second question in the affirmative (Attachment #3)..

The significance of *Odum* is that the court has interpreted AS 44.62.360 as requiring a hearing *before* the termination even if provision is made for the same process *after* the termination. When this application is then read in light of the language of AS 44.62.360, the true magnitude of the problem comes into light: an APA hearing is required before any action is taken to, paraphrasing the statute, revoke, suspend, limit or condition a "right, authority, license or privilege." An APA hearing is required before the University can "limit or condition" a "privilege." It is that simple.

One point that is absolutely critical to remember in the consideration of the applicability of the APA to the University is that this is not a question of denial of an individual's right to due process under the United States or the Alaska Constitutions. Those rights are guaranteed by those documents and I am confident that the University's procedures, absent the APA's adjudication provisions, meet all constitutional requirements for due process. Those rights are secured and the University faces liability for failing to afford those protected rights. Of course, please also remember that "due process" does not describe some fixed bundle of rights. Instead, it is simply that process which is due under the circumstances when the various interests are considered. Hence, all other things being equal, there is more process due in the case of the termination of a person for cause and in the case of putting a student on disciplinary probation. Instead, the APA is a statutory definition of the process which is due with no distinction whatsoever from top to bottom.

During the 1992 legislative session, bills were introduced in each house of the Alaska Legislature to exempt the University of Alaska from the administrative adjudication procedures of the Alaska Administrative Procedures Act. Those measures, in the form of HB 549 and SB 441, were not passed during the last session, largely because of the pressure exerted by the Alaska Community Colleges' Federation of Teachers and the AFL/CIO to block any University legislative initiatives until such time as a resolution of labor disputes was reached with the ACCFT. That resolution has now been achieved and the ACCFT has indicated no objection to the legislation.

The ability of the University of Alaska to make decisions concerning its internal affairs in a timely fashion is critical to the successful operation of this enterprise. The University is bound by the United States and Alaska Constitutions to provide due process. The administrative adjudication provisions of the APA were not intended to affect the University's operations. They have: drastically. The supreme court on two occasions has said that relief must come from the legislature. I seek your support in this effort to secure that relief.

lates art. II of the state constitution. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

No implied general power to veto agency regulations by informal legislative action exists. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

Cited in Wickersham v. State, Com. Fisheries Entry Comm'n, 680 P.2d 1135 (Alaska 1984).

Article 8. Administrative Adjudication.

NOTES TO DECISIONS

Applied in Schnabel v. State, 663 P.2d 960 (Alaska Ct. App. 1983).

Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630. (a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 — 44.62.630 is limited to named functions of the agency.

(1) *[Repealed, § 5 ch 159 SLA 1980.]*

(2) Board of Chiropractic Examiners;

(3) Board of Dental Examiners;

(4) State Board of Registration for Architects, Engineers and Land Surveyors;

(5) *[Repealed, § 13 ch 218 SLA 1976.]*

(6) Board of Examiners in Optometry;

(7) *[Repealed, § 5 ch 159 SLA 1980.]*

(8) State Medical Board;

(9) Division of Lands under Alaska Land Act where applicable;

(10) Board of Nursing;

(11) Board of Pharmacy;

(12) Board of Public Accountancy;

(13) Department of Labor as to functions relating to employment security only as provided in (c) of this section;

(14) Real Estate Commission;

(15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act;

(16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications;

(17) *[Repealed, § 12 ch 131 SLA 1980.]*

(18) *[Repealed, § 49 ch 94 SLA 1980.]*

(19) *[Repealed, § 54 ch 169 SLA 1978.]*

(20) *[Repealed, § 16 ch 82 SLA 1982.]*

(21) *[Repealed, § 54 ch 169 SLA 1978.]*

(22) *[Repealed, § 11 ch 181 SLA 1976.]*

(23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490;

(24) Department of Health and Social Services, under AS 47.35, relating to boarding and foster homes for children;

(25) *[Repealed, § 60 ch 98 SLA 1966.]*

(26) *[Repealed, § 4 ch 120 SLA 1971.]*

(27) Department of Health and Social Services and Department of Environmental Conservation under AS 17.20 (Alaska Food, Drug, and Cosmetic Act), and Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors under AS 08.42;

(28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130;

(29) *[Repealed, § 4 ch 120 SLA 1971.]*

(30) Department of Environmental Conservation, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels;

(31) *[Repealed, § 40 ch 206 SLA 1975.]*

(32) *[Repealed, § 4 ch 106 SLA 1970.]*

(33) Board of Marine Pilots;

(34) Alaska Police Standards Council;

(35) Big Game Commercial Services Board;

(36) Board of Dispensing Opticians;

(37) *[Repealed, § 20 ch 110 SLA 1981.]*

(38) *[Expired pursuant to § 3 ch 128 SLA 1974; am § 7 ch 108 SLA 1975.]*

(39) Alaska Public Offices Commission;

(40) Board of Fisheries;

(41) Board of Game;

(42) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4);

(43) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits;

(44) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03;

(45) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40;

(46) *[Repealed, § 77 ch 14 SLA 1987.]*

(47) Board of Psychologist and Psychological Associate Examiners;

(48) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870;

(49) Board of Veterinary Examiners;

(50) Board of Nursing Home Administrators;

(51) Board of Barbers and Hairdressers;

(52) Department of Natural Resources concerning the Alaska grain reserve program under former AS 03.12;

(53) Department of Commerce and Economic Development concerning the licensing and regulation of audiologists under AS 08.11;

(54) Department of Commerce and Economic Development concerning the licensing and regulation of hearing aid dealers under AS 08.55.

(b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.

(c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in AS 23.20 (Alaska Employment Security Act). All other procedures of the Department of Labor relating to employment security shall be as provided in AS 23.20 and the regulations under AS 23.20.

(d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

(1) civil or criminal penalties;

(2) additional relief by injunction or restraining order;

(3) penalty provisions relating to suspension, revocation, reissuance, and other similar matters of licenses, permits, leases, concessions, and other similar matters;

(4) related matters that in their context do not relate to procedure. (§ 2 (ch 2) ch 143 SLA 1959; am § 14 ch 2 SLA 1964; am § 60 ch 98 SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 58 SLA 1967; am § 18 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969; am §§ 3, 4 ch 106 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 5 ch 179 SLA 1972; am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch 82 SLA 1973; am § 2 ch 7 FSSLA 1973; am § 5 ch 76 SLA 1974; am § 2 ch 128 SLA 1974; am § 6 ch 9 SLA 1975; am § 25 ch 25 SLA 1975; am §§ 39, 40 ch 206 SLA 1975; am § 4 ch 25 SLA 1976; am § 2 ch 59 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 46 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 169 SLA 1978; am § 10 ch 59 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980; am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980; am § 15 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980; am § 20 ch 110 SLA 1981; am E.O. No. 51, §§ 38, 39 (1981); am § 16 ch 82 SLA 1982; am § 2 ch 100 SLA 1983; am § 124 ch 6 SLA 1984; am § 11 ch 131 SLA 1986; am § 77 ch 14 SLA 1987; am § 12 ch 37 SLA 1989)

Effect of amendments. — The 1986 amendment added paragraphs (53) and (54) of subsection (a).

The 1987 amendment repealed paragraph (a)(46), which read "Department of Commerce and Economic Development concerning the fishery enhancement loan program (AS 16.10.500 — 16.10.620)."

The 1989 amendment, effective May 12, 1989, substituted "Big Game Commercial Services Board" for "Guide Licensing and Control Board" in paragraph (a)(35).

Opinions of attorney general. — The purpose of the adjudication procedure is to prescribe a fair procedure for determinations of fact; this is indicated by paragraph (d)(4), which excepts from the adjudication procedure related matters that in their context do not relate to procedure. 1963 Op. Att'y Gen., No. 10.

The policy of subsection (d) of this section is to limit the adjudication procedure set forth in the Administrative Procedure Act to procedural matters, and matters regarding which the agency must make substantial determinations of fact. 1963 Op. Att'y Gen., No. 10.

The words of subsection (d), "in a case ... reinstatement or reduction of penalty," refer to AS 44.62.550, which provides that a person whose license is revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year from the effective date of the decision or from the date of denial of the similar petition. 1963 Op. Att'y Gen., No. 10.

The accusation and hearing procedure set forth in the Administrative Procedure Act was not applicable to the suspension or revocation of liquor licenses by the Alcoholic Beverage Control Board after a conviction of a licensee of certain offenses as set forth in former AS 04.15.100(b). 1963 Op. Att'y Gen., No. 10.

The exceptions set forth in subsection(d) refer to situations in which there is no need for the agency to make a determination of fact since such facts have been determined by the courts. 1963 Op. Att'y Gen., No. 10.

Where the power to suspend or revoke a license is implied by the statutory authority to issue a license, it is clear that suspension or revocation may be ordered only after formal accusation and hearing as re-

quired by the Administrative Procedure Act. 1963 Op. Att'y Gen., No. 10.

Not all of this chapter, as it relates to workers' compensation proceedings, has been repealed by implication. For example, the Alaska Workers' Compensation Act is silent as to judicial review and the scope of judicial review. This chapter therefore applies, since there is nothing in the Alaska Workers' Compensation Act which covers the same ground or which is inconsistent with provisions in this chapter relating to judicial review and the scope of such review. 1959 Op. Att'y Gen., No. 24.

But this section and AS 44.62.450 were superseded with respect to workers' compensation hearings by AS 23.30.115 and 23.30.135 of the Alaska Workers' Compensation Act. 1959 Op. Att'y Gen., No. 24.

NOTES TO DECISIONS

Board of Governors of Alaska Bar Association. — The legislature expressly included the Board of Governors of the Alaska Bar Association as an agency subject to the adjudicative procedures of the Administrative Procedure Act (AS 44.62) under former paragraph (a)(22). In re Peterson, 499 P.2d 304 (Alaska 1972).

Administrative responsibility of Alaska Bar. — While the supreme court ultimately reserves the authority to determine whether or not an applicant should be admitted to the bar, considerable administrative responsibility has been delegated to the Alaska Bar Association. In re Peterson, 499 P.2d 304 (Alaska 1972).

Applicability to workers' compensation proceedings. — The legislature intended to substitute, upon the effective date of the Administrative Procedure Act, the judicial scope of review as provided therein for the judicial scope of review as provided in the Workers' Compensation Act. Manthey v. Collier, 367 P.2d 884 (Alaska 1962).

The superior court is controlled by the Administrative Procedure Act in proceedings, or in a review of proceedings from the Alaska Workers' Compensation Board. See Manthey v. Collier, 367 P.2d 884 (Alaska 1962). But see Aleutian Homes v. Fischer, 418 P.2d 769 (Alaska 1966).

The Administrative Procedure Act (AS 44.62) is applicable to Workers' Compensation Board hearings except where otherwise expressly provided in the Workers' Compensation Act. Employers Com. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

Act applies to leasing procedures. — The judicial review portions of the Administrative Procedure Act govern leasing procedures conducted by the Division of Lands under the Alaska Land Act. Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006 (Alaska 1967).

But not to termination of grazing leases. — The adjudicatory provisions of the Alaska Administrative Procedure Act do not apply to the termination of grazing leases by the state Division of Lands. McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974).

Nor to local school boards. — The Administrative Procedure Act by its express terms does not apply to local school boards. Matanuska-Susitna Borough v. Lum, 538 P.2d 994 (Alaska 1975).

Nor to boards of adjustment. — Boards of adjustment are not included on the list in subsection (a) of agencies, boards and administrative bodies specifically subject to this chapter. Galt v. Stanton, 591 P.2d 960 (Alaska 1979).

Under subsection (d), a hearing is not required before an alcoholic beverage dispensary license is suspended, although it would be permissible if the Alcoholic Beverage Control Board chose to grant it. Frontier Saloon, Inc. v. ABC Bd., 524 P.2d 657 (Alaska 1974).

