ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8283 SENATE HEALTH EDUCATION & SOCIAL SERVICES

criticized for competing with the private sector, they have strong support from the general public. This recommendation was adopted without objection.

2. **Beginning immediately, the legislature should offer support and encouragement to criminal justice agencies in their efforts to reach creative, long-term solutions to budget reductions.**

Innovative ideas are necessary to cope with major budget reductions. The commission recommends that criminal justice agencies be allowed some discretionary funds for planning and for pilot programs. The Legislature also should support internal reallocation of budgets within agencies to achieve long-term budget reductions.

Agencies will need the encouragement of the Legislature and the Governor to try new ideas without the immediate assumption that such changes are unacceptable. If state revenues in fact decline by $1 billion over the next 10 years, people will need to change their expectations of what government can do. The results of the focus groups indicate that people think the state should take financial considerations into account in devising a suitable system of punishment. All branches of government should work to educate the public on the budget impacts of their programs and to the provide information necessary to make difficult choices. This recommendation was adopted without objection.

3. **Beginning immediately, Department of Corrections should establish a plan to allow offenders convicted of driving while intoxicated (DWI) and driving with license suspended or revoked (DWLS/R) to serve their sentences without a long delay (currently nine months in some locations).**

Far and away the most common criminal offense is driving while intoxicated. In 1990, 2544 DWI offenders served time in Department of Corrections facilities. 1629 of these were first-time DWI offenders with an average sentence of five days. Another 2255 people served time in one of the 19 local jails, which are run on contract with the Department of Public Safety, serving an average sentence of three days. As of October 1992, about 960 DWI offenders were on waiting lists with the Department of Corrections, waiting up to nine months to serve their sentences.

In order to clear up the backlog and to provide specific programming appropriate for drunk drivers, the Department of Corrections should investigate the use of low-security facilities to process large numbers of DWI and DWLR/S offenders in the bigger communities. Offenders serving short sentences in halfway houses should not be mixed with offenders being reintegrated into the community at the end of long sentences.

4. **Beginning immediately, the legislature should amend the law providing that DWI first offenders must be sentenced to jail for at least three days. Instead the legislature should investigate other creative alternatives to punish drunk drivers more quickly, cheaply, and effectively.**

The commission recognizes that drunk driving is a serious offense which must be deterred, but believes that the current law does not represent the most cost-effective

approach. The Department of Corrections estimates that housing DWI offenders costs approximately $6 million per year, even though many DWI offenders are already serving their sentences in halfway houses. This does not represent the full cost of housing drunk drivers, since many first and second offenders are housed in local jails.

Jail time is only one part of the sentence for DWI in Alaska. First time DWI offenders also are required to follow the treatment recommendations made by the state alcohol screening program, pay a fine of at least $250, and have their driver's license suspended for 90 days. For second offenses, the fine rises to $500 and the period of suspension to 365 days. AS 28.35.030; AS 28.15.171. In addition, the offender's insurance rates are likely to go up. The commission does not recommend changes in these aspects of the DWI sentence.

While the mandatory jail term may have some added deterrent value, there are many less costly approaches. Other jurisdictions have used a variety of successful programs that publicly identify offenders and require community service from them, like wearing an orange vest to pick up trash along the highway. The commission recommends that the legislature work with representatives of groups like Mothers Against Drunk Drivers to formulate a plan that will deal with this serious problem more effectively. This recommendation passed, nine in favor and four opposed.

5. **The Department of Corrections should increase the use of alternative punishments as part of some presumptive sentences. The commission recommends that the Department of Corrections pursue an active policy for some presumptively sentenced offenders that substitutes time spent in alternative punishment programs for time in prison, within the limits of public safety. High supervision programs such as community residential centers, treatment programs, intensive supervised probation and day reporting centers can control risk to the public, provide rehabilitative opportunities, and fulfill the goals of presumptive sentencing at lower cost than spending the entire presumptive term in prison.**

The commission believes that its support for presumptive sentencing is compatible with its support for alternative punishments. Alaska case law already provides that time spent in custodial programs such as community residential centers and residential treatment programs must be credited to the offender's time served, just like incarceration. Regardless of whether the correctional budget is reduced, the commission has already recommended that these alternatives be routinely used for presumptively sentenced offenders during the final portion of their sentences, to help them make their transition back to the community. For many offenders, these alternatives may also be safely and effectively used for longer periods of time. The commission recommends strong oversight for these offenders, along with careful monitoring and evaluation of their programs. See Section II-A of this report.

