



11513 HOUSE JUDICIARY

SB

129

Amendment #1 - FAILED
to CS8B 129 (JUI) by Rep. Gara)

Change the requisite mental state from
"reckless disregard" to "intentionally"

ALASKA STATE LEGISLATURE

Senate District H
600 E. Railroad Avenue
Wasilla AK 99654
907-376-4866
907-373-4724 - Fax
Senator_Charlie_Huggins@legis.state.ak.us



State Capitol, Room 417
Juneau AK 99801-1182
907-465-3878
Fax: 907-465-3265
800-862-3879
www.akrepublicans.org/huggins/

Charlie Huggins
Senator

April 12, 2005

To: Representative Lesil McGuire, Chairman
House Judiciary Committee

From: Senator Charlie Huggins

Subject: Request to Schedule CSSB 129(JUD)

I respectfully request the scheduling of CSSB 129(JUD), "An Act relating to the wrongful recording of a notice of pendency of an action relating to title to or right to possession of real property", for a hearing before your committee at your convenience.

Thank you.

Attachments

ALASKA STATE LEGISLATURE

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Charlie Huggins Senator

3/23/05

Sponsor Statement

CSSB 129(JUD) – An act relating to the wrongful recording of a notice of pendency of an action relating to title to or right to possession of real property

CSSB 129(JUD) seeks to discourage abusive filings of illegal lis pendens notices and in fact makes it a Class A misdemeanor to file a wrongful "notice of lis pendens"¹. While the filing does not create a formal lien, such a notice can have an impact similar to that of a lien on the ability of the targeted person to do business with the affected real estate.

CSSB 129(JUD) responds to instances of nuisance filings used as a form of retribution against public officials. Current law is clear that lis pendens are only supposed to be filed against property for which the title or right to possession is subject to litigation, but the recorder's office currently has no way to prevent people from filing improper lis pendens. Ordinarily, the improper filing is against property that is not subject to dispute; however, the filing is made simply because the filer has a grievance against the owner or someone connected with the owner.

In one case in 2003, a former state employee filed lis pendens targeting the home, development property and mining claims of members of the Alaska Board of Game, an assistant attorney general, and a real estate developer. None of the properties were actually the subject of a title or possession dispute, but the case took months and thousands of dollars of attorney time to resolve.

In a prosecution under this bill it is an affirmative defense that the owner of the property affected has consented in writing to the lien or the filing of the notice.

¹*Notice of lis pendens* . – A notice filed on public records for the purpose of warning all persons that the title to certain property is in litigation, and that they are in danger of being bound by an adverse judgment. The notice is for the purpose of preserving rights pending litigation.

Contact Information – Deborah Grundmann 465-4711



Alaska State Legislature

Senate Majority Web: www.akrepublicans.org

Sponsor: Senator Charlie Huggins
Current Version: CSSB 129 (JUD)
Contact: Deborah Grundmann, 465-3878

Fact Sheet for: Senate Bill 129

Short Title: WRONGFUL FILING OF LIS PENDENS

Summary:

- Makes it a Class A misdemeanor to file a wrongful notice that an action is pending that affects title to real property when the notice is filed with reckless disregard that the action would not affect title to the property, or no action is actually pending.

Benefits:

- Prohibits abusive real estate filings used for improper retribution against public servants.
- Eliminates public expense and unnecessary workload for court system and other staff.

Background:

- SB 129 relates to the wrongful recording of a notice of "lis pendens," which notifies a potential purchaser or lender that title to the property is subject to litigation. While the filing does not create a formal lien, such a notice can have an impact similar to that of a lien on the ability of the targeted person to do business with the affected real estate. The bill responds to instances of nuisance liens filed as a form of retribution against public officials. Current law clarifies that lis pendens are only supposed to be filed against property for which the title or right to possession is subject to litigation, but the recorder's office currently has no way to prevent people from filing improper lis pendens. Ordinarily, this is a filing against property that is not subject to dispute made simply because the filer has a grievance against the owner or someone connected with the owner. In one case in 2003, a former state employee filed lis pendens targeting the home, development property and mining claims of members of the Alaska Board of Game and an assistant attorney general. None of the properties were actually the subject of a title or possession dispute, but the case took months and thousands of dollars of attorney time to resolve.

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Charlie Huggins Senator

Sectional Analysis of CSSB 129(JUD) (wrongful recording of notice of pendency of action relating to title or possession of real property)

CSSB 129(JUD) seeks to discourage abusive filings of illegal lis pendens notices. There is currently no penalty for filing illegal lis pendens notices. Filing a lis pendens notice creates property title "clouds" that can interfere with property sales or financing.

Sec. 1. The first section of the bill adds an additional type of conduct to the actions designated in AS 11.46.560(a) as comprising "the crime of offering a false instrument for recording in the second degree." This crime is a Class A misdemeanor. Under CSSB 129(JUD) criminal liability is extended to those who file notices of lis pendens with the recorder of deeds with knowing or reckless disregard for the fact that the court action specified in the notice does not concern either the title to, or the right to possess, the real property referred to in the notice. Liability is also extended to those who file such a notice with knowing or reckless disregard for the fact that there is no pending court action at all that concerns either the title to, or the right to possess, the real property referred to in the notice.

The language in section 1 tracks AS 09.45.940, which sets out the circumstances under which it is proper to file with the recorder of deeds a notice of the pendency of an action affecting title to real property or the right to possession of real property. The common legal term for these notices is "notices of lis pendens." Under CSSB 129(JUD), a person knowingly or recklessly using a notice of lis pendens in circumstances not provided in AS 09.45.940 will, in general, be subject to prosecution.

Sec. 2. Section 2 makes it a complete defense to criminal liability if the person filing the wrongful notice shows that the owner of the property consented in writing to the filing. Thus, even if the filing of the notice is not within the law as set out in AS 09.45.940, the person making the filing is not guilty of a misdemeanor if the owner of the property consented in writing to let the wrongful document be filed with the recorder of deeds.

ALASKA LAND TITLE ASSOCIATION

P.O. Box 241811 • Anchorage, Alaska 99524

March 22, 2005

The Honorable Charlie Huggins
Alaska State Senate
State Capitol Building
Juneau, Alaska

Subject: Letter of Support for SB 129

Dear Senator Huggins:

The Legislative Committee of the Alaska Land Title Association (ALTA) has met and discussed SB129, an Act relating to wrongful recording of lis pendens. This letter is to express support by ALTA for SB129.

The Alaska Land Title Association is the state professional association and voice of the title insurance industry. ALTA members search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate. Members of the association are in business in communities throughout Alaska.

During our review and discussion on the bill, it was felt that SB129 would help prohibit abusive recordings of lis pendens against blameless property owners. While it is hard to imagine why someone would take such disingenuous methods, history has shown that this, indeed, can happen.

Thank you for sponsoring this bill and allowing us this opportunity to express support.

Sincerely,



Sheila Bader, President
Alaska Land Title Association
Sheila@aktitle.com

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

KENNETH H. MANNING, JD,)
)
 Plaintiff,)
)
 v.)
)
 ALASKA BOARD OF GAME, GREG)
 ROCZICKA, Chair, GEORGE MATTZ,)
 MIKE FI EAGLE, DANA PRUHS,)
 BEN GRUSSENDORF, Vice Chair,)
 GREG STREVELER, JULIE MAIER,)
 STATE OF ALASKA DEPT. OF LAW,)
 KEVIN SAXBY, ASSISTANT)
 ATTORNEY GENERAL, State of)
 Alaska Department of Law,)
)
 Defendants.)

Case No. 3AN-02-4392 Ci

AFFIDAVIT OF MARK SPARROW

Mark Sparrow, being first duly sworn, deposes and states:

1. My name is Mark Sparrow. I am a resident of Anchorage, Alaska and am over the age of eighteen. I make this affidavit on personal knowledge.
2. I am not a defendant in this case.
3. I have never been a member of the Alaska Board of Game.
4. I do not know Kenneth Manning, and to my knowledge I have never had any contact with him.
5. Since February, 2003, I have been one of the owners of Lot 9A, Block 6, Plat 71-256, District 301 (hereafter "Lot 9A").

6. Lot 9A is an integral part of a 28-unit condominium development project that is scheduled for construction this summer.

7. Lot 9A is under contract for sale at a price of \$244,500. The title company for the transaction is First American Title.

8. First American Title has informed me that it will not insure the title of Lot 9A until the *lis pendens* filed by Mr. Manning is removed. Title insurance is required for the transaction to proceed.

9. If the *lis pendens* is not removed promptly, I believe I will suffer serious financial harm.

Mark Sparrow

STATE OF ALASKA
ANCHORAGE, ~~SS~~

)
) ss.

THIRD JUDICIAL DISTRICT

Personally appeared before me the above-named Mark Sparrow this ___ day of April, 2004, and made oath that the foregoing statements are true to the best of his knowledge.

Notary Public IN AND FOR ALASKA

Printed name:

My commission expires: _____

ALASKA STATE LEGISLATURE

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Charlie Huggins Senator

3/23/05

Sponsor Statement

CSSB 129(JUD) – An act relating to the wrongful recording of a notice of pendency of an action relating to title to or right to possession of real property

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Current Version: CSSB 129 (JUD)
Contact: Deborah Grundmann, 465-3878

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Mark Sparrow

STATE OF ALASKA)
ANCHORAGE, ss) ss.

THIRD JUDICIAL DISTRICT

Personally appeared before me the above-named Mark Sparrow this ___ day of April, 2004, and made oath that the foregoing statements are true to the best of his knowledge.

Notary Public IN AND FOR ALASKA

Printed name:

My commission expires: _____

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSSB 129(JUD)
(S) Publish Date: 3/24/05

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
Title: "An Act relating to the wrongful recording of a RDU CIVIL
notice of pendency..." Component: Torts & Workers' Compensation
Sponsor: Senator Huggins
Requester: Senate Judiciary Component No. _____

Expenditures/Revenues

(Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The proposed legislation would make it a Class A misdemeanor to present a lis pendens to a recorder with reckless disregard for the fact that the underlying action does not concern title to or possession of the property at issue. The intent of the legislation is to deter the use of improper restraints on real property of public officials and members of the public as a means of retribution or intimidation.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhete, Director
Division: Administrative Services Division
Approved by: K. Daughhete for Scott Nordstrand, Acting Attorney General
Agency: Department of Law

Phone: 465-3673
Date/Time: 3/18/05 2:32 PM
Date: 3/18/2005

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSB 129(JUD)
(S) Publish Date: 3/24/05

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
Title: Wrongful Filing of Lis Pendens BRU: Alaska Court System
Component: Trial Courts
Sponsor: Senator Huggins
Requester: _____ Component No.: 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1007 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
The court system does not anticipate any fiscal impact from the passage of SB 129.

Prepared by: Douglas Wooliver, Administrative Attorney Phone: 463-4750
Division: Alaska Court System Date/Time: 3/21/05 11:35 AM
Approved by: Doug Wooliver for Stephanie Cole, Administrative Director Date: 3/21/2005
Agency: Alaska Court System

SB

130

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 4, 2005

FURTHER REFERRALS: Finance

Date of Committee Action: May 6, 2005

The JUDICIARY Committee considered:

CSSB 130(FIN) am

CS FOR SENATE BILL NO. 130(FIN) am

WORKERS' COMPENSATION/INSURANCE

"An Act relating to a special deposit for workers' compensation and employers' liability insurers; relating to assigned risk pools; relating to workers' compensation insurers; stating the intent of the legislature, and setting out limitations concerning the interpretation, construction, and implementation of workers' compensation laws; relating to the Alaska Workers' Compensation Board; assigning certain Alaska Workers' Compensation Board functions to the division of workers' compensation in the Department of Labor and Workforce Development and in that department, and authorizing the board to delegate administrative and enforcement duties to the division; providing for workers' compensation hearing officers in workers' compensation proceedings; establishing a Workers' Compensation Appeals Commission; relating to workers' compensation medical benefits and to charges for and payment of fees for the medical benefits; relating to agreements that discharge workers' compensation liability; relating to workers' compensation awards; relating to reemployment benefits and job dislocation benefits; relating to coordination of workers' compensation and certain disability benefits; relating to division of workers' compensation records; relating to release of treatment records; relating to an employer's failure to insure and keep insured or provide security; providing for appeals from compensation orders; relating to workers' compensation proceedings; providing for supreme court jurisdiction of appeals from the Workers' Compensation Appeals Commission; providing for a maximum amount for the cost-of-living adjustment for workers' compensation benefits; relating to attorney fees with respect to workers' compensation; providing for the department to enter into contracts with nonprofit organizations to provide information services and legal representation to injured employees; providing for administrative penalties for employers uninsured or without adequate security for workers' compensation; relating to fraudulent acts or false or misleading statements by workers' compensation and penalties for the acts or statements; providing for members of a limited liability company to be included as an employee for purposes of workers' compensation; establishing a workers' compensation benefits guaranty fund; making conforming amendments; providing for a study and report by the medical services review committee; establishing the Task Force on Workers' Compensation; and providing for an effective date."