Burden of proof. — While the Alaska Administrative Procedure Act, does not specifically state who has the burden of proof in administrative adjudications, it does provide in AS 44.62.460(e) that "Nothing herein shall be construed to alter the ordinary rules of burden of proof of judicial proceedings in Alaska." The foregoing provision coupled with the fact that under the Administrative Procedure Act a hearing to determine whether a license should be granted, issued or renewed shall be initiated by filing a "statement of issues" which must be served upon the person seeking the issuance or renewal of the license as the respondent (AS 44.62.370, AS 44.62.380), and against which the respondent may defend by filing a notice of defense (AS 44.62.390) impelled the supreme court to the conclusion that the burden of proof on the issue raised by the statement of issues was upon the state.

Alaska ABC Bd. v. Malcolm, Inc., 391 P.2d 441 (Alaska 1964).

Applied in Vick v. Board of Elec. Exmrs., 626 P.2d 90 (Alaska 1981).

Quoted in Pan American Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969).

Stated in Forth v. Northern Stevedoring & Handling Corp., 385 P.2d 944 (Alaska 1963); Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974); Wien Air Alaska Inc. v. Department of Revenue, 647 P.2d 1087 (Alaska 1982).

Cited in Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974); Sisters of Providence in Wash., Inc. v. Department of Health & Social Servs., 648 P.2d 970 (Alaska 1982); Kenai Peninsula Borough v. State, Dep't of Community & Regional Affairs, 751 P.2d 14 (Alaska 1988).

Collateral references. — 1 Am. Jur. 2d, Administrative Law, § 138 et seq.

73 C.J.S., Public Administrative Law and Procedure, § 115 et seq.

Sec. 44.62.340. Delegation of power by agencies. (a) An agency listed in AS 44.62.330 may delegate the power to act, to hear, and to decide, unless expressly prohibited by law.

(b) In a law enacted after April 29, 1959, where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide. (§ 1(1) (ch 2) ch 143 SLA 1959)

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Alaska Transportation Commission exempted. — Former AS 42.07.151(a) specifically exempted the Alaska Transportation Commission from the requirements of both this section, forbidding the delegation of the hearing power absent express statutory authorization, and AS 44.62.500, requiring the hearing officer to prepare a proposed decision and forbidding members of the applicable government agency from voting on the decision if they have not heard the evidence. Alaska Transp. Comm'n v. Gandia, 602 P.2d 402 (Alaska 1979).

Cited in In re Peterson, 499 P.2d 304 (Alaska 1972).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 221 to 226.

73 C.J.S., Public Administrative Law and Procedure, § 56.

Sec. 44.62.350. Appointment of hearing officers. (a) The governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter. The hearing officer may perform other duties in connection with the administration of this chapter and other laws.

(b) An agency with hearing officers may continue their employment as hearing officers on an unbiased and impartial basis within the particular agency and may hire additional officers and prescribe additional qualifications.

(c) A hearing officer hired after April 29, 1959, except to conduct hearings under AS 23.20 (Alaska Employment Security Act), shall

have been admitted to practice law for at least two years immediately before the appointment. (§ 3 (ch 2) ch 143 SLA 1959; am § 7 ch 5 SLA 1966)

NOTES TO DECISIONS

Stated in Alaska ABC Bd. v. Malcolm, Inc., 391 P.2d 441 (Alaska 1964).

Cited in In re Peterson, 499 P.2d 304 (Alaska 1972); Ketchikan Retail Liquor Dealers Ass'n v. State ABC Bd., 602 P.2d 434 (Alaska 1979).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 407 to 409, 434 to 440.

73 C.J.S., Public Administrative Law and Procedure, § 138.

Sec. 44.62.360. Accusation. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned is initiated by filing an accusation. The accusation must

(1) be a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged, so that the respondent is able to prepare a defense;

(2) specify the statute and regulation which the respondent is alleged to have violated, but may not consist merely of charges phrased in the language of the statute and regulation; and

(3) be verified, unless made by a public officer acting in an official capacity or by an employee of the agency on whose behalf the proceeding is to be held; the verification may be on information and belief. (§ 4 (ch 2) ch 143 SLA 1959)

Opinions of attorney general. — This section regarding a formal accusation, contemplates the proceeding in which the agency must make determinations of fact. 1963 Op. Att'y Gen., No. 10.

The accusation provision is obviously inapplicable to a case in which a court of competent jurisdiction has entered a judgment regarding the acts or omissions for which a penalty may be inflicted. 1963 Op. Att'y Gen., No. 10.

NOTES TO DECISIONS

Private individual could not file accusation. — A member of the public could not compel agency action by filing an accusation before the agency. Vick v. Board of Elec. Exmrs., 626 P.2d 90 (Alaska 1981).

When reading this section with AS 44.62.330(d)(4), it becomes clear that the "unless" language in clause (3) of the former provides a means by which administrative agencies themselves may choose to permit a private individual to file an accusation. Vick v. Board of Elec. Exmrs., 626 P.2d 90 (Alaska 1981).

"Unless" language of clause (3) not superfluous. — The words "unless made by a public officer . . . or by an employee of the agency" in clause (3) of this section are not superfluous, even though private individuals are not permitted to file accusations. Vick v. Board of Elec. Exmrs., 626 P.2d 90 (Alaska 1981).

Sec. 44.62.370. Statement of issues. (a) A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed is initiated by filing a statement of issues. The statement of issues is a written statement specifying

(1) the statute and regulation with which the respondent must show compliance by producing proof at the hearing; and

(2) particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought.

(b) The statement of issues shall be verified unless made by a public officer acting in an official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

(c) The statement of issues shall be served in the same manner as an accusation, except that if the hearing is held at the request of the respondent

(1) AS 44.62.380 and 44.62.390 do not apply; and

(2) the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in AS 44.62.420. (§ 5 (ch 2) ch 143 SLA 1959)

Opinions of attorney general. — The requirement of the written statement of issues is inapplicable to a case in which the court has already found that the party involved has not complied with the statute or rule. 1963 Op. Att'y Gen., No. 10.

NOTES TO DECISIONS

Quoted in Ketchikan Retail Liquor Dealers Ass'n v. State ABC Bd., 602 P.2d 434 (Alaska 1979).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 417, 715, 717, 727.

Sec. 44.62.380. Service of accusation. (a) Upon filing the accusation, the agency

(1) shall serve a copy of the accusation on the respondent as provided in (c) of this section;

(2) shall include with the accusation a post card or other form entitled "Notice of Defense" that, when signed by or on behalf of the respondent and returned to the agency, acknowledges service of the accusation and constitutes a notice of defense under AS 44.62.390;

(3) shall include in or with the copy of the accusation a statement that respondent may request a hearing by filing a notice of defense as provided in AS 44.62.390 within 15 days after the accusation is served

on the respondent and that failure to do so constitutes a waiver of the right to a hearing;

(4) may include with the accusation any information that it considers appropriate.

(b) The statement to respondent must be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled "Notice of Defense," or by delivering or mailing a notice of defense as provided by AS 44.62.390 to: (here insert name and address of agency).

(c) The accusation and all accompanying information may be sent to the respondent by any means selected by the agency. However, an order adversely affecting the rights of the respondent may not be made by the agency unless the respondent is served personally or by registered mail, files a notice of defense, or otherwise appears. Service may be proved in the manner authorized in civil actions. Service by registered mail is effective if a statute or agency regulation requires the respondent to file an address with the agency and to notify the agency of a change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency. (§ 6 (ch 2) ch 143 SLA 1959)

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 359 to 364. 73 C.J.S., Public Administrative Law and Procedure, §§ 134, 135.

Sec. 44.62.390. Notice of defense. (a) Within 15 days after service upon the respondent of the accusation, the respondent may file with the agency a notice of defense. In the notice the respondent may

(1) request a hearing;

(2) object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed;

(3) object to the form of the accusation on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense;

(4) admit the accusation in whole or in part;

(5) present new matter by way of defense.

(b) Within the time specified the respondent may file one or more notices of defense upon any or all of the grounds set out in (a) of this section but all of the notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(c) The respondent is entitled to a hearing on the merits if the respondent files a notice of defense, and the notice of defense is considered a specific denial of all parts of the accusation not expressly admitted. Failure to file the notice constitutes a waiver of the respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in (a) (3) of this section, all objections to the form of the accusation are waived.

(d) The notice of defense must be in writing, signed by or on behalf of the respondent, and must state the respondent's mailing address. It need not be verified or follow a particular form. (§ 7 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Cited in Ketchikan Retail Liquor Dealers Ass'n v. State ABC Bd., 602 P.2d 434 (Alaska 1979).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, § 417.

Sec. 44.62.400. Amended or supplemental accusation. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified of the filing. If the amended or supplemental accusation presents new charges the agency shall give the respondent a reasonable opportunity to prepare a defense to it, but the respondent is not entitled to file a further pleading unless the agency in its discretion so orders. New charges are considered controverted. Objections to the amended or supplemental accusation may be made orally and shall be noted in the record. (§ 8 (ch 2) ch 143 SLA 1959)

Sec. 44.62.410. Time and place of hearing. (a) The agency shall determine the time and place of hearing. The hearing shall be held in Juneau or Ketchikan, whichever is closer to the place where the transaction occurred or where the respondent resides, if the transaction occurred in or the respondent resides in the Southeastern Senate District; in Anchorage if the transaction occurred or the respondent resides within the South Central Senate District; in Fairbanks or Nome, whichever is closer to the place where the transaction occurred or where the respondent resides, if the transaction occurred in or the respondent resides in the Central or Northwestern Senate Districts. The agency may, if the transaction occurred in a senate district other than that of respondent's residence, select the place of hearing appropriate for either district. The agency may select a different place nearer the place where the transaction occurred or where the respon-

dent resides, or the parties by agreement may select any place in the state.

(b) Upon the mutual agreement of the parties, the agency may use teleconferencing in the conduct of a hearing under this section. (§ 9 (ch 2) ch 143 SLA 1959; am § 5 ch 54 SLA 1985)

Revisor's notes. — The Senate districts referred to in subsection (a) are somewhat similar to the judicial districts established under AS 22.10.010. Compare AS 22.10.010 with § 2, art. XIV, Alaska Constitution, as that provision existed in March, 1959.

Effect of amendments. — The 1985 amendment added subsection (b).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, § 405.

73 C.J.S., Public Administrative Law and Procedure, § 137.

Sec. 44.62.420. Form of notice of hearing. (a) The agency shall deliver or mail a notice of hearing to all parties at least 10 days before the hearing. The hearing may not be held before the expiration of the time within which the respondent is entitled to file a notice of defense.

(b) The notice to respondent must be substantially in the following form but may include other information:

You are notified that a hearing will be held before (here insert name of agency) at (here insert place of hearing) upon the ..... day of....., 19..., at the hour of....., upon the charges made in the accusation served upon you. You may be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You may have subpoenas issued to compel the attendance of witnesses and the production of books, documents or other things by applying to (here insert appropriate office or agency). (§ 10 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Cited in Hale v. Vitale, 751 P.2d 488 (Alaska 1988).

Sec. 44.62.430. Subpoenas. (a) Before the hearing begins the agency shall issue subpoenas and subpoenas duces tecum at the request of a party in accordance with the rules of civil procedure. After the hearing begins the agency hearing a case or a hearing officer sitting alone may issue subpoenas and subpoenas duces tecum.

(b) A subpoena issued under (a) of this section extends to all parts of the state and shall be served in accordance with the rules of civil procedure. A witness is not obliged to attend at a place out of the election district in which the witness resides unless the distance is less than 100 miles from the place of residence, except that the agency, upon affidavit of a party showing that the testimony of the

witness is material and necessary, may endorse on the subpoena an order requiring the attendance of the witness.

(c) A witness who is not a party and who appears under a subpoena is entitled to receive

(1) fees, except a witness who is an officer or employee of the state or a political subdivision of the state;

(2) mileage in the same amount and under the same circumstances as prescribed by law for a witness in a civil action in a superior court;

(3) an additional fee and mileage to a per diem compensation of $15 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing, if the witness attends a hearing at a point so far removed from the residence of the witness as to prohibit return to the residence from day to day.

(d) Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed. (§ 11 (ch 2) ch 143 SLA 1959)

Cross references. — For issuance and service of subpoenas, see Civil Rule 45, Alaska Rules of Court; for witness fees for mileage, see Administrative Rule 7(b), Alaska Rules of Court.