The Department of Corrections currently is seeking a legal opinion on whether it may furlough presumptively sentenced offenders to their homes in order to participate in highly structured programs such as intensive supervised probation and day reporting centers. See AS 33.30.111. If this cannot be done under current statutes, the commission

SCOTT & WESLEY GERRISH
MEMORIAL

MADD

ANCHORAGE, ALASKA
CHAPTER

MAILING ADDRESS:
783 West 4th Avenue, Box 821
Anchorage, AK 99501

(907) 258-MADD

BUSINESS ADDRESS
719 East 11th Avenue
Anchorage, AK 99501

February 24, 1993

Rep. Eldon Mulder
State Capitol
Room 116
Juneau, Alaska 99801

Dear Rep. Mulder:

We at Mothers Against Drunk Driving would like to express our support for House Bill 136. We feel that this bill addresses the concerns of the Department of Corrections while keeping intact the most important part of our drunk driving laws, time in jail. In fact, we feel this will have an even greater impact on offenders if they are required to pay their own way.

I would encourage all legislators to pass this bill.

Sincerely,

Barbara B Mills

Barbara B. Mills
Executive Director
MADD Anchorage Chapter

BBM:mpc

HB

137

SPONSOR STATEMENT
Representative Eldon Mulder

CS HB137(IUD)

House Bill 137 is a product of one of the Alaska Sentencing Commission's recommendations to the Legislature. It is also a cooperative effort between the Department of Corrections, the Parole Board, and myself. The bill is a cost avoidance measure intended to save the Department of Corrections, and hence the State, a considerable amount of money in the future.

House Bill 137 relates to special medical parole for terminally ill prisoners. The Department of Corrections is responsible for inmates' medical costs as long as they remain in custody. Covering health costs is a serious financial burden, particularly when a terminal illness is involved. Once paroled, their medical costs could be picked up by Medicare or Medicaid, thus easing the financial burden on the Department of Corrections, and hence the State.

This bill would allow the parole board, when appropriate, to grant special medical parole for terminally ill patients. The bill contains certain criteria that the Board must follow before parole can be granted. It must determine that: the prisoner is suffering from a terminal illness, a reasonable probability exists that the prisoner will not violate any laws or conditions imposed by the Board, the prisoner will pose a threat to society, and release of the prisoner would not diminish the seriousness of the crime.

Passage of this bill should save the State of Alaska a substantial amount of money in the future. I urge the Committee to support House Bill 137.

Sectional Analysis for CS HB 137(JUD)

Section 1.

Adds the language "special medical" to AS 33.16.010(d). This is a conforming amendment to the addition of "special medical parole" as a type of parole under section 4 of the bill.

Section 2.

Adds a new subsection to AS 33.16.010 to allow someone who is eligible to be released on special medical parole by the Parole Board under new AS 33.16.085. This is also a conforming amendment to section 4 of the bill.

Section 3.

Amends AS 33.16.060, relating to the duties of the parole board, to include considering the suitability of a prisoner who is eligible for special medical parole and, relating to the board adopting regulations under the Administrative Procedures Act, to establish standards for the suitability of a prisoner for special medical parole. This is also a conforming amendment to section 4 of the bill.

Section 4.

Adds a new section to AS 33.16 pertaining to special medical parole. Allows the Board to grant, upon application by the prisoner or the commissioner, special medical parole to a prisoner who is serving a term of at least 181 days if the board determines: that the prisoner is suffering from a terminal illness and a reasonable probability exists that the prisoner will now violate laws or conditions imposed by the board; the prisoner will not pose a threat of harm to the public; and if the release of the prisoner on parole would not diminish the seriousness of the crime.

This section also allows the board to rescind or revise a previously granted parole release date if it discovers new information or a change in circumstances concerning a prisoner who had already been granted a special medical parole release date.

This section also instructs the board to issue its decision in writing and to provide a basis for its decision.

Finally, Section 4 of the bill also adds new section 33.16.87 pertaining to the rights of victims in connection with special medical parole. If a victim of a crime requests notice of a scheduled hearing to review special medical parole for a prisoner, the board must send notice of the hearing with the application for parole.

Section 5.

Adds the language "special medical" to AS 33.16.140, pertaining to the order for parole. This is also a conforming amendment to section 4 of the bill.

Section 6.

Adds the language "special medical" to AS 33.16.150(a). This is also a conforming amendment to section 4 of the bill.

Section 7.

Adds the language "special medical" to AS 33.16.150(b), relating to the board's conditions of parole. This is also a conforming amendment to section 4 of the bill.