Recommends it be replaced with HCS or CS for CS SB 130 (JUD)
 For Senate Bills with new title: Technical Title New Title: HCR HCS ~~JUD~~

pending ↑
intro - ↑
Forthcoming

- attach amendments
- add new referral to _____ Committee
- Letter of Intent _____ Committee

- List of Abbrev for Depts.:
- ADM
 - CED
 - COR
 - CRT
 - EED
 - DEC
 - DFG
 - GOV
 - HSS
 - LEG
 - LAW
 - LWF
 - MVA
 - DNR
 - DPS
 - REV
 - DOT
 - UA

NEW FISCAL NOTES				
*Assigned by Chief Clerk's				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW		✓		
LAW		✓		
LAW		✓		
LWF		✓		

FISCAL NOTES				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LEG	7			✓
LEG	9			✓
CRT	5			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
<i>[Signature]</i>	KOTT	✓		✓	
<i>[Signature]</i>	Anderson				✓
<i>[Signature]</i>	Anderson				✗
<i>[Signature]</i>	Cochran	✓			
<i>[Signature]</i>	Gara	✓			
<i>[Signature]</i>	Dahlstrom			✓	
Chair: <i>[Signature]</i>	McAure				✓
Chair:					

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HCS CSSB 130 (L&C)
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
 Title Workers' Compensation BRU Alaska Court System
 Component Trial Courts
 Sponsor Senate Rules
 Requester Governor Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
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Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HCS CSSB 130 (L&C).

Prepared by: Douglas Wooliver, Administrative Attorney Phone 463-4750
 Division: Alaska Court System Date/Time 5/5/05 8:23 AM
 Approved by: Doug Wooliver for Stephanie Cole, Administrative Director Date 5/5/2005
 Agency: Alaska Court System

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: SB130-LAW-OSPA-5-3-C
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
Title: "An Act relating to a special deposit for workers' compensation and employers' liability insurers..." RDU: CIVIL
Sponsor: Rules Committee Component: Office of Special Prosecutions and Appeals
Requester: Governor Component No.: _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	69.6	69.6	69.6	69.6	69.6	69.6
Travel	0.2	0.2	0.2	0.2	0.2	0.2
Contractual	8.2	8.2	8.2	8.2	8.2	8.2
Supplies	1.1	1.1	1.1	1.1	1.1	1.1
Equipment	7.1	7.1	7.1	7.1	7.1	7.1
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	86.2	86.2	86.2	86.2	86.2	86.2

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	86.2	86.2	86.2	86.2	86.2	86.2
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	86.2	86.2	86.2	86.2	86.2	86.2

Estimate of any current year (FY2005) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	1	1	1	1	1	1
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 21 and AS 23 in order to increase the efficiency and flexibility of the current workers' compensation system. This fiscal note addresses Section 64 of the bill which requires that the Department of Law designate at least one-half an attorney positions for the purpose of prosecuting actions for fraudulent acts related to workers' compensation. The Department prefers to add a full-time position which it may very well need to fill half-time. Given that the number of prosecutions the designated position would need to handle is not known, a full time position may be necessary.

The cost associated with a half time attorney is in accordance with the Department of Law's FY 2006 timekeeping and billing rate and includes overhead costs and equipment consistent with the addition of a new attorney position in the Department of Law.

Prepared by: Kathryn A. Daughhete, Director Phone 465-3673
Division: Administrative Services Division Date/Time 5/5/05 10:53 AM
Approved by: Kathryn Daughhete for David Márquez, Attorney General Date 5/5/2005
Agency: Department of Law

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB130-LAW-C&S-5-3-05
 () Publish Date: _____

Revision Date/Time (Note if corrected): _____ Dept. Affected: LAW
 Title: "An Act relating to a special deposit for workers' compensation and employers' liability insurers..." RDU: CIVIL
 Sponsor: Rules Committee Component: Collections and Support
 Requester: Governor Component No.: _____
 Appeals: _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	16.2	16.2	16.2	16.2	16.2	16.2
Travel						
Contractual	2.0	2.0	2.0	2.0	2.0	2.0
Supplies	0.2	0.2	0.2	0.2	0.2	0.2
Equipment	1.6	1.6	1.6	1.6	1.6	1.6
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	20.0	20.0	20.0	20.0	20.0	20.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	20.0	20.0	20.0	20.0	20.0	20.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	20.0	20.0	20.0	20.0	20.0	20.0

Estimate of any current year (FY2005) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time	1	1	1	1	1	1
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 21 and AS 23 in order to increase the efficiency and flexibility of the current workers' compensation system. This fiscal note addresses Sections 25 and 26 of the bill. Section 25 allows the workers' compensation board to assess a civil penalty of \$1,000 per day if an employer fails to comply with a stop order prohibiting the use of employee labor by the employer until the employer insures. A further penalty of \$1,000 per employee per day may be assessed against any employer who fails to insure. Any employer who fails to pay the civil penalty order issued within seven days will have a court judgment and the duty to collect that judgment will fall on the Collections and Support Unit. Section 26 creates the Workers' compensation benefits guaranty fund and allows appropriations from that fund to pay for legal expenses. Furthermore, this section would make the fund liable for amounts owed to employee for compensation and benefits under the Workers' Compensation Act. In instances

Prepared by: Kathryn A. Daughhete, Director Phone 465-3673
 Division: Administrative Services Division Date/Time 5/5/05 10:53 AM
 Approved by: Kathryn Daughhete for David Marquez, Attorney General Date 5/5/2005
 Agency: Department of Law

FISCAL NOTE

**STATE OF ALASKA
2005 LEGISLATIVE SESSION**

BILL NO. SB130

ANALYSIS CONTINUATION

where the fund subrogates to the employee's right to payment, the Collections Unit would be responsible for making sure that if there were any funds available from the employer, that money could be collected to offset amounts paid to the employee under subrogation. This fiscal note assumes the primary duty of the fund is to make employees whole, not to pay for all the legal services provided to the Worker's Compensation Division to prosecute fraud, render advice, draft regulations, and collect penalties and subrogation.

This fiscal note anticipates that approximately 250 hours of additional paraprofessional time will be needed each year to conduct bank sweeps and research the availability of money from employers who default of compensation and benefits and/or owe civil penalties to the State.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB130-LAW-L&SA-5-3-0
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act relating to a special deposit for workers' compensation and employers' liability insurers..." RDU CIVIL
 Component Labor & State Affairs
 Sponsor Rules Committee Appeals _____
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	104.4	104.4	104.4	104.4	104.4	104.4
Travel	0.3	0.3	0.3	0.3	0.3	0.3
Contractual	12.3	12.3	12.3	12.3	12.3	12.3
Supplies	1.6	1.6	1.6	1.6	1.6	1.6
Equipment	7.4	7.4	7.4	7.4	7.4	7.4
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	126.0	126.0	126.0	126.0	126.0	126.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	126.0	126.0	126.0	126.0	126.0	126.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	126.0	126.0	126.0	126.0	126.0	126.0

Estimate of any current year (FY2005) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	1	1	1	1	1	1
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 21 and AS 23 in order to increase the efficiency and flexibility of the current workers' compensation system. This fiscal note addresses Section 4 which changes the number of panels that hear workers' compensation matters and requires regulations. Similarly, Section 6 related to the Commissioner of Labor or a designee to hear and decide matters will also require new regulations. Section 26 creates the Workers' Compensation benefits Guaranty Fund and allows subrogation of the fund when employers default on benefits and compensation owed to employees. This section will result in the pursuit of civil claims and subrogation claims on behalf of the fund and defense against improper claims. Section 32 will also require new regulations to establish fees for medical treatment and services under worker's compensation. Additionally, Section 60 of the bill establishes a an investigation section within the workers compensation division and Section 29 requires a medical

Prepared by: Kathryn A. Daughhete, Director Phone 465-3673
 Division Administrative Services Division Date/Time 5/5/05 10:53 AM
 Approved by: Kathryn Daughhete for David Márquez, Attorney General Date 5/5/2005
 Agency Department of Law

FISCAL NOTE

**STATE OF ALASKA
2005 LEGISLATIVE SESSION**

BILL NO. SB130 _____

ANALYSIS CONTINUATION

services review committee be established. These newly established units would need require a certain amount of legal advice. It is estimated that the services of three quarters of an attorney would be needed for the previously discussed changes. The Department prefers to add a full-time position which it may very well need to fill part-time. These services cannot be paid

The cost associated with a three-quarters time attorney is in accordance with the Department of Law's FY 2006 timekeeping and billing rate and includes overhead costs and equipment consistent with the addition of a new attorney position in the Department of Law. Given that the number of issues the designated position would need to handle is not known, a full time position may be necessary.

The cost associated with a half time attorney is in accordance with the Department of Law's FY 2006 timekeeping and billing rate and includes overhead costs and equipment consistent with the addition of a new attorney position in the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: **SB130HCSCS-DOLWD-WC-05-05-05**
 () Publish Date: _____

Revision Date/Time: _____ Department: **Labor and Workforce Development**
 Title: **Workers' Compensation/Insurance** RDU: **Workers' Compensation**
 Component: **Workers' Compensation**
 Sponsor: **Senate Rules**
 Requester: **House Judiciary** Component Number: **344**

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	468.3	468.3	468.3	468.3	468.3	468.3
Travel	95.0	90.0	90.0	90.0	90.0	90.0
Contractual	330.3	265.3	265.3	265.3	265.3	265.3
Supplies	25.5		25.5	25.5	25.5	25.5
Equipment	70.0					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	989.1	849.1	849.1	849.1	849.1	849.1

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (1157)	* 0.0	* 0.0	* 0.0	* 0.0	* 0.0	* 0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1157 Workers' Safety Account	989.1	849.1	849.1	849.1	849.1	849.1
TOTAL	989.1	849.1	849.1	849.1	849.1	849.1

Estimate of any current year (FY2005) cost: None
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	7	7	7	7	7	7
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

(See attached.)

Prepared by: Paul F. Lisankle, Director Phone: 465-6059
 Division: Workers' Compensation Date/Time: 5/5/05 11:21 AM
 Approved by: Greg O'Claray, Commissioner Date: 5/5/2005
 Agency: Department of Labor and Workforce Development

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL VERSION: SB130HCSCS-DOLWD-WC-05-05-05

ANALYSIS: (continued)

Personal Services:

A new position (WC Officer II) is requested to allow the reemployment benefits section to increase the amount of outreach and counseling to injured workers potentially eligible for retraining (cost \$71.1).

Six new positions (Investigator IV, 2 Investigators III, 2 Investigators II, and an Administrative Clerk III) will form a fraud investigation unit (cost \$397.2).

Travel:

Funding of \$30.0 is necessary for travel and per-diem for the staff and members of the medical review committee. An additional \$5.0 is requested in FY06 to attend the legislative task force meetings. On-going funding of \$60.0 is necessary for the travel, per diem and hotel costs to enable the fraud investigators to travel throughout the state.

Contractual:

Funds of \$100.0 for a consultant and other costs associated with the Medical Services Review Committee are included in the first year for the committee to study the medical delivery system for workers' compensation and \$35.0 thereafter. On-going contractual services funding of \$35.0 for rehabilitation program outcome tracking by the Labor Market Information component is required. Contractual services for the new positions include lease costs (\$56.7); mail (\$8.7); administrative support costs (\$83.2); transcripts, copies, printing, etc (\$16.7), training for the fraud investigators (\$15.0). The establishment of a toll free line is estimated to cost \$15.0.