Opinions of attorney general. — AS 23.30.115 and 23.30.135 cover much the same ground as AS 44.62.430, 44.62.440 and AS 44.62.460 of the earlier Administrative Procedure Act. This would have been unnecessary if the intent had been that the Administrative Procedure Act should govern the procedure for hearings in workers' compensation hearings. 1959 Op. Att'y Gen., No. 24.

The Alaska Police Standards Council cannot request the issuance of subpoenas for investigative police reports or documents from other agencies without having initiated proceedings for revocation of a certificate under the Administrative Procedure Act. November 24, 1930, Op. Att'y Gen.

NOTES TO DECISIONS

Applied in Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

Collateral references. — 1 and 2 Am. Jur. 2d, Administrative Law. §§ 89 to 91, 263 to 272.

73 C.J.S., Public Administrative Law and Procedure, §§ 131, 132.

Power of administrative agency, in investigation of nonjudicial nature, to issue subpoenas against persons not subject to agency's regulatory jurisdiction, 27 ALR2d 1208.

Sec. 44.62.440. Depositions. (a) On verified petition of a party, an agency may order that the testimony of a material witness residing inside or outside the state be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition must set out

(1) the nature of the pending proceeding;

(2) the name and address of the witness whose testimony is desired;

(3) a showing of the materiality of the testimony;

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witness is material and necessary, may endorse on the subpoena an order requiring the attendance of the witness.

(c) A witness who is not a party and who appears under a subpoena is entitled to receive

(1) fees, except a witness who is an officer or employee of the state or a political subdivision of the state;

(2) mileage in the same amount and under the same circumstances as prescribed by law for a witness in a civil action in a superior court;

(3) an additional fee and mileage to a per diem compensation of $15 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing, if the witness attends a hearing at a point so far removed from the residence of the witness as to prohibit return to the residence from day to day.

(d) Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed. (§ 11 (ch 2) ch 143 SLA 1959)

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Opinions of attorney general. — AS 23.30.115 and 23.30.135 cover much the same ground as AS 44.62.430, 44.62.440 and AS 44.62.460 of the earlier Administrative Procedure Act. This would have been unnecessary if the intent had been that the Administrative Procedure Act should govern the procedure for hearings in workers' compensation hearings. 1959 Op. Att'y Gen., No. 24.

The Alaska Police Standards Council cannot request the issuance of subpoenas for investigative police reports or documents from other agencies without having initiated proceedings for revocation of a certificate under the Administrative Procedure Act. November 24, 1980, Op. Att'y Gen.

NOTES TO DECISIONS

Applied in Commercial Union Cos. v. Smallwood, 550 P.2d 1231 (Alaska 1976).

Collateral references. — 1 and 2 Am. Jur. 2d, Administrative Law, §§ 89 to 91, 263 to 272.

73 C.J.S., Public Administrative Law and Procedure, §§ 131, 132.

Power of administrative agency, in investigation of nonjudicial nature, to issue subpoenas against persons not subject to agency's regulatory jurisdiction, 27 ALR2d 1208.

Sec. 44.62.440. Depositions. (a) On verified petition of a party, an agency may order that the testimony of a material witness residing inside or outside the state be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition must set out

(1) the nature of the pending proceeding;

(2) the name and address of the witness whose testimony is desired;

(3) a showing of the materiality of the testimony;

(4) a showing that the witness will be unable or cannot be compelled to attend; and

(5) a request for an order requiring the witness to appear and testify before an officer named in the petition for that purpose.

(b) If the witness resides outside the state and if the agency orders the taking of the testimony of the witness by deposition, the agency shall obtain an order of court to that effect by filing a petition for the taking of the deposition in the superior court nearest to the principal office of the agency. The proceedings on this order shall be in accordance with provisions governing the taking of depositions in the superior court in a civil action. (§ 12 (ch 2) ch 143 SLA 1959)

Cross references. — For depositions generally, see Civil Rules 28 — 31, Alaska Rules of Court.

Opinions of attorney general. — AS 23.30.115 and 23.30.135 cover much the same ground as AS 44.62.430, 44.62.440 and AS 44.62.460 of the earlier Administrative Procedure Act. This would have been unnecessary if the intent had been that the Administrative Procedure Act should govern the procedure for hearings in workers' compensation hearings. 1959 Op. Att'y Gen., No. 24.

NOTES TO DECISIONS

Procedure for granting petitions for deposition. — Petitions filed pursuant to subsection (a) of this section may be granted without a hearing, although it should remain open for a party opponent to file a motion to quash the deposition with the agency on such grounds as may be appropriate; and in determining the appropriateness of such a motion, the agency should look to the requirements of this section and, by analogy, to Civ. R. 26 through 32. State v. Thompson, 612 P.2d 1015 (Alaska 1980).

Out-of-state resident deposed in Alaska. — Subsection (b) of this section is intended to apply where a deposition is taken out of the state, and thus, where an out-of-state resident is to be deposed in Alaska, a superior court order is not necessary. State v. Thompson, 612 P.2d 1015 (Alaska 1980).

Sec. 44.62.450. Hearings. (a) A hearing in a contested case shall be presided over by a hearing officer. The agency itself shall determine whether the hearing officer hears the case alone or whether the agency hears the case with the hearing officer.

(b) If the agency hears the case the hearing officer shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law. The agency shall exercise all other powers relating to the conduct of the hearing, but may delegate any or all of these other powers to the hearing officer. If the hearing officer hears a case alone, the hearing officer shall exercise all powers relating to the conduct of the hearing.

(c) A hearing officer or agency member shall voluntarily seek disqualification and withdraw from a case in which the hearing officer or agency member cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is

claimed that a fair and impartial hearing cannot be accorded. If the request concerns an agency member the issue shall be determined by the other members of the agency. If the request concerns the hearing officer, the issue shall be determined by the agency when the agency hears the case with the hearing officer, and by the hearing officer when the officer hears the case alone. An agency member may not withdraw voluntarily or be disqualified if the disqualification would prevent the existence of a quorum qualified to act in the particular case.

(d) The proceedings at the hearing shall be reported by a phonographic reporter or recorder, or other adequate means of assuring an accurate record. (§ 13 (ch 2) ch 143 SLA 1959)

Opinions of attorney general. — Difference between hearings under this section and AS 44.62.210 and distinction between "adjudicative facts" and "legislative facts". See 1960 Op. Att'y Gen., No. 7.

This section and AS 44.62.330 were superseded with respect to workers' compensation hearings by the Alaska Workers' Compensation Act. 1959 Op. Att'y Gen., No. 24.

This article was intended to be applicable to quasi-judicial proceedings such as a dispute as to adjudicative fact under Banking Code and not to quasi-legislative proceedings, which are governed by article 4. Article 4 of this chapter sets forth the procedure which must be followed when an agency exercises its quasi-legislative power. 1960 Op. Att'y Gen., No. 7.

This article provides for adjudication and the kind of hearing which would be designated a trial. 1960 Op. Att'y Gen., No. 7.

NOTES TO DECISIONS

Quoted in Alaska Redi-Mix, Inc. v. Alaska Workmen's Comp. Bd., 417 P.2d 595 (Alaska 1966).

Stated in Alaska ABC Bd. v. Malcolm, Inc., 391 P.2d 441 (Alaska 1964).

Cited in Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979); Hale v. Vitale, 751 P.2d 488 (Alaska 1988).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 397 to 426.

73 C.J.S., Public Administrative Law and Procedure, §§ 134 to 160.

Comment note on right of assistance by counsel in administrative proceedings, 33 ALR3d 229.

Sec. 44.62.460. Evidence rules. (a) Oral evidence may be taken only on oath or affirmation.

(b) Each party may

(1) call and examine witnesses;

(2) introduce exhibits;

(3) cross-examine opposing witnesses on matter relevant to the issues, even though that matter was not covered in the direct examination;

(4) impeach a witness regardless of which party first called the witness to testify; and

(5) rebut the adverse evidence.

(c) If the respondent does not testify in behalf of the respondent, the respondent may be called and examined as if under cross-examination.

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded.

(e) Nothing in this chapter may be construed to alter the ordinary rules of burden of proof of judicial proceedings in the state. (§ 14 (ch 2) ch 143 SLA 1959; am § 8 ch 5 SLA 1966)

Opinions of attorney general. — AS 23.30.115 and 23.30.135 cover much the same ground as AS 44.62.430, 44.62.440 and AS 44.62.460 of the earlier Administrative Procedure Act. This would have been unnecessary if the intent had been that the Administrative Procedure Act should govern the procedure for hearings in workers' compensation hearings. 1959 Op. Att'y Gen., No. 24.

NOTES TO DECISIONS

The Administrative Procedure Act (AS 44.62) is applicable to Workers' Compensation Board hearings except where otherwise expressly provided in the Workers' Compensation Act. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

Alaska's Administrative Procedure Act is applicable to Workers' Compensation Board hearings. Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

Subsection (d) applies to compensation proceedings. Cook v. Alaska Workmen's Comp. Bd., 476 P.2d 29 (Alaska 1970).

And it specifically allows for the consideration of hearsay evidence. Cook v. Alaska Workmen's Comp. Bd., 476 P.2d 29 (Alaska 1970).

Compensation hearings need not be conducted according to technical rules of evidence and hearsay evidence may be used in board hearings. Whaley v. Alaska Workers' Comp. Bd., 648 P.2d 955 (Alaska 1982).

Board was authorized to exclude untrustworthy testimony by claimant regarding discussion with physician concerning cause and extent of his medical condition. Whaley v. Alaska Workers' Comp. Bd., 648 P.2d 955 (Alaska 1982).

Language of subsection (d) of this section gives board discretion to exclude hearsay evidence where it appears untrustworthy. Whaley v. Alaska Workers' Comp. Bd., 648 P.2d 955 (Alaska 1982).

But it does not abrogate right to cross-examination. — Subsection (d) of this section and AS 23.30.135(a), statutes permitting informal administrative proceedings, were never intended to, and could not, abrogate the right to cross-examination in an adjudicatory proceeding. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974); Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

Such right is absolute. — The statutory right to cross-examination is absolute and applicable to the Alaska Workers' Compensation Board. Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

When right to cross-examine not waived. — A party does not waive his

right of cross-examination when to exercise that right would have required that party to bear the initial cost of producing the witness at the hearing. Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

Given the absence of any Workers' Compensation Board rule pertaining to medical reports which parallels its affidavit rule, and in light of the absence of a system requiring notice of intention to cross-examine to be filed before hearing when medical reports are served upon opposing parties pursuant to the Board's current medical report rules, the superior court erred in its conclusion that appellants had waived their right to cross-examine the doctors who had authored the reports. Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

Failing to engage in discovery is not a waiver of the right to challenge the evidence which is adduced at a Workers' Compensation Board hearing. Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

Eight AAC § 45.120(c) parallels subsection (b) of this section. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

The supreme court must interpret subsection (b) and 8 AAC § 45.120(c) identically. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

Burden of proof. — See same catchline in note to AS 44.62.330.

Applied in Employers Com. Union Ins. Cos. v. Schoen, 554 P.2d 1146 (Alaska 1976).

Quoted in Brown v. Northwest Airlines, 444 P.2d 529 (Alaska 1968).

Cited in Ketchikan Retail Liquor Dealers Ass'n v. State ABC Bd., 602 P.2d 434 (Alaska 1979).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 376 to 396.

73 C.J.S., Public Administrative Law and Procedure, §§ 125 to 130.

Necessity of some evidence at hearing to support decision of public board or official required to be made after or upon hearing, 123 ALR 1349.

Administrative decision or finding based on evidence secured outside of hearing, and without presence of interested party or counsel, 18 ALR2d 552.

Administrative decision by officer not present when evidence was taken, 18 ALR2d 606.

Weight, in administrative proceeding, of evidence of surveys or polls of public or consumer's opinion, recognition, preference, or the like, 76 ALR2d 633.

Comment Note on hearsay evidence in proceedings before state administrative agencies, 36 ALR3d 12.