Section 8.

Adds the language "special medical" to AS 33.16.200, relating to custody of a parolee. This is a conforming amendment to section 4 of the bill.

Section 9.

Amends AS 33.16.900 by adding a new paragraph defining "special medical parole."

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSHB 137 (JUD)

Revision Date: 3-30-93
Dept. Affected: Corrections
Title: "An Act authorizing special medical parole for terminally ill prisoners
BRU: Institutions; Stwd Programs
Component:
Sponsor: Rep. Mulder
Requestor: House Finance
COMPONENT SERIAL NO.

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	-0-	-0-	-0-	-0-	-0-	-0-
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: $ -0-

ANALYSIS: (Attach a separate page if necessary)

The Judiciary Committee substitute for HB 137 does not change the Department of Corrections fiscal note. Please see the attached page for further analysis.

Prepared by: Dana LaTour
Phone: 465-3376
Division: Commissioner's Office
Date: 3-30-93
Approved by Commissioner: Lloyd G. Rupp
Date: 3-30-93
Agency: Department of Corrections

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It is assumed that passage of this legislation may result in the parole of some terminally ill inmates who otherwise would not be paroled. There are currently 8 - 10 inmates who could be considered terminally ill. However, there is no assurance that any or all of these inmates would be granted parole since that decision remains at the discretion of the Parole Board.

Department of Corrections medical staff have estimated that a terminally ill inmate in the final stages of life can cost up to $500,000 per year for outside care. At this time, there is one inmate whose cost of care during the last 18 months has exceeded $500,000.

While this bill could create considerable savings over the long run, most of these savings will come as cost aversion. Therefore, the Department cannot reflect an actual budgetary reduction from current budget levels in this fiscal note. As the inmate population ages, the impact of this legislation could be significant.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSHB 137 (IUD)

evision Date: _____ Dept. Affected: Administration
Title: "An Act authorizing special medical parole for terminally ill prisoners . . ." BRU: Public Defender
Component: Public Defender
Sponsor: Representative Mulder
Requestor: (H) Fin COMPONENT SERIAL NO. 1631

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0
FUNDING:						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0
POSITIONS						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: $ none

ANALYSIS: (attach a separate page if necessary.)

Prepared By: John Salemi, Public Defender Phone: 274-1684
Division: Public Defender Agency Date:

Approved by Commissioner: Nancy Bear Usera Date: 3/30/93
Agency: Department of Administration

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSHB 137 (Iud)

Revision Date: _____ Dept. Affected: Administration
Title: "An Act authorizing special medical parole for terminally ill ...." BRU: Office of Public Advocacy
Component: Office of Public Advocacy
Sponsor: Representative Mulder
Requestor: House Finance COMPONENT SERIAL NO. 43

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0
FUNDING:						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0
POSITIONS						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: $ None

ANALYSIS: (attach a separate page if necessary.)

Prepared By: Brant McGee, Public Advocate Phone: 274-1684
Division: Office of Public Advocacy Date:

Approved by Commissioner: Nancy Bear Usera Date: 3/30/93
Agency: Department of Administration

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STATE OF ALASKA

POSITION PAPER

DEPARTMENT OF CORRECTIONS

PHONE 465-3376 - FAX 465-2006

HB 137 ***"An Act authorizing special medical parole for terminally ill prisoners."***

The Alaska Sentencing Commission has recommended that parole statutes be amended to allow special medical parole for terminally ill offenders. The Commission's report found that many offenders have serious medical problems that cost the Department a significant amount of money each year. The Commission expressed concern that as the inmate population ages and as the number HIV infected inmates increase the Department will face even higher inmate health care costs.

Currently, the Department can furlough a terminally ill person, but it will still be responsible for medical expenses. Medicare or Medicaid will step in only after the person has been released from DOC custody.

This legislation tries to establish a class of inmates who would be eligible for discretionary parole at an earlier date. The intention of this action is to reduce inmate medical costs.

Initially, there appears to be 8-10 offenders who might qualify for parole under the provisions of this bill. It should be noted that all inmates paroled under these provisions may not be eligible for government sponsored health care depending on their categorical qualification conditions for Medicaid or their age and their resulting qualification for Medicare.

It is assumed that passage of this legislation may result in the parole of some terminally ill inmates who otherwise would not be paroled. However, there is no assurance that any or all of these inmates would be granted parole since that decision remains at the discretion of the Parole Board.

Department of Corrections medical staff have estimated that a terminally ill inmate in the final stages of life can cost up to $500,000 per year for outside care. At this time there is one inmate whose cost of care during the last 18 months has exceeded $500,000.