Commodities: Funding of \$25.5 for supplies for the new positions is required.

Equipment: One time funding for office equipment for the new positions of \$70.0 is requested.

New Fees/Fines:

This bill authorizes the Workers' Compensation Board to impose civil penalties against employers that violate the statutory requirement to insure or properly self-insure their employees for workers' compensation benefits.

* Penalties may be up to \$1,000.00 per employee per day. In FY04 over 150 employers were found without workers' compensation insurance; however, the amount of any penalties cannot be determined. Any penalties assessed will be deposited to the Workers' Compensation Guaranty Fund established by this legislation. The Guaranty Fund will use those funds to pay benefits to workers injured while employed by an uninsured employer. The amount of those benefits is also indeterminate.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Nancy Dahlstrom
Rep. Pete Kott
Rep. Les Gara
Rep. Max Gruenberg



State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal
From: Vanessa Tondini, Committee Aide
House Judiciary Committee
Date: May 6, 2005
Re: CS Request - RUSH

Please create a final draft House Judiciary Committee Substitute for work order # 24-GS1112\S, SB 130, incorporating the attached amendment. The bill was passed out of committee today and is scheduled for a hearing in the House Finance Committee at 4 p.m. this afternoon.

If you have any questions, please call me at 4990.
Thank you!

The information attached to this memo is **CONFIDENTIAL** and/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

Amendment #1 - PASSED

to HCS CSSB 130(L+C)
version "S"

by Rep. Dahlstrom

Reinsert the 2nd Injury fund.

Workers' compensation reforms under

Senate Bill 899

First annual report of progress



California Division of Workers' Compensation

Workers' compensation reforms under

Senate Bill 899

First annual report of progress

California Division of Workers' Compensation
April 2005

Contents

Introduction.....p. 2

- History of workers' compensation in California
- History of Senate Bill 899
- Cost drivers
- Cost savings
- Fewer disputed claims entering system

Regulations and program implementation.....p. 4

- Advisory groups
- Medical provider networks
- Independent medical review
- Qualified medical examiner panels
- Permanent disability rating schedule
- Pre-designation of personal physician
- Return to work
- Section 5814.6 penalties

Hiring.....p. 9

Education, training and outreach.....p. 9

- Educational conference
- American Medical Association guides training
- DWC Web site
- Injured worker workshops

Claims process efficiency.....p. 11

Introduction

A brief history of workers' compensation in California

Workers' compensation insurance began in 1913 as a bargain between labor and employers. Employers provide no-fault insurance against workplace injuries, which delivers five benefits:

- Temporary disability payments
- Medical expenses (both evaluation and treatment)
- Vocational rehabilitation or supplemental job displacement benefits (SJDB)
- Permanent disability
- Death benefits.

Employers, in turn, are not subject to lawsuits that could be filed by workers injured on the job. The system was not intended to be profit-based. However, many people have learned how to profit from the system at the expense of employers and injured workers.

History of Senate Bill (SB) 899

In an effort to save jobs, reduce costs for employers and improve care for injured workers, SB 899 was overwhelmingly passed by the Legislature and signed into law by Gov. Schwarzenegger on Apr. 19, 2004.

SB 899 reforms focused on controlling escalating medical costs, which account for 51 percent of every dollar and indemnity benefits, which account for 49 percent of every workers' comp dollar spent.

Cost drivers

California workers' compensation costs	Paid by insurers (Source: WCIRB)	Estimated paid by all California employers (Assuming 20% of WC coverage is by self-insurance)
Total costs (Indemnity, medical, expenses and changes to total reserves)	<u>2003:</u> \$21.8 billion <u>1997:</u> \$6.8 billion	<u>2003:</u> \$26.7 billion <u>1997:</u> \$8.3 billion
Medical costs	<u>2003:</u> \$4.9 billion <u>1997:</u> \$2.1 billion	<u>2003:</u> \$6.1 billion <u>1997:</u> \$2.6 billion
Indemnity costs	<u>2003:</u> \$4.6 billion <u>1997:</u> \$2.7 billion	<u>2003:</u> \$5.8 billion <u>1997:</u> \$3.4 billion

SB 899 mitigates the problem of escalating costs by providing prompt, effective medical treatment to injured workers so they recover from injuries and return to

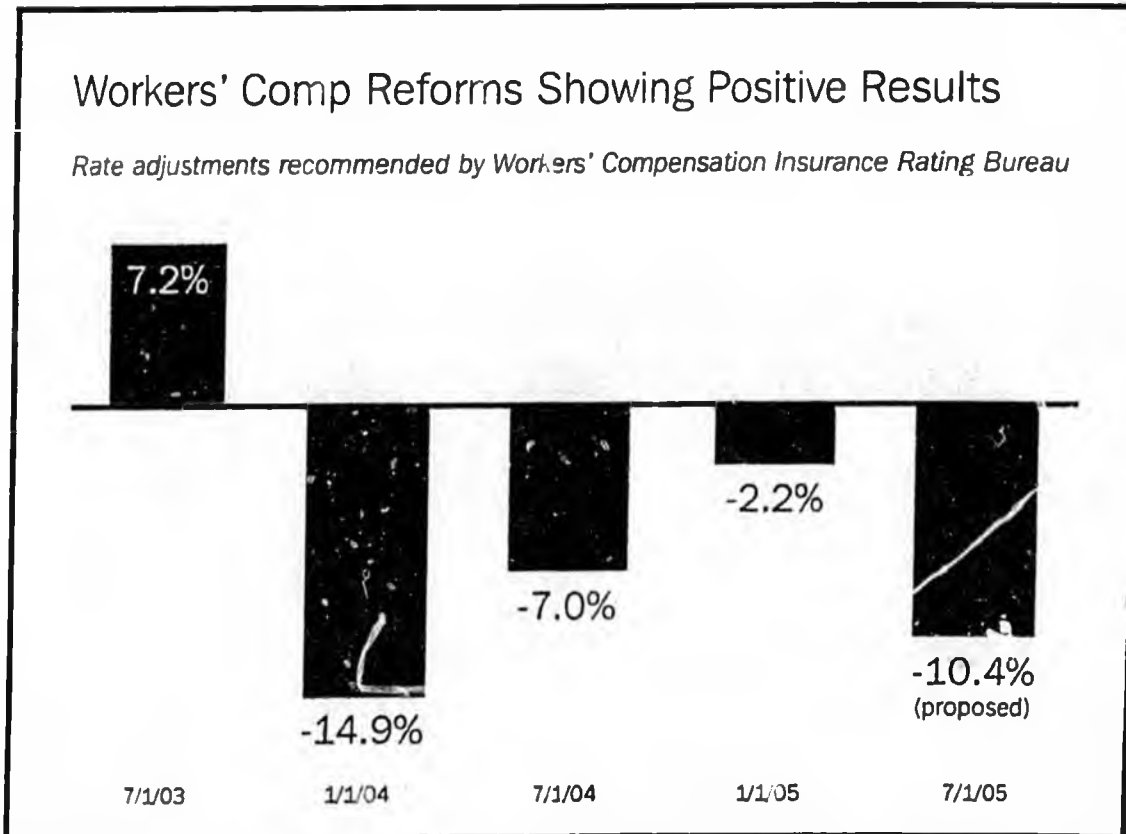
work: Medical provider networks (MPNs) provide a framework for effective medical treatment; medical treatment guidelines determine whether proposed medical treatment is necessary and will be effective; new permanent disability rating schedule (PDRS) provides objective and consistent methodology to determine disability rating; and return to work provision supplies incentive for employers to return injured workers to the job.

The result of implementing these reforms is more effective medical treatment and more accurate disability ratings, which result in significant cost savings to the workers' compensation system. Because the incentive is to treat injuries and return employees to work, the incentive for those who profit from the system by encouraging injured workers to hold out for higher disability awards is eliminated.

Cost savings

The Workers' Compensation Insurance Rating Bureau of California (WCIRB) tracks actual average rates for insured employers. The WCIRB reported a peak level of \$6.35 per \$100 of payroll in the last quarter of 2003. By the third quarter 2004, that rate was \$5.34 per \$100 -- a reduction of 16 percent.

Since that time, more average rate drops were recommended, which reduced rates by 2.2 percent effective Jan. 1, 2005, and the WCIRB proposed another 10.4 percent decrease to be effective Jul. 1, 2005. (This proposal does not include any impact of changes to the permanent disability schedule currently in regulatory process except for those changes seen as automatic, such as "weeks of benefit" changes and "bump-up/bump-down").



If insurers pass those changes through in full, the average cost of workers' compensation insurance would be \$5.22 per \$100 of payroll for early 2005 and \$4.68 for late 2005. **The latter amount would be a reduction of 26.3 percent from the peak rates charged in 2003.**

From the *Sacramento Bee*, January 2005:

"California business owners saw the average annual premium for workers' compensation insurance drop between 13.9 percent and 16.6 percent in the last six months, according to records from the state Department of Insurance."

Fewer disputed claims entering the system

In April 2003, a total of 17,104 new disputed claims entered the workers' compensation adjudication system, but by January 2005, that number was down to 10,878 -- a reduction of 36 percent.

Regulations and program implementation

The Division of Workers' Compensation (DWC) accomplished much in 2004, one considerable piece of which was meeting all of SB 899's statutory deadlines for implementing regulations:

1. Medical provider network (MPN) emergency regulations effective Nov. 1, 2004
2. Independent medical review (IMR) emergency regulations effective Jan. 1, 2005, to coincide with when the first MPNs could be established
3. Permanent disability emergency regulations effective Jan. 1, 2005.

The regulatory process is off to a roaring start in 2005, with the administrative director giving priority to adoption of permanent regulations for MPNs, IMR, the permanent disability rating schedule (PDRS) and utilization review (UR).

This year's focus also includes adoption of regulations for medical treatment utilization guidelines, return to work, pre-designation of physicians, supplemental job displacement benefits, assessing penalties for utilization review violations and Labor Code section 5814.6, new official medical fee schedule, and revised qualified medical evaluator (QME) regulations.

Advisory groups

To draft so many regulations in a timely fashion, the division uses a team approach and conducts advisory groups, which help iron out problems before formal rulemaking on an issue begins. Advisory groups are made up of invited stakeholders and division staff.

When drafting regulations, the division's goal is to provide guidance to those using the system. Advisory groups afford the opportunity for the division to receive input from system users so the impact of the division's actions is clear.

At advisory group meetings, members engage in frank discussion and debate about regulatory language and clarity.

Each regulatory package is supported by the work of an advisory group, which includes 20-30 members. While the core group is invited, anyone who asks will be included in an advisory group. This produces a diverse membership, including representatives of labor, employers, insurers, applicant and defense attorneys, medical providers, injured employees and the Commission on Health and Safety and Workers' Compensation (CHSWC).

"The advisory groups, and the public comment we get in that venue, afford the division the opportunity to sort through issues on the front end."

--DWC Administrative Director Andrea Lynn Hoch

Medical provider networks (MPN)

The MPN regulations govern the medical treatment component of the workers' compensation system, and are designed to improve the treatment process for injured workers through the creation and operation of medical provider networks.

An MPN is an entity or group of providers, set up by an insurer or self-insured employer and approved by the administrative director of the Division of Workers' Compensation, to treat workers injured on the job. Each MPN must include a mix of doctors who specialize in treating work-related injuries and doctors with general areas of medical expertise, and is required to meet access standards to care for common occupational injuries and work-related illnesses. MPNs must follow all medical treatment guidelines established by DWC and allow employees a choice of provider(s) in the network after the first visit. MPNs also must offer an opportunity for second and third opinions if the injured worker disagrees with the diagnosis or treatment offered by the treating physician.

To ensure injured workers have easy access to treatment, the regulations require MPNs in urban areas to make certain a primary care physician and a hospital for emergency care are located within 30 minutes or 15 miles of each employee's residence or workplace; Specialists must be within 60 minutes or 30 miles. Alternate standards for rural areas must be approved by the DWC administrative director on a case-by-case basis.

The regulations provide safeguards for workers injured prior to the establishment of approved MPNs by allowing them to continue to receive treatment from their existing doctor(s) if the worker is scheduled for surgery or if the worker's condition is acute, serious and chronic, or terminal.