Sec. 44.62.470. Evidence by affidavit. (a) At any time 10 or more days before a hearing or a continued hearing, a party may mail or deliver to the opposing party a copy of an affidavit that the party proposes to introduce in evidence, together with a notice as provided in (b) of this section. Unless the opposing party, within seven days after that mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, the party's right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not given after request for it is made, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in (a) of this section must be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceed-

ing). (Here insert name of affiant) will not be called to testify orally and you may not question the affiant unless you notify (here insert name of proponent or the proponent's attorney) at (here insert address) that you wish to cross-examine the affiant. To be effective your request must be mailed or delivered to (here insert name of proponent or the proponent's attorney) before (here insert a date eight days after the date of mailing or delivering the affidavit to the opposing party). (§ 15 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Cited in Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

Sec. 44.62.480. Official notice. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of a generally accepted technical or scientific matter within the agency's special field, and of a fact that is judicially noticed by the courts of the state. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to in the record, or appended to it. A party present at the hearing shall, upon request, be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or oral presentation of authority. The agency shall determine the manner of this refutation. (§ 16 (ch 2) ch 143 SLA 1959)

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 384, 385.

Sec. 44.62.490. Amendment of accusation after submission. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that the party will be prejudiced by it unless the case is reopened to permit the introduction of additional evidence in behalf of the party. If prejudice is shown, the agency shall reopen the case to permit the introduction of additional evidence. (§ 17 (ch 2) ch 143 SLA 1959)

Sec. 44.62.500. Decision in a contested case. (a) If a contested case is heard before an agency

(1) the hearing officer who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency; and

(2) a member of the agency who has not heard the evidence may not vote on the decision.

(b) If a contested case is heard by a hearing officer alone, the hearing officer shall prepare a proposed decision in a form that may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record with the lieutenant governor and a copy of the proposed decision shall be served by the agency on each party in the case and the party's attorney. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

(c) If the proposed decision is not adopted as provided in (b) of this section the agency may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence. If the case is so assigned the hearing officer shall prepare a proposed decision as provided in (b) of this section upon the additional evidence and the transcript and other papers which are part of the record of the earlier hearing. A copy of the proposed decision shall be furnished to each party and the party's attorney as prescribed by (b) of this section. The agency may not decide a case provided for in this subsection without giving the parties the opportunity to present either oral or written argument before the agency. If additional oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the additional oral evidence. (§ 18 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Presence of hearing officer at agency's deliberations. — The State Medical Board did not violate subsection (b) of this section in allowing the hearing officer to be present during the board's closed executive session. Rosi v. State Medical Bd., 665 P.2d 28 (Alaska), cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

The absence of a mandatory phrase requiring the hearing officer's presence in subsection (b) deliberations cannot reasonably be interpreted to deprive the board of the discretion to receive valuable assistance from the hearing officer in a case which clearly requires the hearing officer's assistance. Storrs v. State Medical Bd., 664 P.2d 547 (Alaska), cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

Alaska Transportation Commission exempted. — Former AS 42.07.151(a) specifically exempted the Alaska Transportation Commission from the requirements of both AS 44.62.340, forbidding the delegation of the hearing power absent express statutory authorization, and this section, requiring the hearing officer to prepare a proposed decision and forbidding members of the applicable government agency from voting on the decision if they have not heard the evidence. Alaska Transp. Comm'n v. Gandia, 602 P.2d 402 (Alaska 1979).

Applied in DeNardo v. State, 740 P.2d 453 (Alaska 1987).

Cited in In re Peterson, 499 P.2d 304 (Alaska 1972); Grunert v. State, Com. Fisheries Entry Comm'n, 735 P.2d 118 (Alaska 1987).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 434 to 472.

73 C.J.S., Public Administrative Law and Procedure, §§ 143 to 160.

Sec. 44.62.510. Form and effect of decision. (a) A decision shall be written and must contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference to them. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

(b) A decision in a primarily judicial proceeding has retroactive effect in the same manner as a decision of a state court. (§ 19 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Decision must contain findings of fact. — Under the Administrative Procedure Act a decision of the Workers' Compensation Board is required to contain findings of fact. Brown v. Northwest Airlines, 444 P.2d 529 (Alaska 1968).

Findings must be made pursuant to this section and AS 44.62.570(b). — Findings of fact supporting compensation awards must be made pursuant to subsection (a) of this section and AS 44.62.570(b). Hewing v. Alaska Workmen's Comp. Bd., 512 P.2d 896 (Alaska 1973).

Findings need not accompany acceptance of petition for borough incorporation. — The supreme court found no statutory command that findings of fact accompany acceptance of a petition for borough incorporation. Mobile Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974).

Former AS 07.10.110, which permitted judicial review of the local boundary commission's acceptance of a petition to incorporate a proposed organized borough "in the manner and within the scope of review prescribed by the Administrative Procedure Act (AS 44.62)," when read together with this section, did not create an obligation on the part of the local boundary commission to make findings of fact. Mobile Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974).

Failure to follow section constitutes abuse of discretion. — Where the written decision of the Workers' Compensation Board contained no such findings as required by this section, the board abused its discretion. Manthey v. Collier, 367 P.2d 884 (Alaska 1962).

Disclosure of basis for determination of motions to dismiss. — The Workers' Compensation Board should either file a separate order or in its decision make findings which disclose the basis for its determination of motions to dismiss. Morrison-Knudsen Co. v. Vereen, 414 P.2d 536 (Alaska 1966); Alaska Redi-Mix, Inc. v. Alaska Workmen's Comp. Bd., 417 P.2d 595 (Alaska 1966).

Quoted in Wien Air Alaska Inc. v. Department of Revenue, 647 P.2d 1087 (Alaska 1982); State, ABC Bd. v. Decker, 700 P.2d 483 (Alaska 1935).

Cited in Ketchikan Retail Liquor Dealers Ass'n v. State ABC Bd., 602 P.2d 434 (Alaska 1979).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 460 to 462, 473 to 505.

73 C.J.S., Public Administrative Law and Procedure, § 143 et seq.

Stare decisis doctrine as applicable to decisions of administrative agencies, 79 ALR2d 1126.

Sec. 44.62.520. Effective date of decision. (a) A decision becomes effective 30 days after it is delivered or mailed to the respondent unless

(1) a reconsideration is ordered within that time;

(2) the agency itself orders that the decision become effective sooner; or

(3) a stay of execution is granted for a particular purpose and not to postpone judicial review.

(b) A stay of execution may be included in the decision or, if not included in it, may be granted by the agency at any time before the decision becomes effective. The stay of execution may be accompanied by an express condition that the respondent comply with specified terms of probation. The terms of probation shall be just and reasonable in the light of the findings and decision.

(c) If the respondent was required to register with a public officer, a notification of suspension or revocation shall be sent to that officer after the decision becomes effective. (§ 20 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Applied in DeNardo v. State, 740 P.2d 453 (Alaska 1987).

Quoted in Pan Am. Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969); Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

Sec. 44.62.530. Default. If the respondent does not file a notice of defense or does not appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without notice to the respondent. If the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence. Nothing in this chapter may be construed to deprive the respondent of the right to make a showing by way of mitigation. (§ 21 (ch 2) ch 143 SLA 1959)

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 365, 366.

Sec. 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS

44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence. (§ 22 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Subsection (a) applies only to reconsideration by the specific "agency" that actually made the decision, not the more comprehensive agency. Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

Intra-departmental review not precluded. — Subsection (a) does not preclude the kind of intra-departmental review presented where the commissioner of the Department of Natural Resources reviews the decision of the director of the division of lands, denying an application for discovery well certification, particularly where such review is authorized by statute. Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

Even though the administrative code provisions refer to the commissioner's action on petition for reconsideration, where the director of the division of lands, has denied an application for discovery well certification, as "reconsideration," the actual process is that of the "review" authorized by AS 38.05.020(b)(3). Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

"Review" and "reconsideration" compared. — Both "review" and "reconsideration" in a broad sense refer to a reexamination of acts or a course of proceedings. But as normally used in the context of administrative adjudication, "review" implies a consideration of a case by one other than the entity which initially decides it, while "reconsideration" implies a re-examination, and possibly a different decision, of a case by the entity which initially decides it. Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

Time limitation on right to seek judicial review. — Subsection (a) and AS 44.62.560(a) seem to combine to allow only 60 days after delivery or mailing of a decision within which to seek review in the courts, where the agency has not responded to a petition for reconsideration within 30 days after delivery of its decision. Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

Applied in DeNardo v. State, 740 P.2d 453 (Alaska 1987).

Quoted in Pan Am. Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969), Owsichek v. State, Guide Licensing & Control Bd., 627 P.2d 616 (Alaska 1981).

Cited in In re Peterson, 499 P.2d 304 (Alaska 1972); Jeffries v. Glacier State Tel. Co., 604 P.2d 4 (Alaska 1979); Anderson v. State, Com. Fisheries Entry Comm'n, 654 P.2d 1320 (Alaska 1982).

Collateral references. — 2 Am. Jur. 2d, Public Administrative Law, §§ 520 to 538.

73 C.J.S., Public Administrative Law and Procedure, §§ 161 to 165.

Power of administrative agency to reopen and reconsider final decision as affected by lack of specific statutory authority, 73 ALR2d 939.

Sec. 44.62.550. Petition for reinstatement or reduction of penalty. A person whose license is revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the attorney general of the filing of the petition, and the attorney general and the petitioner shall be given an opportunity to present either oral or written argument before the agency. The agency shall decide the petition, and the decision shall include the reasons for the decision. This section

does not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty. (§ 23 (ch 2) ch 143 SLA 1959)

Opinions of attorney general. — The words of AS 44.62.330(d), "in a case of reinstatement or reduction of penalty," refer to this section, which provides that a person whose license is revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year from the effective date of the decision or from the date of denial of the similar petition. 1963 Op. Att'y Gen., No. 10.

A hearing to determine whether a penalty should be reduced or reinstated is necessary under this section, because such a determination requires the agency to make findings of fact regarding conditions which have changed since the imposition of the penalty at least one year previous. 1963 Op. Att'y Gen., No. 10.

Sec. 44.62.560. Judicial review. (a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. Except as otherwise provided in this section, the notice of appeal shall be filed within 30 days after the last day on which reconsideration can be ordered, and served on each party to the proceeding. The right to appeal is not affected by the failure to seek reconsideration before the agency.

(b) The complete record of the proceedings, or the parts of it which the appellant designates, shall be prepared by the agency. A copy shall be delivered to all parties participating in the appeal. The original shall be filed in the superior court within 30 days after the appellant pays the estimated cost of preparing the complete or designated record or files a corporate surety bond equal to the estimated cost.

(c) The complete record includes

(1) the pleadings;

(2) all notices and orders issued by the agency;

(3) the proposed decision by a hearing officer;

(4) the final decision;

(5) a transcript of all testimony and proceedings;

(6) the exhibits admitted or rejected;

(7) the written evidence; and

(8) all other documents in the case.

(d) Upon order of the superior court, appeals may be taken on the original record or parts of it. The record may be typewritten or duplicated by any standard process. Analogous rules of court governing appeals in civil matters shall be followed where this chapter is silent, and when not in conflict with this chapter.

(e) The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action. (§ 24 (ch 2) ch 143 SLA 1959)

Cross references. — For court rule provisions that supersede some of the provisions of this section, see Appellate Rules 601 — 611, Alaska Rules of Court.

NOTES TO DECISIONS

This section and AS 44.62.570 prescribe the manner and scope of judicial review. Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974).

But they do not address the form of an agency's determinations. Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974).

Effect of court judgment. — Where a superior court judgment affirmed a labor relations agency decision based on plaintiff's failure to file a timely appeal, the validity or invalidity of the underlying agency decision is irrelevant to the validity of the subsequent affirmance. DeNardo v. State, 740 P.2d 453 (Alaska), appeal dismissed and cert. denied, U. S. , 108 S. Ct. 277, 98 L. Ed. 2d 239 (1987).

When review is proper. — Review is proper where postponement of appellate review until a final judgment is entered by the superior court may result in injustice because of impairment of a legal right and where the order sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court. Mukluk Freight Lines v. Nabors Alaska Drilling, Inc., 516 P.2d 408 (Alaska 1973).

When order is final. — An order by the trial court as a general rule is said to be final if it completely and finally disposes of the contested claims on their merits. Mukluk Freight Lines v. Nabors Alaska Drilling, Inc., 516 P.2d 408 (Alaska 1973).