While this bill could create considerable savings over the long run, most of these savings will come as cost avoidance. The Department cannot reflect an actual budgetary reduction from current budget levels, since its budget is not currently being heavily impacted by terminally ill offenders. However, as the inmate population ages, the impact of this legislation could be significant.

Revised 3-18-93

☒ YES
☐ NO

D La Tour for

Lloyd G. Rupp, Commissioner

Walter J. Hickel, Governor

Alaska Sentencing Commission

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501 (907) 279-2526 FAX (907) 276-5046

February 9, 1993

FEB 15 ...

Representative Eldon Mulder
Alaska State Legislature
State Capitol
Juneau AK 99801-1182

FEB 15 1993

RE: HB 137; Special Medical Parole

Dear Re sentative Mulder:

I am writing about your proposed legislation on special medical parole. This legislation would implement the Sentencing Commission's recommendation that a special medical parole for terminally ill offenders be allowed in appropriate cases, in order to shift the huge medical costs in these cases from the state to the federal government. The Commission recommended:

> **Parole statutes should be amended to allow special medical parole for terminally ill offenders.** Many offenders have serious medical problems that cost the Department of Corrections an extraordinary amount of money. The AIDS epidemic has not yet had a serious impact on Alaska prisons, but prison populations in some East Coast states are reported to be 40% HIV positive. In addition, there are a number of inmates serving long sentences who can be expected to grow old in prison.
>
> DOC currently can furlough a terminally ill person, but it still will be responsible for medical expenses. Medicare or Medicaid will pick up the person's medical costs only upon release from DOC custody. The parole board should be allowed to grant parole to terminally ill offenders. DOC should study the offender population and devise a system to achieve this objective. This recommendation passed unanimously.

Your legislation appears to be a measured response to the fiscal problem the Commission addressed. First, it creates a special medical parole for terminally ill prisoners. Second, it allows the parole board to limit use of the provision to offenders who will not pose a danger to society. Clearly, not all terminally ill prisoners would be appropriate candidates.

The need for legislation such as HB 137 is substantial now, and will increase as time goes by. My understanding is that the state has paid well over a half a million dollars for health care for two terminally ill prisoners in the last two years. We can expect these numbers to dramatically increase over the next few years, because of an aging prison population generally and because of AIDS.

On behalf of the Alaska Sentencing Commission, I would urge the Legislature to adopt legislation like HB 137 which allows special medical parole for appropriate terminally ill prisoners. Please feel free to call me if I can be of assistance.

Very truly yours,

William T. Cotton
Executive Director

WTC:erm

HB 148

REPRESENTATIVE
GENE THERRIAULT
P.O. Box 55326
North Pole, Alaska 99705
(907) 488-0862

House District 33

Alaska State Legislature

While in Juneau
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4797

House Of Representatives

M E M O R A N D U M

TO: Senator Steve Rieger
Chair, Senate Health, Ed. & Social Services Committee

FROM: Representative Gene Therriault

DATE: April 15. 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 Senate HESS 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-

contact: Wendy Redman
UA Statewide System
463-3086/474-7582

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.

UNIVERSITY OF ALASKA
Office of the General Counsel
203 Butrovich Building
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Office: (907) 474-7259
FAX: (907) 474-5574

Fairbanks
William R. Kauffman
Vice President and General Counsel
J. Mark Neumayr
Associate General Counsel

Anchorage
Jean S. Sagan
Associate General Counsel

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.

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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]

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.

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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.

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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).

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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).

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

(continued...)

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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.

UNIVERSITY OF ALASKA
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Fairbanks
William R. Kauffman
Vice President and General Counsel
J. Mark Neumayr
Associate General Counsel

Anchorage
Jean S. Sagan
Associate General Counsel

February 8, 1993

Honorable Fran Ulmer
House of Representatives
State Capitol
Juneau, Alaska 99811

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

Dear Representative Ulmer:

It is my understanding from both University of Alaska Vice President for Finance Brian Rogers and Budget Director Marsha Hubbard that you have requested 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 am writing for the purpose of providing the requested information. Some of the following information may already be in your possession from Chancellor Lind; however, some of the following is new, particularly that portion dealing with the recently announced Alaska Supreme Court Decision in *Odum v. University of Alaska Anchorage*.