Additionally, treatment delays caused by insurer or self-insured employer objections to proposed treatments will be reduced because they will be more confident MPN doctors are following appropriate treatment guidelines.

As of April 2005, DWC has received over 800 applications and has approved 477 MPNs. No default approvals have occurred because the division has never missed the statutory timeline required for approval.

Independent medical review (IMR)

As part of an MPN, an injured employee has the opportunity to seek a second and third opinion from physicians within the MPN if he/she disputes the diagnosis, diagnostic service(s) or medical treatment of his/her treating physician. If the dispute is not resolved by the second or third opinion process, the injured worker may seek an independent medical review from a physician or independent medical review organization on contract with the administrative director.

The IMR regulations establish the criteria and process for contracting with individual physicians, and for establishing a statewide list of eligible independent medical reviewers.

In addition to the physician application process, the new regulations outline the manner in which an injured employee requests an IMR, which could involve an in-person examination or records review. After the examination or records review, the independent medical reviewer must issue a report to the administrative director with analysis and a determination whether the disputed diagnostic service(s) or medical treatment was consistent with the medical treatment utilization schedule adopted by the administrative director, or the American College of Occupational and Environmental Medicine (ACOEM) guidelines if the administrative director has not yet adopted a medical treatment utilization schedule.

If the independent medical reviewer agrees with the diagnostic service or medical treatment prescribed by the treating physician, the injured employee must continue to receive medical treatment within the MPN. If the independent medical reviewer does not agree, the injured employee can seek diagnostic service or medical treatment from a physician of his or her choice within or outside the MPN.

As of April 2005, the DWC has received over 900 applications from physicians to be on the IMR list. Of those, 667 have been approved, 27 are not eligible, 38 are under further review and 247 incomplete applications have been returned.

To date, DWC has not received a valid request for IMR.

Qualified medical examiner (QME) panels

Qualified medical examiner (QME) panels are sought when parties to a claim have a dispute over permanent disability or other medical issues. Prior to passage of SB 899, only an unrepresented injured worker was allowed to seek a panel QME, and only in cases where liability for the injury had been accepted. SB 899 added a provision, which became effective Apr. 19, 2004, which allows claim adjusters to initiate a QME panel in cases where liability for the claim is in question.

Additionally, beginning Jan. 1, 2005 represented workers in disputes over permanent disability, other medical issues, or claim liability can also seek a QME panel.

Because of these changes, the DWC has seen a dramatic increase in the number of panels requested, which means those with disputes are utilizing the process to

resolve them. The division is delivering panel requests within the statutory timelines, which facilitates the resolution of medical disputes to get injured workers the treatment they need to return to work.

QME panels processed:

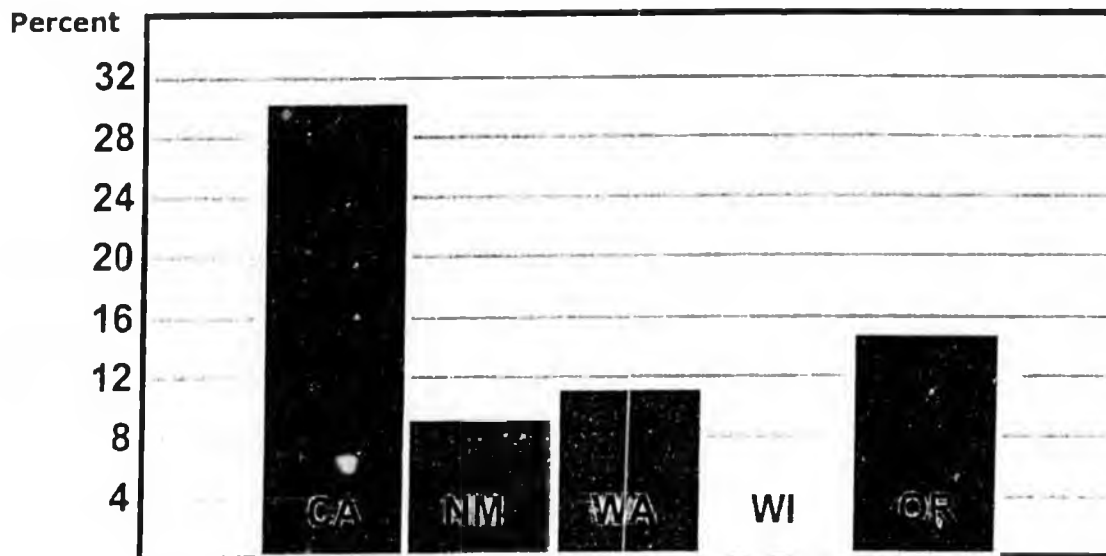
April - November 2003	13,871
April - November 2004	20,288
January - April 2005	13,333

Permanent disability rating schedule (PDRS)

Permanent disability benefits are paid to injured workers who will never recover completely from their injury, and will always be somewhat limited in their ability to work. Before those benefits can be paid, a worker's level of disability must be rated.

Of indemnity benefits paid by insured employers in 2003, payments for permanent partial disability accounted for 41 percent of every dollar.

Because of subjectivity in the prior schedule, California has the highest fraction of disputed permanent disability claims in a five-state median: 30 percent, compared to nine percent in New Mexico, 11 percent in Washington, seven percent in Wisconsin and 15 percent in Oregon.



Lost-time claims with PPD

(Source: Commission on Health and Safety and Workers' Compensation)

SB 899 created a new system for determining percentage of permanent disability based on "the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of such injury, consideration being given to an employee's diminished future earning capacity."

For the first time, the new PDRS makes ratings more accurate by basing them on objective medical conditions and empirical wage loss data, instead of subjective factors and work restrictions currently used to calculate a permanent disability rating.

Under the old system, two workers with the same type of injury could receive entirely different permanent disability ratings because there was so much subjectivity in the way impairment was evaluated, and in the way it was converted into a disability award. The old schedule also rewarded less serious work-related injuries with higher disability ratings based on over-reliance on subjective factors and work restrictions, resulting in disability ratings that did not accurately reflect the employee's disability and ability to return to work.

The new schedule promotes consistency, uniformity and objectivity by replacing subjective factors and work restrictions with objective medical evidence based on the American Medical Association (AMA) Guides, 5th Edition. Using the AMA guides gives everyone the same methodology to determine impairment. The AMA guides are used by 41 other states and in the federal workers' comp system.

Once an injured worker's impairment is objectively evaluated using the AMA guides, three adjustment factors (diminished future earning capacity, occupation and age) are applied to convert the impairment rating into a disability rating. All three adjustment factors are clearly laid out in the schedule and result in very similar disability ratings for similar types of injuries.

Pre-designation of personal physician

The first draft of these regulations was distributed to advisory group members for discussion and comment, and the advisory group met Mar. 28, 2005. Member comments are being reviewed by DWC and a revised draft of the regulations will be distributed to advisory group members and posted on DWC's Web site in May 2005.

Return to work

The first draft of these regulations was distributed to advisory group members for discussion and comment, and the advisory group met Mar. 28, 2005. Member comments are being reviewed by DWC and a revised draft of the regulations will be distributed to advisory group members and posted on DWC's Web site in May 2005.

Section 5814.6 penalties

The first draft of these regulations was distributed to advisory group members for discussion and comment in February, and the advisory group met Feb. 16, 2005. The revised draft of regulations will be distributed to advisory group members and posted on DWC's Web site in May 2005.

Hiring

While the division's total number of authorized positions is still less than the peak number authorized in fiscal year 1994-1995, DWC did acquire 300 new positions as a result of SB 899 and other reform measures.

The division has hired 166 new employees and promoted 134 existing employees since Jul. 1, 2004. At the current hiring rate of approximately 25-30 new employees per month, DWC hopes to fill all available positions by the end of next fiscal year, which will provide increased levels of service to system users.

To ensure all DWC professional staff whose work is impacted by changes to the law are up-to-date, and to ensure resources are used efficiently and effectively, the division is conducting statewide training of 368 staffers in April. Topics covered at the training include: medical provider networks; utilization review; permanent disability rating issues; qualified medical examiners; spinal surgery second opinion; case law update; supplemental job displacement benefits; new stipulation/compromise and release forms adequacy; apportionment; extra-jurisdictional issues and more.

Education, training and outreach

In addition to DWC's regulatory priorities, hiring and internal training, the division's focus has been on:

- Providing high quality education to users of the workers' comp system
- Making valuable information easily accessible to the public through the DWC Web site
- Revitalizing injured worker workshops at all 24 district offices.

Educational conference

This annual event, hosted by DWC in association with the International Workers' Compensation Foundation, constitutes the largest workers' compensation training in the state and allows claims administrators, medical providers, attorneys, rehabilitation counselors and others in the workers' compensation community to learn firsthand about the division's latest developments and ongoing programs.

This year's conference focused on key topics in SB 899. Many SB 899 provisions -- such as medical provider networks and the new permanent disability rating schedule -- became effective Jan. 1, 2005, making the conference, held in February, particularly timely.

This conference was the best attended in the twelve years it's been held: Both the Los Angeles and Oakland locations sold out, with 800 registrants each. Due to demand, the division allowed 40 walk-in registrations at both locales. The exhibitor spaces also sold out, with 45 at each conference.

The conference is certified by eight organizations representing attorneys, doctors, rehabilitation counselors, case managers, claims adjusters and nurses for continuing educational credits. Over 600 people signed up for CEU credits, demonstrating that attendees are workers' compensation professionals.

"Information delivered was excellent, just what we needed to hear."

--DWC educational conference attendee

AMA guide training

In cooperation with the American Medical Association (AMA), the California Medical Association (CMA) and the Commission on Health and Safety and Workers' Compensation (CHSWC), the DWC conducted training on proper use of the AMA guides. Under the new permanent disability rating system, medical providers must use the AMA guides to rate an injured worker's level of impairment -- a vital feature of California's reform measure.

While the AMA guides are used in 41 other states and in the federal workers' comp system, their use in California is new. Conducted for adjusters, attorneys, medical doctors, rehabilitation nurses and case managers, this crucial training provided system users with information on key concepts and terms, how to rate complex impairments and determine their role in disability assessment, how to rate difficult cases appropriately and how to write reports correctly.

Held in Anaheim and South San Francisco in November 2004, approximately 400 people attended each session.

DWC Web site

The division has embarked on a four-phase project to improve the flow of information about workers' compensation rights and responsibilities to system users. The project will take DWC's Web site from obsolete and difficult to navigate to user-friendly and fresh by:

- Changing the site structure to a user-based format
- Redesigning, updating and integrating content and introducing more graphics
- Creating a forms center with fill-able/downloadable forms
- Introducing new technology, such as instant electronic notification for targeted newlines and streaming video.

Injured worker workshops

This year, the DWC revitalized an education program, which provides information and assistance to injured workers through monthly workshops at local DWC offices.

While enacted 10 years ago, in recent years most workshops for injured workers were suspended due to a lack of adequate funding, a lack of proper staffing levels and outdated materials. It took the commitment of necessary financial resources by the DWC administrative director to revitalize the program.

The free workshops consist of a structured presentation followed by a question and answer session, and are held on a regular basis at local DWC Information and Assistance Unit offices around the state.

As of April 2005, eight offices are conducting the workshops. The division's goal is to have all 24 local offices conducting workshops as quickly as possible.

In a Mar. 7, 2005 *Sacramento Bee* article, Carol Rapicavoli, 41, of San Francisco, called the workshops "empowering."

Claims process efficiency

DWC electronic adjudication management system (EAMS)

DWC is one year into its project to upgrade and replace current court technology and supporting infrastructure to better meet statutory guidelines, realize operational efficiencies and lower the overall cost of the California workers' compensation system.

EAMS technology will greatly improve DWC and Workers' Compensation Appeals Board (WCAB) ability to quickly resolve claims by enhancing responsiveness to claim filings, employing more efficient and effective calendaring to ensure all dispute parties are available to meet with judges, and improving ability to track case documentation. Primary objectives for the new system include:

- Streamlining the process of creating files, setting hearings and serving decisions, orders and awards
- Improving access to case records while preserving confidentiality
- Providing cost and time savings both to case parties and the state
- Reducing delays and eliminate duplication
- Reducing file storage space and shipping costs
- Standardizing the DWC desktop computing environment
- Supporting enforcement against uninsured employers

The output of basic information is being built into the system, which will allow the state -- rather than private entities -- to make information easily available to parties in need of case status.