The term "finality" is subject to several definitions. Mukluk Freight Lines v. Nabors Alaska Drilling, Inc., 516 P.2d 408 (Alaska 1973).

Final administrative determination. — The rejection of an application for a permit constituted a final administrative determination where there was no more time to submit evidence or alter the decision through administrative means. Ostman v. State, Com. Fisheries Entry Comm'n, 678 P.2d 1323 (Alaska 1984).

Applicable standard for review of agency determination. — See Mukluk Freight Lines v. Nabors Alaska Drilling, Inc., 516 P.2d 408 (Alaska 1973).

The heading of article 8, "Administrative Adjudications," is not determinative of whether this section and AS 44.62.570 apply solely to adjudicatory proceedings, since such headings are not part of the law of Alaska. Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979).

Action of the Alcoholic Beverage Control Board in considering and approving a license application was an administrative adjudication. Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979).

Who may appeal order. — Although this section does not specify who may appeal the order, it is interpreted to create a right of appeal in the parties to an administrative hearing. Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979).

Although not party to action, city had standing to appeal a decision of the utilities commission because it (1) was directly interested in the proceedings, (2) was factually aggrieved by the decision, and (3) participated in the proceedings. City of Kenai v. State, Pub. Utils. Comm'n, 736 P.2d 760 (Alaska 1987).

"Parties". — Persons permitted to appear at a public hearing authorized by former AS 04.05.030(c) were parties to that proceeding. Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979).

Necessary parties. — It is too broad a reading of this section to conclude that the phraseology "final administrative order" manifests a legislative intent that the director of the division of lands, or the State of Alaska, are necessary parties to any appeal from the director's grant or rejection of an application for royalty allowance once the same has been contested. Pan Am. Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969).

Time limit for filing subject to appellate rules. — See Owsichek v. State, Guide Licensing & Control Bd., 627 P.2d 616 (Alaska 1981).

Time limitation set by AS 44.62.540(a) and subsection (a). — AS 44.62.540(a) and subsection (a) of this sec-

tion seem to combine to allow only 60 days after delivery or mailing of a decision within which to seek review in the courts, where the agency has not responded to a petition for reconsideration within 30 days after delivery of its decision. Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

"Review" and "reconsideration" compared. — Both "review" and "reconsideration" in a broad sense refer to a re-examination of acts or a course of proceedings. But as normally used in the context of administrative adjudication, "review" implies a consideration of a case by one other than the entity which initially decides it, while "reconsideration" implies a re-examination, and possibly a different decision, of a case by the entity which initially decides it. Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

Judicial review without exhaustion of remedies. — Pan Am. Petroleum Corp. v. Shell Oil Co., Sup. Ct. Op. No. 553 (File No. 918), 455 P.2d 12 (1969), establishes the propriety of seeking judicial review of a division of lands decision without exhausting further remedies within the Department of Natural Resources. But it does not prohibit the pursuit of further remedies within the department where those remedies exist pursuant to statutory authority and promulgated regulations, such as AS 38.05.020 and 11 AAC 516.32. Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

There are situations in which one may possess the alternatives of either seeking judicial review directly from a decision of the division of lands or seeking review by the commissioner and then invoking judicial review. Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

Failure to file an appeal within strict time limitations does not create a jurisdictional defect. McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974).

Extension of time limitations for filing appeal is procedural. — The superior court's decision in extending the time limitations for filing an appeal only involved a procedural matter and was entirely proper since in analogous procedural matters, Alaska Civ. R. 94 permits a superior court to relax the filing deadlines provided in the civil rules. McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974).

No abuse of discretion in relaxing 30-day requirement. — Due to the confusion concerning the time limitations for appealing administrative decisions, the trial court did not abuse its discretion in relaxing the 30-day requirement of this section. McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974).

For express authority to the superior court to relax the time limitation for appeals from administrative boards, see Alaska App. R. 45(i). McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974).

Initiation of review of order of Workers' Compensation Board. — Where a party to a proceeding before the Alaska Workers' Compensation Board seeks review in superior court of a board order, such review must be initiated by the injunction procedures made obligatory by AS 23.30.125(c). Aleutian Homes v. Fischer, 418 P.2d 769 (Alaska 1966).

Action for injunctive relief seeking same review as under appeal. — When an action for injunctive relief seeks exactly the same review by the superior court as could be had in an appeal from the administrative order, the action should be treated as an appeal. Owsichek v. State, Guide Licensing & Control Bd., 627 P.2d 616 (Alaska 1981), providing that to the extent that this holding is inconsistent with the discussion of the issue in United States v. RCA Alaska Communications, Inc., 597 P.2d 489 (Alaska 1979), this holding takes precedence.

Complaint for injunctive relief is distinct from an appeal of an administrative order. United States v. RCA Alaska Communications, Inc., 597 P.2d 489 (Alaska 1978).

See note under catchline "Action for injunctive relief seeking same review as under appeal," Owsichek v. State, Guide Licensing & Control Bd., 627 P.2d 616 (Alaska 1981).

Factors required for issuance of preliminary injunction. — The coexistence of three factors is required in order to justify the issuance of a preliminary injunction: (1) The plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise "serious" and "substantial" questions going to the merits of the case; that is, the issues raised cannot be "frivolous or obviously without merit." Keystone Servs., Inc. v.

Alaska Transp. Comm'n, 568 P.2d 952 (Alaska 1977).

Article governs leasing procedures under Alaska Land Act. — The judicial review portions of the Administrative Procedure Act govern leasing procedures conducted by the Division of Lands under the Alaska Land Act. Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006 (Alaska 1967).

Preliminary relief where permanent rate established. — Subsection (e) allows the superior court to assert jurisdiction and grant preliminary relief in a case where an agency has established a permanent rate. A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537 (Alaska 1970), rev'd on other grounds on rehearing, 483 P.2d 198 (Alaska 1971).

Appeal to court to obtain review and return to court to continue litigation are separate processes. — Appealing to a court for the purpose of obtaining review of an inferior tribunal's order and returning to a court with retained jurisdiction for the purpose of continuing litigation are separate and distinct legal processes. Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972), overruled on other grounds, City of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979).

Court apprising parties of right to seek review did not retain jurisdiction. — A lower court which merely apprised the parties of their rights to seek judicial review of an administrative adjudication under this chapter did not retain jurisdiction. Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972), overruled on other grounds, City of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979).

Applied in Jager v. State, 537 P.2d 1100 (Alaska 1975); Moore v. State, 553 P.2d 8 (Alaska 1976); Alaska Pub. Utils. Comm'n v. Chugach Elec. Ass'n, 580 P.2d 687 (Alaska 1978); Jeffries v. Glacier State Tel. Co., 604 P.2d 4 (Alaska 1979).

Quoted in Jerrel v. Kenai Peninsula Borough School Dist., 567 P.2d 760 (Alaska 1977); Sisters of Providence in Wash., Inc. v. Department of Health & Social Servs., 648 P.2d 970 (Alaska 1982); Vincent v. State, Com. Fisheries Entry Comm'n, 717 P.2d 391 (Alaska 1986).

Stated in Alaska Transp. Comm'n v. Alaska Airlines, 431 P.2d 510 (Alaska 1967); Matanuska-Susitna Borough v. Lum, 538 P.2d 994 (Alaska 1975).

Cited in Leege v. Martin, 379 P.2d 447 (Alaska 1963); King v. Alaska State Hous. Auth., 512 P.2d 887 (Alaska 1973); Alaska Pub. Util. Comm'n v. Greater Anchorage Area Borough, 534 P.2d 549 (Alaska 1975); D.S.W. v. Fairbanks N. Star Borough School Dist., 628 P.2d 554 (Alaska 1981); McDaniel v. Cory, 631 P.2d 82 (Alaska 1981); Pipeliners Union 798 v. Alaska State Comm'n for Human Rights, 681 P.2d 330 (Alaska 1984); Messerli v. Department of Natural Resources, 768 P.2d 1122 (Alaska 1989).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 550, 553 et seq.

73 C.J.S., Public Administrative Law and Procedure, § 172 et seq.

Effect of court review of administrative decision, 79 ALR2d 1141.

Sec. 44.62.570. Scope of review. (a) An appeal shall be heard by the superior court sitting without a jury.

(b) Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) The court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evi-

dence, abuse of discretion is established if the court determines that the findings are not supported by

(1) the weight of the evidence; or

(2) substantial evidence in the light of the whole record.

(d) The court may augment the agency record in whole or in part, or hold a hearing de novo. If the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing, the court may

(1) enter judgment as provided in (e) of this section and remand the case to be reconsidered in the light of that evidence; or

(2) admit the evidence at the appellate hearing without remanding the case.

(e) The court shall enter judgment setting aside, modifying, remanding, or affirming the order or decision, without limiting or controlling in any way the discretion legally vested in the agency.

(f) The court in which proceedings under this section are started may stay the operation of the administrative order or decision until

(1) the court enters judgment;

(2) a notice of further appeal from the judgment is filed; or

(3) the time for filing the notice of appeal expires.

(g) A stay may not be imposed or continued if the court is satisfied that it is against the public interest.

(h) If further appeal is taken, the supreme court may, in its discretion, stay the superior court judgment or agency order.

(i) If a final administrative order or decision is the subject of a proceeding under this section, and the appeal is filed while the penalty imposed is in effect, finishing or complying with the penalty imposed by the administrative agency during the pendency of the proceeding does not make the determination moot. (§ 25 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

This section and AS 44.62.560 prescribe the manner and scope of judicial review. Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974).

But they do not address the form of an agency's determinations. Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974).

The heading of article 8, "Administrative Adjudications," is not determinative of whether AS 44.62.560 and this section apply solely to adjudicatory proceedings, since such headings are not part of the law of Alaska. Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979), modified on other grounds, 615 P.2d 1391 (Alaska 1980).

Right to peremptorily challenge a judge. — The right to peremptorily challenge a judge exists in an appeal to the superior court from a final administrative determination of the Alaska Commercial Fisheries Entry Commission. State, Com. Fisheries Entry Comm'n v. Polushkin, 628 P.2d 6 (Alaska 1981), distinguishing, Halligan v. State, 624 P.2d 281 (Alaska 1981).

Enforcement judgment may be entered under AS 18.80.135(b) before the order is reviewed unless the court imposes a stay of the enforcement cause of

action. Pipeliners Union 798 v. Alaska State Comm'n for Human Rights, 681 P.2d 330 (Alaska 1984).

Questions for review. — One type of administrative decision on questions of law involves questions in which the particularized experience and knowledge of the administrative personnel go into the determination. When this type of question is presented to the court for review, deference should be given to the administrative interpretation, since the expertise of the agency would be of material assistance to the court. The other kind of case presents questions of law in which knowledge and experience in the industry afford little guidance toward a proper consideration of the legal issues. These cases usually concern statutory interpretations or other analysis of legal relationships about which courts have specialized knowledge and experience. Consequently, courts are at least as capable of deciding this kind of question as an administrative agency. Swindel v. Kelly, 499 P.2d 291 (Alaska 1972).

Leasing decisions of the division of lands and Department of Natural Resources are subject to judicial review. Such judicial review would be governed by the relevant provisions of the Administrative Procedure Act (AS 44.62). Swindel v. Kelly, 499 P.2d 291 (Alaska 1972).

Four principal standards of review. — In interpreting this section the supreme court has recognized at least four principal standards of review of administrative decisions. These are the "substantial evidence test" for questions of fact; the "reasonable basis test" for questions of law involving agency expertise; the "substitution of judgment test" for questions of law where no expertise is involved; and the "reasonable and not arbitrary test" for review of administrative regulations. Jager v. State, 537 P.2d 1100 (Alaska 1975).

The reasonable basis test is as follows: In cases where a decision involves administrative expertise as to either complex subject matter or fundamental policy formulations, deference should be given to an administrative determination if it has a reasonable basis in law and fact. Alaska Pub. Utils. Comm'n v. Chugach Elec. Ass'n, 580 P.2d 687 (Alaska 1978), disapproved on other grounds sub nom. City & Borough of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979).

Use of rational basis test. — The reasonable basis approach should be used for the most part in cases concerning administrative expertise as to either complex subject matter or fundamental policy formulations. Swindel v. Kelly, 499 P.2d 291 (Alaska 1972).