The University was included in the Administrative Procedures Act (APA) in 1977 at a time when the University was facing intense legislative criticism for the university's 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 record reflects little interest in the APA's applicability but instead reflects legislative interest in the fiscal regulations. 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. Holman's only mention of the APA inclusion came when he quoted from a portion of a sectional analysis of the bill prepared by Glen Vernon, a fiscal analyst for the Division of Legislative Finance. The entire portion of the analysis explaining the inclusion of the University in APA stated:

> Section 1 of the bill would have the effect of placing the University of Alaska under the Administrative Procedures Act. This section would require the University to promulgate regulations and procedures so as to assure uniformity in administration of the University. Don Dafoe, retained as a consultant to the House Finance Committee feels this section is of dubious value, but sees no problem for the University if it is left in.

The elements of the adjudication procedures provide a hearing as a matter of right to determine "whether a right, authority, license or privilege should be revoked, suspended, limited, or conditioned" or "whether a right, authority, license or privilege should be granted, issued or renewed" AS 44.62.360 and AS 44.62.370 respectively. In the former case, the hearing is initiated by the filing of an accusation by the agency, whereas in the second instance, the matter is initiated by filing a statement of issues. In the case of the accusation, the matter must be served on the respondent who is given 15 days in which to request a hearing. The process is similar for matters initiated by the filing of a statement of issues. The hearing is to be conducted before a hearing officer appointed by the Office of the Governor. The statutory procedures provide for specific detail as to the form of the notice of the hearing; permits the issuance of subpoenas and the use of depositions; details the role of the hearing officer in conducting the matter; and establishes other procedural rules for the hearing and the procedures for judicial review.

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 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.* A copy of the decision is enclosed. 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, administrative 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.

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. By virtue of its public status, most any contact the University has with anyone, be it visitor, student or employee, is at least a privilege. Impose the contractual relationship between the University and an employee and it becomes questionable as to whether the University can discipline an employee without first affording an APA hearing. Even discounting the expense of the hearing process, it is currently taking approximately four weeks to secure the appointment of a hearing officer. A student suspended in the early part of the first semester for severe violations of the student conduct code is still awaiting a hearing.

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.

In reviewing the adjudication provisions of the APA, 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.

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. I am enclosing a copy of the proposed bill submitted to the Governor; legislative introduction is being sought for this measure.

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.

If I may be of further assistance, please contact me.

Very truly yours,

William R. Kauffman
Vice President and General Counsel

WRK:jdp
(wrk.1626)

/Enclosures

cc: Representative Terry Miller w/encls.
President Jerome B. Komisar w/encls.
Vice Presidents Proenza, Redman and Rogers w/encls.
Chancellors Behrend, Lind and Wadlow w/encls.
Executive Director Kastelic w/encls.
Director Hubbard w/encls.

SENATE BILL NO. 441

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 2/19/92
Referred: HES, Judiciary

A BILL

FOR AN ACT ENTITLED

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

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

* **Section 1.** AS 44.62.330(a)(45) is repealed.

* **Sec. 2.** TRANSITION. A university administrative action ongoing on the effective date of this Act is to continue to its conclusion under the procedures being followed before the effective date of this Act.

Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

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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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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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.

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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

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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...)

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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.

THE SUPREME COURT OF THE STATE OF ALASKA

ROSE M. ODUM,

Petitioner,

v.

UNIVERSITY OF ALASKA, ANCHORAGE,

Respondent.

Supreme Court File No. [illegible]
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

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

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

TRANSMISSION REPORT

THIS DOCUMENT (REDUCED SAMPLE ABOVE) COULD NOT BE SENT

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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, 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.

Alaska State Legislature

Senator Steve Rieger, Chair
Senator Bert Sharp, Vice Chair
Senator Loren Leman
Senator Mike Miller
Senator Jim Duncan
Senator Johnny Ellis
Senator Judith Salo

State Capitol
Room 516
Juneau, Alaska 99801
(907) 465-3762

Senate Committee on Health, Education and Social Services

SENATE HEALTH, EDUCATION, AND SOCIAL SERVICES COMMITTEE

Letter of Intent for House Bill 148

It is the intent of the Senate Health, Education, and Social Services Committee that upon passage of HB 148 the University put into place the draft grievance policy distributed to employees for review on March 22, 1993. It is the understanding of the legislature that this policy will be used as an interim policy only until the University of Alaska General Assembly and the Board of Regents formally and jointly agree to a successor grievance policy.

It is further the intent of the legislature that the University of Alaska General Assembly and the Board of Regents reach final approval of a successor grievance policy by June 15, 1993.

Senator Steve Rieger, Chair
Health, Education, and Social Services
Committee