The EAMS system will also improve DWC's ability to project resource needs and measure performance. In general, EAMS will allow markedly improved reporting of division processes and results. Case handling time frames, comparison of work practices and consistency will be measurable under the EAMS system.

Disaster readiness will also be possible, as EAMS will allow near instantaneous movement of cases to other offices should an emergency such as an earthquake make that necessary.

From a *Work Comp Central* article posted Apr. 15, 2005:

Los Angeles County has reduced its workers' compensation costs by 10.5 percent thanks to last year's reform bill and an increased emphasis on return-to-work programs, according to a report delivered this week to the Board of Supervisors.

"I think the reforms had the major impact -- and the fact that the departments are getting more active in terms of return-to-work efforts and in terms of getting involved in their own claims."

--Los Angeles County Workers' Compensation Chief Program Specialist Alex Rossi

SB

132

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 5, 2005

FURTHER REFERRALS:

Date of Committee Action: ~~MAY 9, 2005~~ ^{SS}

FEB. 6, 2006

The JUDICIARY Committee considered:

SB 132(efd fld)

SENATE BILL NO. 132(efd fld)

HUMAN RIGHTS COMMISSION

"An Act relating to complaints filed with, investigations, hearings, and orders of, and the interest rate on awards of the State Commission for Human Rights; and making conforming amendments."

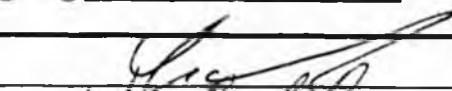
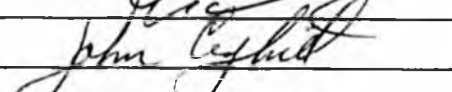
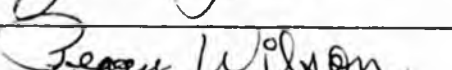
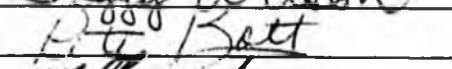
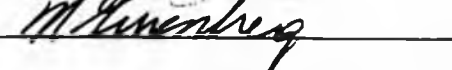

Recommends it be replaced with HCS or CS for SB 132 (JUD)
 For Senate Bills with new title: Technical Title New Title: HCR _____ Same Title New Title

- attach amendments
- add new referral to _____ Committee
- Letter of Intent _____ Committee

List of Abbrev for Depts.:
 ADM
 CED
 COR
 CRT
 EED
 DEC
 DFG
 GOV
 HSS
 LEG
 LAW
 LWF
 MVA
 DNR
 DPS
 REV
 DOT
 UA

<u>NEW FISCAL NOTES</u>				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				X
GOV				X

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Sara			✓	
	Coghill			✓	
	Wilson			✓	
	KOTT			✓	
	Gruenberg			✓	
Chair: 	MCW			✓	
Chair:					

AMENDMENT #1 - PASSED

OFFERED IN THE HOUSE JUDICIARY
COMMITTEE
TO: HCS SB 132(STA)

BY Greenberg

1 Page 2, line 27:

2 Delete "The commission, in its"

3

4 Page 2, line 28, through page 3, line 1:

5 Delete all material.

6

7 Page 3, line 4:

8 Delete ", in the executive director's discretion,"

10 Page 3, following line 15:

11 Insert the following new material:

12 "(c) The commission, in its discretion, may, but is not required to, review the
13 executive director's order of dismissal under (a) or (b) of this section and may affirm the
14 order, remand the complaint for further investigation, or, if the commission concludes
15 that substantial evidence supports the complaint of an unlawful discriminatory practice,
16 refer the complaint for conference, conciliation, and persuasion as provided in
17 AS 18.80.110, or for hearing."

18

19 Page 3, line 16:

20 Delete "(c)"

21 Insert "(d)"

22

23 Page 3, line 22:

24 Delete ", in the executive director's discretion,"

Amendment #3* - PASSED

to HCS 813.132 (SFA)

by Rep. Garza

Page 2, line 7 & line 9:

Delete "180 days"

Insert "1 year"

Conceptual amendment #4B - PASSED

HCR 8B132 (87A)

by Rep. Gara

Page 4, line 17:

After "shows"

Insert ", after a reasonable opportunity
for discovery,"

AMENDMENT # 5

OFFERED IN THE HOUSE

BY: REPRESENTATIVE GARA

TO: HCS SB132(STA)

Page 4, line 28

Delete "noneconomic"

Page 4, line 30 following "DISCRIMINATION]."

Insert "Nothing in this subsection prevents an award of noneconomic damages, including damages for emotional injury."

1/25/06

24-GS1110G.1
Kane
1/18/06

offer on 2/6/06

AMENDMENT

6 PASSED

OFFERED IN THE HOUSE
TO: HCS SB 132(STA)

BY REPRESENTATIVE GARA

Y | ~~XXXXXXXXXX~~ | IIII
| IIII

1 Page 1, line 2:

2 Delete "and"

3 Insert "providing for attorney fees and costs in cases involving human rights
4 violations;"

6 Page 1, line 3, following "amendments":

7 Insert "; and amending Rule 82, Alaska Rules of Civil Procedure"

9 Page 6, following line 15:

10 Insert a new bill section to read:

11 "§ Sec. 11. AS 18.80 is amended by adding a new section to article 2 to read:

12 **Sec. 18.80.147. Attorney fees and costs.** (a) In an action brought by a person
13 under AS 22.10.020(i), a prevailing plaintiff shall be awarded costs as provided by
14 court rule and full reasonable attorney fees at the prevailing reasonable rate.

15 (b) Unless the action is found to be frivolous, in an action brought by a person
16 under AS 22.10.020(i), a prevailing defendant shall be awarded attorney fees and costs
17 as provided by court rule. If the action is found to be frivolous, the attorney fees to be
18 awarded to the defendant shall be full reasonable attorney fees at the prevailing
19 reasonable rate.

20 (c) In this section, "frivolous" means

21 (1) not reasonably based on evidence or on existing law or a
22 reasonable extension, modification, or reversal of existing law; or

23 (2) brought to harass the defendant or to cause unnecessary delay or

1 needless expense."

2

3 Renumber the following bill sections accordingly.

4

5 Page 7, following line 3:

6 Insert a new bill section to read:

7 "* Sec. 15. The uncodified law of the State of Alaska is amended by adding a new section to
8 read:

9 INDIRECT COURT RULE AMENDMENT. The provisions of sec. 11 of this Act
10 have the effect of changing Rule 82, Alaska Rules of Civil Procedure, by requiring the award
11 of full reasonable attorney fees in certain cases."

12

13 Renumber the following bill sections accordingly.

14

15 Page 7, line 7:

16 Delete "secs. 1 - 13"

17 Insert "secs. 1 - 14"

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 132
 (S) Publish Date: 3/4/05

Revision Date/Time (Note if correction): _____ Dept. Affected: OOG
 Title "An Act relating to complaints filed RDU Commissions/Special Offices
with, investigations...of the State Human Rights Comm.." Component Human Rights Commission
 Sponsor Rules
 Requester Governor Component No. 1

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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 EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Kevin Jardell, Legislative Liaison Phone 465-4021
 Division: Office of the Governor Date/Time 3/3/05 3:25 PM
 Approved by: Kevin Jardell, Legislative Liaison Date 3/3/2005
 Agency: Office of the Governor

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: SB 132
 (S) Publish Date: 3/4/05

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act relating to complaints filed with, RDU CIVIL
investigations...the State Commission for Human Rights..." Component Labor & State Affairs
 Sponsor _____
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 18.80.112 to provide the staff of the Human Rights Commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The bill also sets out the appropriate remedy for employment discrimination but preserves the commission's discretion to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn Daughhete, Director
 Division: Administrative Services Division
 Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General
 Agency: Department of Law

Phone 465-3673
 Date/Time 1/28/05 2:48 PM
 Date 1/28/2005

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
 Bill Version: HCS SB 132(JUD)
 (H) Publish Date: 3/3/06

Revision Date/Time (Note if correction): _____ Dept. Affected: OOG
 Title "An Act relating to complaints filed RDU Commissions/Special Offices
with, investigations...of the State Human Rights Comm..." Component Human Rights Commission
 Sponsor Rules Committee
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Kevin Jardell, Legislative Director Phone 465-4021
 Division: Governor's Legislative Office Date/Time 1/12/06 12:00 AM
 Approved by: Kevin Jardell, Legislative Director Date 1/12/2006
 Agency: Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 4
 Bill Version: HCS SB 132(JUD)
 (H) Publish Date: 3/3/06

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act relating to complaints filed with,
investigations...the State Commission for Human Rights..." RDU CIVIL
 Sponsor _____ Component Labor & State Affairs
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 18.80.112 to provide the staff of the Human Rights Commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The bill also sets out the appropriate remedy for employment discrimination but preserves the commission's discretion to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn Daughhete, Director Phone 465-3673
 Division Administrative Services Division Date/Time 3/1/06 9:22 AM
 Approved by: Kathryn Daughhete for David Márquez, Attorney General Date 3/1/2006
 Agency Department of Law

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 7, 2006

SUBJECT: Ramifications of bill title change (HCS SB 132(JUD))
(Work Order No. 24-GS1110\F)

TO: Representative Lesil McGuire
Chair of the House Judiciary Committee
Attn: Shalon Szymanski

FROM: Brian J. Kane *BK*
Legislative Counsel

Enclosed is a draft of the changes you requested for HCS SB 132(JUD). However, there is an issue I would like to bring to your attention regarding the amendment for a title change.

Bill section 11 adds material allowing for recovery of full reasonable attorney fees. Please be aware that the awarding of "full reasonable attorney fees" may have the effect of amending an existing court rule, Civil Rule 82. Civil Rule 82 provides for the recovery of a percentage of attorney fees, and the percentage of recovery permitted varies with the amount of the judgment and whether the matter was contested. If there is no money judgment recovery, the rule establishes a different test. The text of the rule itself also allows for some variation from these provisions. Civil Rule 82 does make an exception from its provisions where law provides otherwise. However, the interpretation of this exception is not clear. It may mean that an attorney fee provision passed by the legislature by majority vote without complying with the usual court rule change requirements is considered an exception. It may also be interpreted to only apply to an attorney fee provision that is passed by the legislature after complying with the usual court rule change requirements, including the two-thirds majority vote. Since it is not clear which interpretation the state's Supreme Court would favor, as a matter of practice, this office recommends adhering to the usual court rule change requirements in order to safeguard the bill from attack. This is especially true given the superior court's decision (currently on appeal) in Native Village of Nunapitchuk, 1-JU-03-700 CI (April 6, 2004) that changes to Civil Rule 82 do require a two-thirds vote.

I have added the phrase "providing for attorney fees and costs in cases involving human rights violations" to the bill title. Uniform Rule 35 sets out the rule in this area, providing in pertinent parts: "A motion or proposition on a subject that requires a change in the title of the bill as enacted in the house of origin, other than a clerical or technical change, is not in order in the second house." There are additional steps that need to be taken in

Representative Lesil McGuire
February 7, 2006
Page 2

order to conform with the rule. At your request, I can draft for you a concurrent resolution waiving the application of the appropriate rules that will allow this title to be changed with minimal confusion.

If I may be of further assistance, please advise.

BJK:lmb:med
06-045.lmb

Enclosure

SENATE BILL NO. 132
"AN ACT RELATING TO COMPLAINTS FILED WITH, AND
INVESTIGATIONS, HEARINGS, AND ORDERS OF, AND
THE INTEREST RATE ON AWARDS OF THE
STATE COMMISSION FOR HUMAN RIGHTS"

SECTIONAL ANALYSIS
OFFICE OF THE ATTORNEY GENERAL

Section 1: Amends AS 18.80.100 to ensure that a complainant may withdraw a complaint of unlawful discrimination during the investigative and conciliation phases of the procedures and before the executive director issues an accusation, which begins formal procedures.

Section 2: Adds new subsections to 18.80.100. The power of the executive director to file a complaint is moved from subsection (a) to proposed subsection (b).