Application of the reasonable basis test is extremely useful where the administrative action under review resembles executive as opposed to legislative or judicial activity, where the decision under review clearly has nothing to do with the agency's rule making function. Swindel v. Kelly, 499 P.2d 291 (Alaska 1972).

Review of decision by ABC Board. — Where decision by ABC Board to deny a liquor store license involved separable fact findings as to the effect of the store's location on nearby schools and a discretionary policy choice that such effects would not serve the public interest, it was proper to use the substantial-evidence standard to review the findings of fact and the reasonable basis standard to review the policy choice. State, ABC Bd. v. Decker, 700 P.2d 483 (Alaska 1985).

Delineation of electrical service areas. — Where the delineation of electrical service areas involved complex financial and engineering determinations and required considerable expertise in these areas, and, in addition fundamental policy formulations were involved in the Public Utilities Commission's task of eliminating undesirable competition and duplication of facilities under AS 42.05.221(d), the reasonable basis test was appropriate. Alaska Pub. Utils. Comm'n v. Chugach Elec. Ass'n, 580 P.2d 687 (Alaska 1978), disapproved on other grounds sub nom. City & Borough of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979).

This section is made applicable to review of final orders of the Public Utilities Commission by AS 42.05.551. Jager v. State, 537 P.2d 1100 (Alaska 1975).

Whether proposed utility rates were designed to and could meet competition, shift sales of gas from winter to summer, and achieve interruptibility are all questions of fact of the type traditionally reviewed under a substantial evidence standard. Jager v. State, 537 P.2d 1100 (Alaska 1975).

Public Utilities Commission's decision whether to conduct a rate investigation is similar to the type of decision involving agency expertise in a mixed law and fact setting subject to the "reasonable

basis" standard of review. Jager v. State, 537 P.2d 1100 (Alaska 1975).

Under the "reasonable and not arbitrary" standard for review of administrative regulations, the supreme court upheld the standard employed by the Public Utilities Commission in determining whether to initiate a thorough rate investigation, i.e., whether public interest would be served by such investigation. Jager v. State, 537 P.2d 1100 (Alaska 1975).

Findings of fact supporting compensation awards must be made pursuant to subsection (b) of this section and AS 44.62.510(a). Hewing v. Alaska Workmen's Comp. Bd., 512 P.2d 896 (Alaska 1973).

Findings must be supported by substantial evidence. — The test to be applied under this section is whether the findings of the board which have been challenged are supported by substantial evidence in the light of the whole record. Forth v. Northern Stevedoring & Handling Corp., 385 P.2d 944 (Alaska 1963).

An administrative board's findings should not be reversed if in the light of the whole record they are supported by substantial evidence. Keiner v. City of Anchorage, 378 P.2d 406 (Alaska 1963); Forth v. Northern Stevedoring & Handling Corp., 385 P.2d 944 (Alaska 1963).

In order to prevent dislocations of the respective functions of administrative agencies and the courts, the supreme court has consistently adhered to the substantial evidence test as the appropriate scope of review with regard to appeals from administrative agencies. In re Peterson, 499 P.2d 304 (Alaska 1972).

The supreme court has long recognized the reviewing court's power to measure a decision by the test of whether "substantial evidence on the whole record" supports it. Swindel v. Kelly, 499 P.2d 291 (Alaska 1972).

Abuse of discretion by agencies is established on review if the agency's findings are not supported by "substantial evidence in the light of the whole record." In re Peterson, 499 P.2d 304 (Alaska 1972).

The substantial evidence criterion has been adopted as the appropriate scope of review in regard to appeals from administrative agencies to the superior court. Pan Am. Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969).

It is well settled in Alaska that an initial order of the Workers' Compensation Board should be reviewed in accordance with the principle of substantial evidence. Interior Paint Co. v. Rodgers, 522 P.2d 164 (Alaska 1974).

The substantial evidence standard restricts the court on review to considering only whether the administrative findings of fact are supported by substantial evidence, and whether the award is contrary to law. Interior Paint Co. v. Rodgers, 522 P.2d 164 (Alaska 1974).

The standard of review of agency findings of fact that is they will be set aside if they are not supported by substantial evidence on the whole record. Inherent in this standard is a requirement, in part statutory, that the facts found be based on evidence in the record. City of Fairbanks v. Alaska Pub. Utils. Comm'n & Wire Communications, Inc., 611 P.2d 493 (Alaska 1980).

The requirement that the facts found be based on evidence in the record serves three purposes: First, it helps to ensure that the agency does not make decisions that have no adequate basis in fact; second, it gives opposing parties the opportunity to challenge the agency's reasoning process and the correctness of the decision; and third, it affords reviewing courts the opportunity to evaluate the decision. City of Fairbanks v. Alaska Pub. Utils. Comm'n & Wire Communications, Inc., 611 P.2d 493 (Alaska 1980).

The substantial evidence standard is employed by the superior court as well as the supreme court in reviewing Workers' Compensation Board decisions. This standard is applied in order to avoid a possible dislocation of the respective functions of the administrative agency and the superior court. Interior Paint Co. v. Rodgers, 522 P.2d 164 (Alaska 1974).

"Substantial evidence". — Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Keiner v. City of Anchorage, 378 P.2d 406 (Alaska 1963); Forth v. Northern Stevedoring & Handling Corp., 385 P.2d 944 (Alaska 1963); Interior Paint Co. v. Rodgers, 522 P.2d 164 (Alaska 1974); State Dep't of Labor v. Boucher, 581 P.2d 660 (Alaska 1978).

Court may not reweigh evidence. — The Workers' Compensation Board's decision need not be the only possible solution to the problem, for it is not the function of the court to reweigh the evidence or choose between competing inferences, but only to determine whether such evidence

exists. Interior Paint Co. v. Rodgers, 522 P.2d 164 (Alaska 1974).

Under the substantial evidence standard, it is not the function of the reviewing court to reweigh the evidence or choose between competing inferences, but only to determine whether such evidence exists. State Dep't of Labor v. Boucher, 581 P.2d 660 (Alaska 1978).

The procedure allowing discretion of the superior court in the granting of trial de novo simplifies and expedites the handling of appeals, and at the same time, it affords sufficient flexibility so that if the agency record is not sufficient to determine the issue on appeal, or if the record discloses that justice requires evidence to be taken de novo, the superior court has the discretion to do what is necessary by granting a new trial on hearing, either in whole or in part. Keiner v. City of Anchorage, 378 P.2d 406 (Alaska 1963).

Conditions for granting stay. — A court is neither required to nor barred from placing conditions upon its imposition of a stay. Pipeliners Union 798 v. Alaska State Comm'n for Human Rights, 681 P.2d 330 (Alaska 1984).

The posting of a supersedeas bond is not required before a stay may be imposed under subsection (f) of this section. Pipeliners Union 798 v. Alaska State Comm'n for Human Rights, 681 P.2d 330 (Alaska 1984).

The court's authority to remand is limited by the provisions of subsection (d)(1). Fischback & Moore of Alaska, Inc. v. Lynn, 407 P.2d 174 (Alaska 1965).

When subsection (d) authorizes remand. — Subsection (d) authorizes remand if the court finds that there is relevant evidence (1) which in the exercise of reasonable diligence could not have been produced or (2) which was improperly excluded at the hearing. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

A remand is appropriate when the superior court determines that vital evidence has been erroneously excluded before the Alaska Workers' Compensation Board. Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

Denial of cross-examination resulting in the improper exclusion of relevant evidence justifies a remand under the second standard enunciated in subsection (d). Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

Remand held proper. — Where the causal relationship between employment and disability is disputable and the sufficiency of evidence question is close, it was appropriate for the superior court to remand such a case after determining that vital evidence had erroneously been excluded. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

Absence of ground for remand. — Where the statutory ground for remand relied upon by the court was not present, the court erred in declining to decide the question presented on the appeal. Fischback & Moore of Alaska, Inc. v. Lynn, 407 P.2d 174 (Alaska 1965).

The superior court's action in remanding a pending case, appealing the Workers' Compensation Board's finding of no permanent partial disability, to the board on the basis of an ex parte order requiring the employer to provide for a medical examination of the employee, was a mistake. Fischback & Moore of Alaska, Inc. v. Lynn, 407 P.2d 174 (Alaska 1965).

Initial examination of sufficiency of evidence to be made in superior court. — In the circumstances of a remand, the supreme court is not inclined to deviate from its previous procedure of requiring the initial examination of the sufficiency of evidence to be made in the superior court rather than undertaking itself a review of the record for the first time. Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976).

Augmenting an administrative record is a discretionary device available to the superior court. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

That it is proper for the court to augment the record is made clear in subsection (d). Jager v. State, 537 P.2d 1100 (Alaska 1975).

Complaint for injunctive relief is distinct from an appeal of an administrative order. United States v. RCA Alaska Communications, Inc., 597 P.2d 489 (Alaska 1978).

Factors required for issuance of preliminary injunction. — The coexistence of three factors is required in order to justify the issuance of a preliminary injunction: (1) The plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise "serious" and "substantial" questions going to the merits of the case; that is, the issues raised cannot be "frivolous or obviously without merit." Keystone Servs., Inc. v.

Alaska Transp. Comm'n, 568 P.2d 952 (Alaska 1977).

Article governs leasing procedures under Alaska Land Act. — The judicial review portions of the Administrative Procedure Act (AS 44.62) govern leasing procedures conducted by the Division of Lands under the Alaska Land Act. Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006 (Alaska 1967).

Handling of information by Public Utilities Commission unconstitutional. — Where both the city of Fairbanks and a corporation sought a certificate of public convenience and necessity to provide telephone service; at the hearing to decide the matter the Alaska Public Utilities Commission staff requested two years' annual balance sheets and income statements from the corporation; the corporation agreed to supply them to the staff, but requested that they not be divulged to Fairbanks or become part of the record, claiming that they were proprietary and that revealing them could place the corporation at a competitive disadvantage in its telecommunications contracting business; Fairbanks objected and suggested as an alternative that the income statements and balance sheets could be revealed to certain representatives of Fairbanks under an order of confidentiality; the commission ruled that the information was proprietary and should be kept confidential and did not allow any representative of Fairbanks to see it; a commission staff member reviewed the income statements and balance sheets and based on that review testified that the corporation could meet its financial commitments and was financially fit; and the information upon which this determination was based was never placed in the record, the commission's handling of the information relating to the corporation's financial fitness violated procedural due process. City of Fairbanks v. Alaska Pub. Utils. Comm'n & Wire Communications, Inc., 611 P.2d 493 (Alaska 1980).

Action of ABC Board as administrative adjudication. — Action of the Alcoholic Beverage Control Board in considering and approving a license application was an administrative adjudication. Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979), modified on other grounds, 615 P.2d 1391 (Alaska 1980).

Review of an administrative decision pursuant to an Appellate Rule 45 appeal is governed by the broad standards established in subsection (b) of this section. Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979), modified on other grounds, 615 P.2d 1391 (Alaska 1980).

Applied in Manthey v. Collier, 367 P.2d 884 (Alaska 1962); Cordova Fish & Cold Storage Co. v. Estes, 370 P.2d 180 (Alaska 1962); Morrison-Knudsen Co. v. Vereen, 414 P.2d 536 (Alaska 1966); State v. Smith, 593 P.2d 625 (Alaska 1979); Jeffries v. Glacier State Tel. Co., 604 P.2d 4 (Alaska 1979); White v. Alaska Com. Fisheries Entry Comm'n, 678 P.2d 1319 (Alaska 1984); Adams v. Pipeliners Union 798, 699 P.2d 343 (Alaska 1985).

Quoted in Leege v. Martin, 379 P.2d 447 (Alaska 1963); Watts v. Seward School Bd., 421 P.2d 586 (Alaska 1966); Employers' Liab. Assurance Corp. v. Bradshaw, 417 P.2d 600 (Alaska 1966); Alaska Redi-Mix, Inc. v. Alaska Workmen's Comp. Bd., 417 P.2d 595 (Alaska 1966).

Stated in In re Simpson, 645 P.2d 1223 (Alaska 1982); Ostman v. State, Com. Fisheries Entry Comm'n, 678 P.2d 1323 (Alaska 1984).