Proposed subsection (c) adds to 18.80.100 the limitation period for filing a complaint set out in 6 AAC 30.230. The limitation period established allows the filing of a complaint for 180 days after the discriminatory act or practice ends.

Section 3: Amends 18.80.110 to require a written and signed agreement if a complaint is resolved in the conciliation phase, to make that agreement the equivalent of a commission order for purposes of enforcement, and to authorize the compromise of a damages claim in the agreement.

Section 4: Adds a new section establishing the procedure to be followed if a complaint lacks substantial supporting evidence and expanding the discretion of the executive director to dismiss a complaint that is supported by substantial evidence in appropriate circumstances. A purpose of the section is to reverse the Alaska Supreme Court's decision in *Department of Fish and*

Game v. Meyer, 906 P.2d 1365 (Alaska 1995), that a hearing is mandatory if a complaint is supported by substantial evidence. The Court concluded that the law did not give the commission staff discretion to discontinue action on a complaint after an investigator found substantial evidence of unlawful discrimination. *Id.*, at 1373. The effect of this decision was to require the commission to commit its resources to any complaint supported by substantial evidence without regard to such factors as the weakness of the evidence, the strength of an employer's affirmative defenses, or the significance of the alleged violation.

Subsection (a) establishes the procedure that follows a conclusion after investigation that substantial evidence does not support a complaint of unlawful discrimination. The executive director dismisses the complaint without prejudice. The commission is provided with the discretion to consider an appeal from the director's dismissal.

Subsection (b) expands the discretion of the executive director to pursue complaints based on such factors as, for example, the strength of the evidence, the severity of the alleged violation, an employer's history before the commission, the complainant's cooperation, or the complaint's value in establishing precedent guiding future conduct.

Subsection (c) ensures that the executive director's administrative dismissal is not a dismissal on the merits and that a complainant may file an action with a court or another agency or even file a new complaint with the commission if the reason for the administrative dismissal can be resolved.

Section 5: Repeals and reenacts 18.80.120, which sets out the requirements for a hearing on a complaint of discrimination.

Subsection (a) implements the expanded discretion of the executive director to choose the complaints that commission staff pursue to hearing and provides that the commission may not review the executive director's exercise of that discretion. It also provides that, if the executive director refers a complaint for hearing, the executive director must issue an accusation based on the investigator's determination of substantial evidence.

Subsection (b) adds a requirement that the chief administrative law judge appoint the hearing officer who will conduct the hearing, that various statutes applying to the Office of Administrative Hearings (including those addressing disqualification of a hearing officer and administrative hearing records but excluding the section addressing hearing procedures) apply to the hearing, and a requirement that the hearing follow the procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630, except where the statutes applying to the commission provide otherwise.

Subsection (c) allows reasonable and fair amendments to an accusation, but it provides that substantial evidence must support an amendment naming a different discriminatory practice and that the parties must have an opportunity to resolve the different discriminatory practice in conciliation before the hearing may proceed.

Subsection (d) establishes the burden of proof at a hearing by requiring that the elements of an accusation or defense be proven by a preponderance of the evidence.

Subsection (e) authorizes the commission to issue a summary decision without a hearing

in the same manner that a court may issue a summary judgment -- when the facts are not in dispute and the party petitioning for a summary decision is entitled to an order as a matter of law.

Section 6: Amends the remedial provisions in 18.80.130(a) to authorize the commission to order a remedy after a hearing or after considering a petition for a summary decision. It clarifies the remedial authority of the commission by providing that the commission may order action to correct the discriminatory practice but may not order awards of noneconomic or punitive damages.

Paragraph (1), addressing employment, is amended to set out the specific remedies that the commission can award to remedy a discriminatory employment practice. To the remedies of hiring, reinstatement or upgrading an employee with or without back pay, it adds the authority to order training regarding discriminatory practices, accommodation of a disability, changes to personnel records, posting signs, restoration of seniority, and the payment of front pay for a period of one year in special circumstances: if hiring, reinstatement or upgrading of an employee cannot be accomplished because the employer does not have an appropriate vacancy; if the employer's discriminatory conduct made the employee incapable of returning to work; or if the relationship between the employer and employee has so deteriorated that they cannot work together. The paragraph adds a duty to mitigate. An order for either front pay or back pay must be reduced by the amount that the employee could have earned if the employee made a reasonably diligent effort to obtain comparable employment.

Section 7: Makes conforming amendments to 18.80.130(c).

- Section 8:** Adds a provision tying the rate of interest when the commission awards interest to the legal rate in AS 09.30.070.
- Section 9:** Makes conforming amendments to 18.80.135(b)
- Section 10:** Makes conforming amendments to 18.80.140.
- Section 11:** Makes conforming amendments to 18.80.270.
- Section 12:** Adds definitions of "complainant" and "pay" to the definition section in 18.80.300.
- Section 13:** Adds a paragraph to the Administrative Procedure Act adding the commission to the list of agencies that the Act's hearing provisions cover.
- Section 14:** Authorizes the commission to begin adopting regulations to implement the changes before the effective date of the act and provides that the regulations may not take effect before the act's effective date.
- Section 15:** Applies the law prospectively, to complaints filed after it is enacted.
- Section 16:** Provides an immediate effective date for section 14, which authorizes the commission to begin procedures to adopt regulations.
- Section 17:** Provides an effective date of July 2, 2005.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB132-LAW-L&SA-3-21-
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act relating to complaints filed with, RDU CIVIL
investigations...the State Commission for Human Rights..." Component Labor & State Affairs
 Sponsor Senate Rules Committee
 Requester Senate State Affairs Component No. 2718

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 18.80.112 to provide the staff of the Human Rights Commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The bill also sets out the appropriate remedy for employment discrimination but preserves the commission's discretion to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn Daughhete, Director Phone 465-3673
 Division: Administrative Services Division Date/Time 1/13/06 3:11 PM
 Approved by: K. Daughhete for Scott Nordstrand, Acting Attorney General Date 1/13/2006
 Agency: Department of Law

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB 132
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: OOG
 Title "An Act relating to complaints filed RDU Commissions/Special Offices
with, investigations...of the State Human Rights Comm..." Component Human Rights Commission
 Sponsor Rules Committee
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2008) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Kevin Jardell, Legislative Director Phone 465-4021
 Division: Governor's Legislative Office Date/Time 1/12/06 12:00 AM
 Approved by: Kevin Jardell, Legislative Director Date 1/12/2006
 Agency: Governor's Legislative Office

COMMENTS OF THE COMMISSIONERS OF THE ALASKA STATE
COMMISSION FOR HUMAN RIGHTS
ON HCS SB 132(STA)
(as amended by the House Judiciary Committee)

August 22, 2005

The Commissioners submit the following comments on HCS SB 132(STA) as amended by the House Judiciary Committee. The Commissioners met in Fairbanks on June 28 and 29 to discuss the bill and the recent amendments. The Commissioners are concerned about the impact of some of the amendments on the Commission's ability to effectively investigate and resolve discrimination claims.

Expanding the Time to File Complaints

The Commissioners are particularly concerned about changes to the bill that would expand the time for filing complaints with the Commission from 180 days to 365 days from the date of harm. Presently, the Commission's regulations provide for 180 days for a person to file a complaint from the date an alleged discriminatory act or practice occurred. 6 AAC 30.230(b). The Commission reduced the filing time from 300 days in 1997 in the face of dwindling resources and a growing backlog of cases. At that time the Commissioners considered the impact to the public and determined that 180 days was sufficient time for Alaskans to bring claims to an administrative agency. The Commission found that reducing the filing time resulted in fewer cases filed and allowed some lessening of the backlog.

Commission staff estimates that expanding the filing time to 365 days will result in approximately 125 additional cases per year. Currently, the backlog of cases awaiting investigation is approximately ninety cases, and most cases are not assigned for investigation for up to eight months after they have been filed. An increase of another 125 filings each year will increase this backlog significantly, and an even greater amount of time will be required before active investigation will begin. The Commission experienced a similar backlog several years ago, frustrating both businesses and complainants seeking efficient resolution of discrimination claims. Although partly lessened by a reduction in filing time, the Commission was able to completely eliminate the backlog after receiving resources for additional staff. These resources have since been reduced and the Commission has lost approximately twenty-five percent of its staff.

The Commissioners believe that, should the filing time be expanded to 365 days, it is imperative that additional resources be given to the Commission to avoid the serious backlog and wait time that would result. At current staffing levels, cases could wait for more than one year before being investigated. The Commission's mandate to conduct prompt investigations would be frustrated by this outcome.

The Commissioners are also concerned that expanding the filing time to 365 days, especially without the influx of additional resources, will cause most cases to become stale before they are ever investigated. As mentioned above, cases now must wait up to eight months before being assigned for active investigation. In cases where complainants wait up to 365 days to file complaints *and* where the cases has been backlogged for up to a year, two year's time could elapse between the alleged discriminatory act and the beginning of the investigation. Even where shorter times have passed, problems with locating witnesses, accurate recollections, and retention of evidence already exist. Moreover, the parties will continue to be frustrated by the additional delays.

Finally, the Commissioners believe that, as a matter of policy, 180 days is sufficient time to allow for the filing of a complaint with the agency. The Commission is an alternative forum in which to file discrimination complaints. Alaskans retain the right to file a complaint in court for up to two years from the date of the alleged discrimination, and are not required to first exhaust their administrative remedies with the Commission. The Commissioners do not believe that 180 days is an inadequate amount of time for complainants to choose between these alternatives.

Proposal to Allow Recovery of Non-Economic Damages

The Commissioners are also concerned about the proposed amendment to the bill that would provide for the recovery of non-economic damages. The Commissioners oppose the passage of this amendment. As noted above, the Commissioners believe that the Commission is intended to be an alternative forum to filing a civil action in court. The Commissioners believe that the appropriate avenue to seek redress for non-economic damages is to pursue a civil action. The Commissioners believe that the Commission's remedial authority, as set forth in the bill, is sufficient to protect the public interest and to compensate victims of discrimination who choose the Commission as the place to file a complaint.

Additional Changes to SB 132

The Commissioners reviewed the pending legislation prior to its introduction and agreed to support the bill as a whole in its original form. The present committee substitute, as amended, contains changes in addition to those mentioned above; however, the Commissioners do not believe that these additional amendments sufficiently alter the substance of the legislation. The Commissioners have therefore taken no position on the remaining amendments to the bill.

Conclusion

The Commissioners continue to support the passage of SB 132. However, the Commissioners are concerned that expanding the time to file complaints to 365 days would adversely affect the Commission's ability to resolve discrimination complaints. The Commissioners are also opposed to the proposed amendment to allow for the recovery of non-economic damages. The Commissioners take no position on the other amendments to the bill.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 5, 2005

SUBJECT: Statutory citation on page 2, line 4 of HCS SB 132(STA)

TO: Representative Paul Seaton
Attn: Louie

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

Enclosed is HCS SB 132(STA). Please look at page 4, line 2 and the reference to AS 44.64.020. Should this reference actually be to AS 44.64.030(b) instead of AS 44.64.020? AS 44.64.030(b) reads as follows:

(b) An agency may request the office to conduct an administrative hearing or other proceeding of that agency or to conduct several administrative hearings or other proceedings under statutes not listed in (a) of this section. The office may provide the service after entering into a written agreement with the agency describing the services to be provided and providing for reimbursement by the agency to the office of the costs incurred by the office in providing the services.

If this citation should be changed, please advise the chair of the next committee of referral.

DMB:med
05-350.med

Enclosure

Westlaw.

906 P.2d 1365

Page 1

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

C

Supreme Court of Alaska.
 STATE of Alaska, DEPARTMENT OF FISH AND
 GAME, SPORT FISH DIVISION, Petitioner,
 v.
 Andrea MEYER and Alaska State Commission on
 Human Rights, Respondents.
 No. S-6036.

Nov. 17, 1995.

State employee who had claimed discrimination sought review of a decision of the State Commission for Human Rights closing her case. The Superior Court, Third Judicial District, Anchorage, Joan M. Woodward, J., determined that the order was appealable and that the Commission abused its discretion in ruling that employee did not produce substantial evidence of pretext/discrimination. Employer petitioned for review. The Supreme Court, Eastaugh, J., held that: (1) closing order was final agency action subject to judicial review, and (2) it was an error of law for Commission staff or executive director to resolve at investigative stage legitimacy of employer's nondiscriminatory reasons for its actions and employee's success in rebutting those reasons.

Affirmed and remanded.

West Headnotes

[1] Appeal and Error ⇨893(1)
 30k893(1) Most Cited Cases
 The Supreme Court reviews issues of law de novo.

[2] Administrative Law and Procedure ⇨796
 15Ak796 Most Cited Cases
 On appeal from a decision of administrative agency, the Supreme Court reviews questions of law where no agency expertise is involved under the substitution of judgment test.

[3] Administrative Law and Procedure ⇨683
 15Ak683 Most Cited Cases

Supreme Court gives no deference to superior court's decision reviewing an administrative agency decision because that court was acting as an intermediate appellate court.

[4] Administrative Law and Procedure ⇨651
 15Ak651 Most Cited Cases

All final administrative actions are presumed to be reviewable, and this presumption controls unless it is rebutted by an affirmative indication of legislative intent that there be no reviewability.

[5] Administrative Law and Procedure ⇨651
 15Ak651 Most Cited Cases

[5] Administrative Law and Procedure ⇨704
 15Ak704 Most Cited Cases

Under statute providing that a complainant or a person against whom a complaint is filed or other person aggrieved by an order of an agency, may obtain judicial review of the order, agency decisions are presumed reviewable if they have requisite finality. AS 18.80.135(a).

[6] Administrative Law and Procedure ⇨704
 15Ak704 Most Cited Cases

Administrative agency's decision's reviewability does not turn on whether it is labeled an "order"; rather, determinative question in deciding whether decision is reviewable is whether it ended case at agency level and thus constituted final agency action. AS 18.80.135(a), 44.62.560(e).

[7] Administrative Law and Procedure ⇨704
 15Ak704 Most Cited Cases

Court question in determining when an agency action is final and reviewable is whether agency has completed its decisionmaking process, and whether result of that process is one that will directly affect the parties.

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906 P.2d 1365

Page 2

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

[8] Administrative Law and Procedure ⇨704

15Ak704 Most Cited Cases

An agency determination need not be one which ends litigation on the merits and leaves nothing for court to do but execute the judgment in order to be ripe for judicial review.

[9] Administrative Law and Procedure ⇨704

15Ak704 Most Cited Cases

[9] Civil Rights ⇨1712

78k1712 Most Cited Cases

(Formerly 78k447)

A decision of Commission on Human Rights staff or executive director closing employment discrimination claimant's case was ripe for judicial review; the case-closing order was final action taken by the agency, and legislature intended to allow courts to determine whether an agency's withholding of action was unreasonable or unlawful. AS 18.80.135(a), 44.62.560(e).

[10] Administrative Law and Procedure ⇨701

15Ak701 Most Cited Cases

[10] Civil Rights ⇨1712

78k1712 Most Cited Cases

(Formerly 78k447)

Fact that determination of Commission on Human Rights that an employment discrimination case was not supported by substantial evidence was an exercise of prosecutorial discretion did not render agency's determination unreviewable; if Commission wanted its staff to have discretionary prosecutorial authority, it had to be obtained from the legislature, not the judiciary, and opportunity for judicial review was necessary because federal Equal Employment Opportunity Commission (EEOC) might, and in some circumstances had to, accord substantial weight to findings by state authorities, and the anti-discrimination statutory scheme was a mandate to seek out and eradicate discrimination in employment and did not simply create a complaint-taking agency. Civil Rights Act of 1964, § 706(a), as amended, 42 U.S.C.A. § 2000e-5(b).

[11] Civil Rights ⇨1710

78k1710 Most Cited Cases

(Formerly 78k445)

Employee claiming discrimination must introduce evidence raising an inference of employer's discriminatory intent, and once employee has established this prima facie case of disparate treatment, burden rests with employer to articulate a legitimate, nondiscriminatory reason, supported by evidence, for the treatment.

[12] Civil Rights ⇨1744

78k1744 Most Cited Cases

(Formerly 78k453)

If employer establishes a legitimate reason for its actions, burden shifts back to employee claiming discrimination to persuade court that discriminatory reasons more likely motivated the employer, and employee usually satisfies this burden by showing that employer's explanation is pretextual.

[13] Administrative Law and Procedure ⇨470

15Ak470 Most Cited Cases

[13] Civil Rights ⇨1709

78k1709 Most Cited Cases

(Formerly 78k442.1)

[13] Civil Rights ⇨1711

78k1711 Most Cited Cases

(Formerly 78k446)

It was an error of law for staff or executive director of Commission on Human Rights to resolve at investigative stage legitimacy of employer's nondiscriminatory reasons for its alleged discriminatory action and employee's success in rebutting those reasons; by offering objective evidence of facts which established a prima facie case of discrimination and which raised a genuine dispute about employer's explanation of its decisions, employee established substantial evidence of discrimination sufficient to warrant a hearing. AS 18.80.110, 18.80.120.

[14] Administrative Law and Procedure ⇨470

15Ak470 Most Cited Cases

[14] Civil Rights ⇨1711

78k1711 Most Cited Cases

(Formerly 78k446)

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906 P.2d 1365

Page 3

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

Burden required to compel a hearing for the Commission on Human Rights on an employment discrimination complaint is less than burden required to prevail on the merits at hearing's conclusion. AS 18.80.110, 18.80.120.

[15] Administrative Law and Procedure ⇨796
15Ak796 Most Cited Cases

[15] Civil Rights ⇨1712
78k1712 Most Cited Cases
(Formerly 78k447)

Commission on Human Rights' failure to conduct a hearing mandated by statute in employment discrimination case once employee established a prima facie case of discrimination included a question of law to which the Supreme Court applied independent judgment. AS 18.80.110, 18.80.120.

*1366 Marie Sansone, David M. Weingartner, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Petitioner.

Randall G. Simpson, Jermain, Dunnagan & Owens, P.C., Anchorage, for Respondent Andrea Meyer.

Mark Ertischek, Anchorage, for Respondent Alaska State Commission for Human Rights.

Before MOORE, C.J., and RABINOWITZ, MATTIEWS, COMPTON and EASTAUGH, JJ.

**1367 OPINION*

EASTAUGH, Justice.

I. INTRODUCTION

Andrea Meyer filed a discrimination complaint with the Alaska State Commission for Human Rights (Commission) against her employer, the Alaska Department of Fish and Game (ADF & G). We hold that the Commission's order closing Andrea Meyer's case is judicially reviewable. We further hold that Meyer's claim of discrimination is supported by substantial evidence.

II. FACTS AND PROCEEDINGS

Andrea Meyer began working for ADF & G in 1977 as a seasonal field researcher for the Russian River Sockeye Salmon Fishery. Her job title was Fisheries Biologist I (FBI). Meyer had substantial previous experience as a biologist as well as a B.A. in biology. During her employment with ADF & G, Meyer's primary duty was the creel census. She also computed fisheries data, operated the weir at Lower Russian Lake, assisted in the production of area surveys, conducted salmon spawning escapement counts, enforced Fish and Game regulations, and conducted group tours in which she explained the fishery and the wildlife of the area.

In March 1987 Meyer filed a discrimination complaint against ADF & G with the Alaska State Commission for Human Rights. [FN1] The complaint alleged four specific instances which caused Meyer to believe her employer had discriminated against her on the basis of gender and also asserted that no women employed in the Sport Fish Division for Region II held the position of Fish Biologist II (FBII) or higher.

FN1. AS 18.80.100 authorizes any person aggrieved by discriminatory conduct prohibited by statute to file a complaint with the Commission.

Under AS 18.80.110 the executive director or a member of the Commission's staff shall informally investigate the matters set out in a file complaint promptly and impartially. If the investigator determines that the allegations are supported by substantial evidence, the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion.

If these informal efforts are unsuccessful, the executive director is required to hold a hearing before the Commission. AS 18.80.120.

In March 1989 the Commission's executive director issued a closing order, finding that Meyer's allegations were not supported by substantial evidence and dismissing the case. Meyer requested reconsideration of the closing order. The

906 P.2d 1365

Page 4

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

Commission's chairperson, Katie Hurley, ordered the case reopened for further investigation because she believed that the investigation was insufficient to conclude that ADF & G had provided legitimate nondiscriminatory reasons for denying Meyer employment extensions or job assignments. In March 1991, after further investigation and review by the Commission staff, the executive director again closed the file on Meyer's complaint, summarizing the additional investigation as follows:

[T]he additional investigation conducted by Commission staff determined that respondent's defense to complainant's prima facie case is legitimate and nondiscriminatory and that complainant has failed to rebut respondent's legitimate nondiscriminatory reason. Therefore, I find that complainant's allegations are not supported by substantial evidence.

Meyer again asked for reconsideration; Commissioner Esther A. Wunnicke denied her request in an order which contained an entry which read as follows:

A person dissatisfied with a Commission Order dismissing the complaint may obtain judicial review by Superior Court in accordance with AS 44.62.560-44.62.570. An aggrieved person must file an appeal with the Superior Court within 30 days of the issuance of the Order of the Commission.

Meyer appealed the closing order to superior court. ADF & G argued that judicial review of a case-closing order is not available and that even if available, the Commission did not abuse its discretion by finding that Meyer's complaint was not supported by substantial evidence. The superior court determined that such orders are appealable to the superior court and that the Commission abused its discretion in ruling that Meyer did not produce substantial evidence of "pretext/discrimination." It consequently reversed the Commission's decision and remanded "for *1368 further proceedings under AS 18.80.110 and, if appropriate, 18.80.120." We granted ADF & G's petition for review under Alaska Rule of Appellate Procedure 402. [FN2]

FN2. Although the Alaska State Human Rights Commission is listed as a

co-respondent with Andrea Meyer, the Commission was granted permission to submit a brief in support of ADF & G's position. Meyer was permitted to submit a reply to the Commission's brief.

III. DISCUSSION

The Alaska Civil Rights Act permits a person aggrieved by discriminatory conduct to file a complaint with the Alaska State Commission for Human Rights. AS 18.80.100. The executive director or a staff member must then informally investigate the complaint to determine whether the allegations of the complaint are supported by substantial evidence. AS 18.80.110. If the investigator determines that the allegations are supported by substantial evidence, "the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion." *Id.* By implication, if the investigator determines that the allegations of the complaint are not supported by substantial evidence, the complaint is dismissed. If the investigator determines that substantial evidence does exist and informal efforts to eliminate the discrimination do not succeed, a hearing before the Commission is required. AS 18.80.120. At the conclusion of the hearing, the Commission is required to enter an order. AS 18.80.130. The order is reviewable in court in accordance with Alaska's Administrative Procedure Act. AS 18.80.135(a). [FN3]

FN3. The following are the relevant sections of the Civil Rights Act.

Sec. 18.80.100. Complaint.

A person who is aggrieved by any discriminatory conduct prohibited by this chapter may sign and file with the commission a written, verified complaint stating the name and address of the person alleged to have engaged in discriminatory conduct, and the particulars of the discrimination. The executive director may file a complaint in like manner when an alleged discrimination comes to the attention of the director.

Sec. 18.80.110. Investigation and

906 P.2d 1365

Page 5

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

conciliation. The executive director or a member of the commission's staff designated by the executive director shall informally investigate the matters set out in a filed complaint, promptly and impartially. If the investigator determines that the allegations are supported by substantial evidence, the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion.

Sec. 18.80.120. Hearing.

If the informal efforts to eliminate the alleged discrimination are unsuccessful, the executive director shall inform the commission of the failure, and the commission shall provide the respondent and the complainant with notice of the failure and shall serve written notice together with a copy of the complaint, requiring the person, employer, labor organization, or employment agency charged in the complaint to answer the allegations of the complaint at a hearing before the commission. The hearing shall be held by the commission at the place where the unlawful conduct is alleged to have occurred unless the person, employer, labor organization, or employment agency requests a change of venue for good cause shown. The case in support of the complaint shall be presented before the commission by the executive director or a designee who shall be a bona fide resident of the state. The person charged in the complaint may file a written answer to the complaint and may appear at the hearing in person or otherwise, with or without counsel, and submit testimony. The executive director has the power reasonably and fairly to amend the complaint, and the person charged has the power reasonably and fairly to amend the answer. The commission is not bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and shall be transcribed at the request of

any party to the hearing.