Cited in City of Juneau v. Cropley, 429 P.2d 21 (Alaska 1967); Arndt v. State, Dep't of Labor, 583 P.2d 799 (Alaska 1978); McDaniel v. Cory, 631 P.2d 82 (Alaska 1981); Messerli v. Department of Natural Resources, 768 P.2d 1122 (Alaska 1989).

Sec. 44.62.580. Continuances. The agency may grant continuances The agency may grant continuances. If a hearing officer is assigned to a hearing, a continuance may not be granted except by the hearing officer for good cause shown. (§ 26 (ch 2) ch 143 SLA 1959)

Collateral references. — 2 Am. Jur. 2d, Administrative Law, § 426.

Sec. 44.62.590. Contempt. (a) In a proceeding before an agency, the agency shall certify the facts to the superior court in the judicial district where the proceeding is held if a person in the proceeding

(1) disobeys or resists a lawful order;

(2) refuses to respond to a subpoena;

(3) refuses to take oath or affirmation as a witness;

(4) refuses to be examined; or

(5) is guilty of misconduct at a hearing or so near the hearing as to obstruct the proceeding.

(b) Upon certification under (a) of this section, the court shall issue an order directing the person to appear before the court and show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person.

(c) After service under (b) of this section, the court has jurisdiction of the matter.

(d) The law applicable to contempt committed by a person in the trial of a civil action before the superior court applies to contempt under this section as to

(1) the proceeding taken;

(2) the penalties imposed; and

(3) the way the person charged may be purged of the contempt. (§ 27 (ch 2) ch 143 SLA 1959)

Cross references. — For provisions relating to contempt, see generally AS 09.50.010 — 09.50.060 and Civil Rule 90, Alaska Rules of Court.

Sec. 44.62.600. Voting procedure. A member of an agency qualified to vote on a question may vote by mail or by teleconferencing. A vote by teleconferencing shall be recorded in a manner that identifies each person who has voted and how the person voted. (§ 28 (ch 2) ch 143 SLA 1959; am § 6 ch 54 SLA 1985)

Effect of amendments. — The 1985 amendment rewrote the catchline, added "or by teleconferencing" at the end of the first sentence and added the second sentence.

NOTES TO DECISIONS

Quoted in In re Application of Peterson, 499 P.2d 304 (Alaska 1972).

Cited in In re Application of Peterson, 499 P.2d 304 (Alaska 1972).

Sec. 44.62.610. Charge. A sum authorized to be spent under AS 44.62.330 — 44.62.630 by an agency is a legal charge against the appropriations of the agency. (§ 29 (ch 2) ch 143 SLA 1959)

Sec. 44.62.620. Power to administer oaths. In a proceeding under AS 44.62.330 — 44.62.630 an agency, agency member, secretary of an agency, or hearing officer may administer oaths and affirmations and certify official acts. (§ 30 (ch 2) ch 143 SLA 1959)

Sec. 44.62.630. Impartiality. The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of ex parte matters authorized by law, may not engage in interviews with, or receive evidence or argument from, a party, directly or indirectly, except upon opportunity for all other parties to be present. Copies of all communications with these officers shall be served upon all parties. (§ 31 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Combination of functions of the state bar attorney, prosecutor and adjudicator did not violate this section or due process. In re Cornelius, 520 P.2d 76, 521 P.2d 497 (Alaska 1974).

The combination of investigative and judicial functions within an agency does not violate due process; a board may make preliminary factual inquiry on its own in order to determine if charges should be filed. And, minimum requirements of procedural due process are not offended by the attorney for the agency acting as advisor on procedural matters. In re Cornelius, 520 P.2d 76, 521 P.2d 497 (Alaska 1974).

Combination of prosecutorial and adjudicative functions. — Due process requires some separation between those persons prosecuting a complaint and those adjudicating it, since the prosecutor, who has a "probable partiality," should not be in a position to influence the decision makers, but there may be some combination of these functions within a particular agency. In re Walton, 676 P.2d 1078 (Alaska 1983), appeal dismissed, 469 U.S. 801, 105 S. Ct. 54, 83 L. Ed. 2d 6 (1984).

Collateral references. — 1 and 2 Am. Jur. 2d, Public Administrative Law, §§ 63, 410 to 413.

73 C.J.S., Public Administrative Law and Procedure, § 61.

Article 9. General Provisions.

Section
635. Teleconferencing
640. Definitions
650. Short title

Sec. 44.62.635. Teleconferencing. (a) An agency may use teleconferencing for the benefit or convenience of the parties, the public, or the agency, in connection with a proceeding or act authorized under this chapter if all statutory and constitutional rights of the parties are waived or adequately protected.

(b) Teleconferencing may be used to establish quorums, receive public input, and, if all voting individuals have an opportunity to evaluate all testimony and evidence, to vote on actions. (§ 7 ch 54 SLA 1985)

Sec. 44.62.640. Definitions. (a) In AS 44.62.010 — 44.62.320, unless the context otherwise requires,

(1) "lieutenant governor" means the office of the lieutenant governor in the executive branch of the state government, or another agency designated by executive order under the constitution;

(2) "order of repeal" means a resolution, order or other official act of a state agency that expressly repeals a regulation in whole or in part;

(3) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

(4) "state agency" means a department, office, agency, or other organizational unit of the executive branch, except one expressly excluded by law, but does not include an agency in the judicial or legislative branches of the state government.

(b) In AS 44.62.330 — 44.62.630, unless the context otherwise requires,

(1) "agency" includes the state boards, commissions and officers listed in AS 44.62.330 and those to which this chapter is made applicable by law or executive order involving reorganization under the constitution;

(2) "agency member" means a person who is a member of an agency to which AS 44.62.330 — 44.62.630 apply, and includes a person who individually is an agency;

(3) "hearing officer" means a hearing officer qualified under AS 44.62.350;

(4) "party" includes the agency, the respondent, and a person, other than an officer or an employee of the agency in an official capacity, who has been allowed to appear in the proceeding;

(5) "respondent" means a person against whom an accusation is filed under AS 44.62.360 or against whom a statement of issues is filed under AS 44.62.370.

(c) In this chapter "teleconferencing" means information exchange by audio or video medium. (§§ 2, 3 art I (ch 1) ch 143 SLA 1959; § 1 (ch 2) ch 143 SLA 1959; am § 78 ch 69 SLA 1970; am § 8 ch 54 SLA 1985)

Revisor's notes. — Reorganized in 1984 to alphabetize the defined terms.

Effect of amendments. — The 1985 amendment added subsection (c).

Opinions of attorney general. — The Department of Public Works has authority to require contractors to set up a system of prequalification of contractors as a prerequisite for bidding on state construction projects and under such system to require contractors to furnish periodic and financial statements, and under paragraph (2) of this section the department would not be required to follow the Administrative Procedure Act (AS 44.62) in adopting regulations to implement such a program. 1959 Op. Att'y Gen., No. 27.

NOTES TO DECISIONS

"Regulation". — "Regulation" encompasses many statements made by administrative agencies, including policies and guides to enforcement. Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897 (Alaska 1981).

Under paragraph (2) of subsection (a), one of the indicia of a regulation is that it implements, interprets or makes specific the law enforced or administered by the state agency. Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897 (Alaska 1981).

The label placed on a particular statement by an administrative agency does not determine the applicability of this chapter. Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897 (Alaska 1981).

Though certain provisions in a policy and procedure manual used by the Department of Natural Resources might plausibly have been considered regulations, those provisions had no bearing on a case in which they fell within the scope of the internal management exception to this chapter because they merely listed statutory procedures for an adjudicator to follow. Messerli v. Department of Natural Resources, 768 P.2d 1122 (Alaska 1989).

Verbal additions to regulations involving requirements of substance are unauthorized and unenforceable. State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854 (Alaska 1978).

The issuance of permits for the killing of caribou in certain specified areas of the state based on verbal instructions to the permit agents as to the need of individual applicants does not conform to requirements of this chapter. State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854 (Alaska 1978).

Department of Education's interpretation of its own regulation does not fall within the definition of "regulation," and therefore the department was not required to follow procedures mandated in the Administrative Procedure Act in issuing a directive to a school board. State v. Northern Bus Co., 693 P.2d 319 (Alaska 1984).

Sufficient regulatory notice of deadline waiver availability. — A regulation

which establishes a filing deadline "unless the applicant is notified otherwise" gives sufficient notice of the availability of a waiver of the deadline to meet the requirements of this chapter, the Administrative Procedure Act. Forquer v. State, Com. Fisheries Entry Comm'n, 677 P.2d 1236 (Alaska 1984).

An investigation is not a regulation. Allstate Ins. Co. v. Municipality of Anchorage, 599 P.2d 140 (Alaska 1979).

The legislature has expressly included the Board of Governors of the Alaska Bar Association as an agency subject to the adjudicative procedures of the Administrative Procedure Act (AS 44.62). In re Peterson, 499 P.2d 304 (Alaska 1972).

Administrative responsibility of Alaska Bar. — While the supreme court ultimately reserves the authority to determine whether or not an applicant should be admitted to the bar, considerable administrative responsibility has been delegated to the Alaska Bar Association. In re Peterson, 499 P.2d 304 (Alaska 1972).

Nothing of substance hinges in choice of name for administrative agency. — An administrative agency may be called a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division, or agency. Nothing of substance hinges in the choice of name. Alaska State Hous. Auth. v. Dixon, 496 P.2d 649 (Alaska 1972).

The Alaska State Housing Authority is an instrumentality of the state within the Department of Commerce (now Department of Commerce and Economic Development). Alaska State Hous. Auth. v. Dixon, 496 P.2d 649 (Alaska 1972).

Within the meaning of "state agency". — As an instrumentality of the state within the Department of Commerce (now Department of Commerce and Economic Development), the Alaska State Housing Authority comes within the meaning of "state agency" as that term is used and defined in the Alaska Administrative Procedure Act (AS 44.62). Alaska State Hous. Auth. v. Dixon, 496 P.2d 649 (Alaska 1972).

"Internal management of a state agency" construed. — The supreme court has declined to construe the phrase "internal management of a state agency" to encompass all individuals and activities affected by regulations promulgated by the lieutenant governor during a statewide election. Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973).

The supervision of personnel and activities relating to the conduct of a statewide election is not the same as the management of employees and internal affairs of a state agency. Executive organization of the election machinery goes well beyond the lieutenant governor's control of his own staff and their actions. Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973).

"Party". — Persons permitted to appear at a public hearing authorized by former AS 04.05.030(c) were parties to that proceeding. Ketchikan Retail Liquor Dealers Ass'n v. State, ABC Bd., 602 P.2d 434 (Alaska 1979), modified on other grounds, 615 P.2d 1391 (Alaska 1980).

Person who is directly interested in the proceedings before an administrative agency, who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a "party" to any proceedings for the purpose of taking an appeal from the decision. City of Kenai v. State, Pub. Utils. Comm'n, 736 P.2d 760 (Alaska 1987).

Election regulations under AS 15.15.330 not exempt from chapter. — Regulations promulgated under AS 15.15.330, dealing with early counting of election votes, are not exempt from the requirements of the Administrative Procedure Act (AS 44.62) by operation of AS 44.62.040 and this section. Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973).

Alaska Transportation Commission must adopt rules consistent with chapter. — It is incumbent upon the Alaska Transportation Commission to adopt rules for the transfer of permits consistent with the requirements of the Administrative Procedure Act (AS 44.62). Mukluk Freight Lines v. Nabors Alaska Drilling, Inc., 516 P.2d 408 (Alaska 1973).

Policy establishing priorities of use between fisheries. — While the board of fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing these priorities were regulations which should have been adopted pursuant to the provisions of this chapter. Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897 (Alaska 1981).

Applied in Wien Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1087 (Alaska 1982); Vincent v. State, Com.

Fisheries Entry Comm'n, 717 P.2d 391 (Alaska 1986).

Quoted in Standard Alaska Prod. C . v. State, Dep't of Revenue, Sup. Ct. Op. No. 3425 (File No. S-2445), P.2d (1989).

Cited in Wickersham v. State, Com. Fisheries Entry Comm'n, 680 P.2d 850 (Alaska 1984); Matanuska-Susitna Borough v. Hammond, 726 P.2d 166 (Alaska 1986).

Sec. 44.62.650. Short title. This chapter may be cited as the Administrative Procedure Act. (§ 1 art I (ch 1) ch 143 SLA 1959)

NOTES TO DECISIONS

Applied in Horowitz v. Alaska Bar Ass'n, 609 P.2d 39 (Alaska 1980).

Cited in Pan Am. Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969); In re Sullivan, 551 P.2d 531 (Alaska 1976); Wien Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1087 (Alaska 1982); Wickersham v. State, Com. Fisheries Entry Comm'n, 680 P.2d 1135 (Alaska 1984).

Chapter 65. Interdepartment and Interagency Services.

[Repealed, § 69 ch 106 SLA 1986, as amended by § 27 ch 65 SLA 1987.]

Chapter 66. Review of the Activities of Agencies, Boards and Commissions.

Cross references. — For legislative findings related to this chapter, see § 1, ch. 149, SLA 1977.

Sec. 44.66.010. Termination of state boards and commissions. (a) Boards and commissions listed in this subsection expire on the date set out after each:

(1) Alcoholic Beverage Control Board (AS 04.06.010) — June 30, 1990;

(2) *[Repealed, 1983 Initiative Proposal No. 2, § 6.]*

(3) Board of Parole (AS 33.16.020) — June 30, 1993;

(4) Alaska Public Utilities Commission (AS 42.05.010) — June 30, 1993;

(5) *[Repealed, § 20 ch 110 SLA 1981.]*

(6) *[Repealed, § 63 ch 21 SLA 1985.]*

(7) *[Repealed, § 16 ch 161 SLA 1984.]*

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THE SUPREME COURT OF THE STATE OF ALASKA

RALPH McGRATH and DON MOHR, Appellants, v. UNIVERSITY OF ALASKA, Appellee.	Supreme Court No. S-3418 Superior Court No. 3AN-S88-08936 Civil O P I N I O N [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 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-

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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

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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).

III. CONCLUSION

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

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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 Aden case.

Attachment #3

THE SUPREME COURT OF THE STATE OF ALASKA

ROSE M. ODUM, Petitioner, v. UNIVERSITY OF ALASKA, ANCHORAGE, Respondent.	Supreme Court File No. S-5258 Superior Court File No. 3AN-92-5432 Civil O P I N I O N [No. 3925 - January 29 , 1993]

Petition for Review From the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Allison E. Mendel, Mendel & Huntington, Anchorage, for Petitioner. Mark E. Ashburn, Ashburn & Mason, Anchorage, for Respondent.

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

PER CURIAM.

The University of Alaska-Anchorage (University) terminated Rose M. Odum as an associate professor. She filed a complaint for declaratory relief, claiming that the University had denied her due process of law guaranteed by the United States[1] and

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1. U.S. Const. amend. V, provides in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Alaska Constitutions,[2] and also had denied her procedures guaranteed by the Alaska Administrative Procedures Act (APA), AS 44.62.330-630. She moved for a preliminary injunction, which was denied. Odum seeks review. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

Odum was a tenured associate professor at the University. Laura W. MacLachlan, Dean of the University's School of Nursing and Health Sciences, received complaints about Odum. Unable to resolve the complaints internally, MacLachlan asked the University Provost to appoint a Performance Review Group to evaluate Odum's performance.

The Provost appointed a Special Peer Review Committee (Committee) to review Odum's performance. The chairperson circulated a set of guidelines for the conduct of the hearing. These guidelines provided that each party would have an opportunity to make opening and closing statements, present testimony and documentation, and question each other's witnesses. The guidelines permitted the parties to be advised by legal counsel, but prohibited counsel from questioning witnesses or speaking on behalf

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2. Alaska Const. art. I, § 7, provides in part:

> No person shall be deprived of life, liberty, or property, without due process of law. . . .

3. These facts are constructed from the Petition for Review, the Response to Petition for Review and attached exhibits.

Alaska Constitutions,[2] and also had denied her procedures guaranteed by the Alaska Administrative Procedures Act (APA), AS 44.62.330-630. She moved for a preliminary injunction, which was denied. Odum seeks review. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

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The Provost appointed a Special Peer Review Committee (Committee) to review Odum's performance. The chairperson circulated a set of guidelines for the conduct of the hearing. These guidelines provided that each party would have an opportunity to make opening and closing statements, present testimony and documentation, and question each other's witnesses. The guidelines permitted the parties to be advised by legal counsel, but prohibited counsel from questioning witnesses or speaking on behalf

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2. Alaska Const. art. I, § 7, provides in part:

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of the parties. After the hearing, and following receipt of the Committee's recommendation, MacLachlan terminated Odum.

Odum filed suit. She moved for a preliminary injunction to enjoin enforcement of her termination during the pendency of the proceeding. Superior Court Judge J. Justin Ripley denied without comment Odum's motion for preliminary injunction. Odum filed a Petition for Review pursuant to Alaska Appellate Rule 402. We granted her petition, and directed the parties to address the following issues: 1) whether the APA requires that pre-termination hearings held by the University must comply with the procedures outlined in the APA; and 2) whether the right to a pre-termination hearing guaranteed by the due process clause of the Alaska Constitution includes the right to be represented by counsel, that is, the right to counsel who is permitted to question witnesses and make arguments.

We conclude that the APA governs pre-termination hearings held by the University. Since the APA affords the right to counsel to participate in hearings, we do not reach the question whether due process of law also requires the University to allow counsel to participate.

II. STANDARD OF REVIEW

The interpretation of a statute is a question of law which involves this court's independent judgment. McGrath v. University of Alaska, 813 P.2d 1370, 1371 n.1 (Alaska 1991). "On questions of law, this court is not bound by the lower court's

decision. . . . Our duty is to adopt the rule of law that is most persuasive in light of precedent, reason, and policy." Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

III. PRE-TERMINATION HEARINGS AND THE APA

We have consistently held that due process of law guaranteed by the United States and Alaska Constitutions requires a pre-termination hearing. Storrs v. Municipality of Anchorage, 721 P.2d 1146, 1149-50 (Alaska 1986), cert. denied, 479 U.S. 1032 (1987); Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034, 1037 (Alaska 1984); McMillan v. Anchorage Community Hosp., 646 P.2d 857, 864 (Alaska 1982); University of Alaska v. Chauvin, 521 P.2d 1234, 1238 (Alaska 1974); Nichols v. Eckert, 504 P.2d 1359, 1366 (Alaska 1973) (Erwin, J., concurring).

While the University agrees that Odum was entitled to a pre-termination hearing, it contends that this hearing was not governed by the APA. The APA provides:

> The procedure of the state boards . . . listed in this subsection . . . shall be conducted under AS 44.62.330-44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing . . . conduct of hearing . . . shall be governed by this chapter . . .

AS 44.62.330(a) (emphasis added).

The University presents no persuasive reason why the mandatory language of AS 44.62.330(a) should not apply to pre-termination proceedings. Alaska Statutes 44.62.330-.630 govern the procedures to be employed by the University "except to the

decision. . . . Our duty is to adopt the rule of law that is most persuasive in light of precedent, reason, and policy." Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

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AS 44.62.330(a) (emphasis added).

The University presents no persuasive reason why the mandatory language of AS 44.62.330(a) should not apply to pre-termination proceedings. Alaska Statutes 44.62.330-.630 govern the procedures to be employed by the University "except to the

extent that [the University's] inclusion is inconsistent with the provisions of AS 14.40."[4] AS 44.62.330(a)(45); McGrath, 813 P.2d at 1372. As we noted in McGrath, "[u]ltimately, if [d]efendant seeks to be exempted from the workings of the APA, it must seek such remedy from the [l]egislature, not this [c]ourt." Id. at 1375 (quoting Aden).

The University argues that the plain language of the APA should not be used to determine how it applies to intra-agency personnel decisions. Although the procedural protection of the APA may be applied to personnel actions, the APA was not drafted with these actions in mind. Accordingly, the University contends that applying the plain language of the APA to personnel actions is "a very suspect enterprise."

We disagree. Where the language of the statute is clear, "[w]e see no reason to suspect that [it] does not mean exactly what it appears to mean." Kodiak Elec. Ass'n v. Delaval Turbine, Inc., 694 P.2d 150, 155 (Alaska 1984) (quoting Vest v. First Nat'l Bank of Fairbanks, 659 P.2d 1233, 1234 (Alaska 1983)).

The University further argues that Odum was sufficiently protected by existing procedures. Although the pre-termination

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4. The University does not argue that AS 14.40 precludes the APA from applying to it. 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 . . . ." However, the procedures used in Odum's hearing were not adopted by the Board of Regents. Furthermore, this court has held that "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" is consistent with the provisions of AS 14.40. McGrath, 813 P.2d at 1372 (quoting Aden v. University of Alaska, No. 3AN-85-17179 Civil (Alaska Super., Feb. 2, 1987)).

hearing afforded Odum "did not incorporate all the procedural provisions of the APA," the University notes that she was entitled to grieve the outcome of this hearing. The grievance process includes a hearing which complies with the APA. Thus the University argues in the alternative that the pre-termination hearing already provided Odum, and the opportunity for a post-termination hearing which complies with the APA, taken together satisfy due process requirements and the APA.

Again, we disagree. A post-termination hearing which complies with the requirements of the APA does not cure the failure of a pre-termination hearing to comply with the APA. The procedural protections the APA provides are most important before termination.

III. CONCLUSION

The parties agree that Odum is entitled to a pre-termination hearing under state and federal guarantees of due process of law. Since the APA governs the procedures to be employed by the University in the conduct of hearings, the pre-termination hearing to which Odum is entitled must be conducted pursuant to the APA. The APA provides that parties may be represented by counsel.[5] Counsel's participation may not be

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5. Alaska Statute 44.62.420(b) provides in part:

> The notice to respondent must be substantially in the following form but may include other information:

(continued...)

hearing afforded Odum "did not incorporate all the procedural provisions of the APA," the University notes that she was entitled to grieve the outcome of this hearing. The grievance process includes a hearing which complies with the APA. Thus the University argues in the alternative that the pre-termination hearing already provided Odum, and the opportunity for a post-termination hearing which complies with the APA, taken together satisfy due process requirements and the APA.

Again, we disagree. A post-termination hearing which complies with the requirements of the APA does not cure the failure of a pre-termination hearing to comply with the APA. The procedural protections the APA provides are most important before termination.

III. CONCLUSION

The parties agree that Odum is entitled to a pre-termination hearing under state and federal guarantees of due process of law. Since the APA governs the procedures to be employed by the University in the conduct of hearings, the pre-termination hearing to which Odum is entitled must be conducted pursuant to the APA. The APA provides that parties may be represented by counsel.[5] Counsel's participation may not be

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5. Alaska Statute 44.62.420(b) provides in part:

> The notice to respondent must be substantially in the following form but may include other information:

(continued...)

limited to giving advice only, rather, counsel must be permitted to question witnesses and make arguments on behalf of the parties. Since the statute does not limit counsel's traditional role as an advocate in an adversarial proceeding, Odum has the right to be represented by counsel who is permitted to question witnesses and make arguments.[6]

The case is REMANDED to the superior court for further proceedings consistent with this opinion.

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5. (...continued)

> . . . You may be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you.

6. Since the APA resolves the issue in Odum's favor, we do not address whether the due process clauses of the United States or Alaska Constitutions require that legal counsel be allowed to participate in the pre-termination hearing of a tenured professor.

HOUSE COMMITTEE REPORT

3/29

(7)

Date Referred: February 11, 1993 FURTHER REFERRALS: HESS Judiciary

Date of Committee Action: 3-17-93

The STATE AFFAIRS Committee considered: HB 148

HOUSE BILL NO. 148 EXEMPT U OF AK FROM APA PROCEDURES

"An Act exempting the University of Alaska from the administrative adjudication provisions of the Administrative Procedure Act; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[X] zero fiscal note U.of AK

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Vezey	X	Ulmer BILL NEEDS AMENDMENT			X
Olberg	✓	Betty Davis B. Davis	X		
Larry D. Dam. B. Davis					
Sanders					
Kott					

Vezey Vezey
CHAIRMAN'S SIGNATURE