Sec. 18.80.130. Order.

(a) At the completion of the hearing, if the commission finds that a person against whom a complaint was filed has engaged in the discriminatory conduct alleged in the complaint, it shall order the person to refrain from engaging in the discriminatory conduct. The order must include findings of fact, and may prescribe conditions on the accused's future conduct relevant to the type of discrimination. In a case involving discrimination in

(1) employment, the commission may order any appropriate relief, including but not limited to, the hiring, reinstatement or upgrading of an employee with or without back pay, restoration to membership in a labor organization, or admission to or participation in an apprenticeship training program, on-the-job training program, or other retraining program;

(2) housing, the commission may order the sale, lease, or rental of the housing accommodation to the aggrieved person if it is still available, or the sale, lease, or rental of a like accommodation owned by the person against whom the complaint was filed if one is still available, or the sale, lease, or rental of the next vacancy in a like accommodation, owned by the person against whom the complaint was filed; the commission may award actual damages which shall include, but not be limited to, the expenses incurred by the complainant for obtaining alternative housing or space; for storage of goods and effects; for moving and for other costs actually incurred as a result of the unlawful practice or violation.

(b) The order may require a report on the manner of compliance.

(c) If the commission finds that a person against whom a complaint was filed has not engaged in the discriminatory conduct alleged in the complaint, it shall issue an order dismissing the complaint.

906 P.2d 1365

Page 6

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

(d) A copy of the order shall be filed in all cases with the attorney general of this state.

(e) The commission may order payment of reasonable expenses, including reasonable attorney fees to any private party before the commission when the commission, in its discretion, determines the allowance is appropriate.

Sec. 18.80.135. Judicial review and enforcement.

(a) A complainant, or person against whom a complaint is filed or other person aggrieved by an order of the commission, may obtain judicial review of the order in accordance with AS 44.62.560-44.62.570.

*1369 [1][2][3] ADF & G and the Commission argue that the superior court's decision should be reversed because (1) the decision to close Meyer's case for lack of substantial evidence is not reviewable, and (2) if the decision is reviewable, it should be reviewed under the abuse of discretion standard and should be affirmed because there was no abuse of discretion. Meyer argues that the superior court's opinion should be affirmed in all respects. [FN4]

FN4. We review issues of law *de novo*. *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979). Thus, in deciding whether judicial review is available and which standard of review to apply, we will adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Id.* We review questions of law where no agency expertise is involved under the substitution of judgment test. *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992). If the agency has not proceeded in the manner required by law, the agency has abused its discretion. AS 44.62.570(b)(3). No deference is given to the superior court's decision because that court was acting as an intermediate court of appeal. See *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

A. Reviewability of Case-Closing Decisions by Commission Staff or Executive Director

ADF & G and the Commission argue that decision of the Commission staff or executive director is not reviewable because the decision (1) is not an "order" under AS 18.80.135, (2) does not constitute final agency action, and (3) is an enforcement decision committed to the Commission's discretion and thus presumptively unreviewable. Each of these arguments fails.

1. *The decision as an "order" under AS 18.80.135*

The State and Commission first argue that a decision issued before a public hearing is not an "order" under AS 18.80.135 [FN5] and is thus not subject to judicial review. The State and Commission cite *Hotel & Restaurant Union Local 878 v. Alaska State Comm'n for Human Rights*, 595 P.2d 653 (Alaska 1979), in support.

FN5. We have interpreted the first sentence of AS 44.62.560(e) as allowing a superior court to assert jurisdiction and grant preliminary injunctive relief in cases in which an agency has taken an action which directly and immediately affects the complainant. See *Alaska Pub. Util. Co. v. Greater Anchorage Area Borough*, 534 P.2d 549, 556-58 (Alaska 1975); *A.J. Industries v. Alaska Pub. Serv. Comm'n*, 470 P.2d 527, 539 (Alaska 1970). Although we have never interpreted the second sentence of AS 44.62.560(e), in *Schnabel v. State*, 663 P.2d 960 (Alaska App.1983), the Alaska Court of Appeals stated that the remedy provided by this sentence "is independent of and in addition to Schnabel's right to judicial review of an adverse administrative adjudication." *Id.* at 966 (dictum) (citing *United States v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 508 (Alaska 1978)).

Alaska Statute 18.80.135(a) expressly permits judicial review of "an order of the commission...." Given the structure of the chapter, and the sequence

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906 P.2d 1365

Page 7

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

apparently contemplated by AS 18.80.120, .130, and 135, it seems likely that § 135 deals only with review of orders issued by the Commission itself at the conclusion of hearings conducted by the Commission pursuant to § 130. Accordingly, § 135 is not concerned with review of some action by the executive director which is not an "order" as that term is used in Chapter 80. In *1370Hotel and Restaurant Union Local 878, 595 P.2d at 654-55, we discussed the sequence of events contemplated by §§ 120 and 130. That discussion supports a conclusion that § 135 does not authorize review of a decision of the sort that closed Meyer's case.

[4][5] Assuming § 135 deals only with review of post-hearing Commission orders, it does not follow that § 135 affirmatively bars judicial review of the order closing Meyer's case. Moreover, all final administrative actions are presumed to be reviewable. This presumption controls unless it is rebutted by an affirmative indication of legislative intent that there be no reviewability. *Johns v. CFEC*, 699 P.2d 334, 339 (Alaska 1985); *Sisters of Providence v. Department of Health & Soc. Servs.*, 648 P.2d 970, 976 (Alaska 1982); *Alyeska Ski Corp. v. Holdsworth*, 426 P.2d 1006, 1011 n. 16 (Alaska 1967). Section 135(a) does not express an affirmative legislative intention that file-closing decisions of the executive director or her staff be judicially unreviewable. We consequently apply the presumption of reviewability, and hold that such decisions are reviewable if they have the requisite finality.

[6] We also reject any suggestion that a decision's reviewability turns on whether it is labeled an "order." As AS 44.62.560(e) confirms, the legislature imposed no such prerequisite for judicial review if agency action is "unlawfully withheld or unreasonably withheld." [FN6] Rather, as discussed *infra*, the determinative question in deciding whether the decision is reviewable is whether it ended the case at the agency level and thus constituted final agency action.

FN6. AS 44.62.560(e) provides:

The superior court may enjoin agency action in excess of constitutional or

statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action.

We also note that when Meyer last sought reconsideration of the executive director's file-closing order, the order of the Commissioner denying reconsideration informed Meyer that "[a] person dissatisfied with a Commission Order dismissing the complaint may obtain judicial review by Superior Court in accordance with AS 44.62.560-44.62.570." It appears the Commissioner then considered that Meyer's order would be judicially reviewable.

2. The case-closing order as final agency action

[7] In deciding whether a superior court order possessed the finality essential for appellate review, this court observed that, "[t]he term finality is subject to several definitions." *Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 411 (Alaska 1973). [FN7] The test in Alaska for determining whether a judgment is final is "essentially a practical one." *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 184 (Alaska 1980). As the United States Supreme Court recently noted, "[t]he core question [in determining when an agency action is final] is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S.Ct. 2767, 2773, 120 L.Ed.2d 636 (1992).

FN7. We noted in *Mukluk* that the United States Supreme Court had stated that, "'final' in the context of appealability [is] an 'abstruse and infinitely uncertain term.'" *Mukluk*, 516 P.2d at 411, n. 11 (quoting *Will v. United States*, 389 U.S. 90, 108, 88 S.Ct. 269, 280, 19 L.Ed.2d 305 (1967) (Black, J., concurring)).

[8] Contrary to ADF & G's assertions, *Ostman v. State Commercial Fisheries Entry Comm'n*, 678

906 P.2d 1365

Page 8

906 P.2d 1365 68 Emp. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

P.2d 1323 (Alaska 1984), does not stand for the proposition that Meyer's ability to file a separate superior court discrimination claim renders the case-closing decision unreviewable. [FN8] ADF & G notes that we stated in *Ostman* that a final agency determination "must be one which disposes of the entire case ... [or] one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." 678 P.2d at 1327 (quoting *1371 *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1030-31 (Alaska 1972)). However, our quoted statement discusses the finality of a *trial court* decision. 504 P.2d at 1030-31. See also *Mukluk Freight Lines*, 516 P.2d at 411. An agency determination need not be "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" in order to be ripe for judicial review. Thus, we held in *Ostman* that agency rejection of a fishing permit application constitutes a final order which is reviewable in superior court where there is no more time to submit evidence or alter the decision through administrative means. 678 P.2d at 1326-28. Our holding in *Ostman* is contrary to ADF & G's argument.

FN8. AS 22.10.020(i) authorizes individuals to bring civil rights actions against the State in superior court. See *Johnson v. Alaska Dept. of Fish and Game*, 836 P.2d 896, 905 (Alaska 1991).

Case law from other jurisdictions is conflicting. New York, New Jersey and Iowa have held that Human/Civil Rights Commission dismissals based on no probable cause are judicially reviewable. See *State Div. of Human Rights v. Blanchette*, 73 A.D.2d 820, 423 N.Y.S.2d 745 (1979) (reviewing a Division finding of no probable cause under substantial evidence test); *Sprague v. Glassboro State College*, 161 N.J.Super. 218, 391 A.2d 558, 561 (App.Div.1978) (holding that the Division on Civil Rights did not abuse its discretion in finding no probable cause of discrimination and that the Fourteenth Amendment does not require a hearing before finding "no probable cause"); *Oliver v. Teleprompter Corporation*, 299 N.W.2d 683, 686-87 (Iowa 1980) (holding that a finding of no

probable cause is a "final decision" and that the complainant was not limited to a thirty-day period in which to file a petition for judicial review of no probable cause finding). [FN9]

FN9. The Commission argues that *Sprague* and a previous Iowa case, *Estabrook v. Iowa Civil Rights Comm'n*, 283 N.W.2d 306 (Iowa 1979), support its assertion that there is no judicial review of no probable cause determinations in these jurisdictions.

However, these cases held only that an administrative complainant is not constitutionally entitled to an evidentiary hearing *before* a human rights commission makes a determination of no probable cause. See *Sprague*, 391 A.2d at 561-62; *Estabrook*, 283 N.W.2d at 309-10. As noted above, *Sprague* itself held that a determination of no probable cause is judicially reviewable. 391 A.2d at 561. The court in *Estabrook* noted that the complainant had only challenged the merits of the commission's finding as not supported by substantial evidence, a standard reserved for "contested cases" (post-hearing cases) under Iowa law. 283 N.W.2d at 311. As *Oliver* indicates, probable cause determinations are judicially reviewable under Iowa law. 299 N.W.2d at 686. Furthermore, Iowa statutory law currently allows explicitly for judicial review of "no-probable-cause decisions and other final agency actions." Iowa Code Ann. § 216.17(1) (West 1994).

In *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392 (D.C.1991), the court held that a determination by the Office of Human Rights that there was no probable cause to believe that the Human Rights Act had been violated was a final agency action subject to judicial review. *Id.* at 397-99. As ADF & G points out, the District of Columbia court appeared to base its decision in part on the fact that the applicable statute did not authorize a human rights complainant to bring suit on her own behalf if the agency declines or fails to do so for lack of probable cause. 597 A.2d at 398.

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906 P.2d 1365

Page 9

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

However, the District of Columbia has since indicated that this distinction is not pertinent. In *Timus v. District of Columbia Dep't of Human Rights*, 633 A.2d 751 (D.C.1993), the court held that an administrative convenience dismissal (which occurs under District of Columbia law after a finding of probable cause but before a hearing) was subject to judicial review even though the complainant had the right to a trial *de novo* in superior court. *Id.* at 761. Thus, although the court in *Simpson* had indicated that reviewability of an administrative convenience dismissal might depend on whether the complainant had the right to a *de novo* trial, 597 A.2d at 398, *Timus* indicates that judicial review is available in both instances. 633 A.2d at 769 (Ferren, J., concurring).

In *Demetry v. Colorado Civil Rights Comm'n*, 752 P.2d 1070 (Colo.App.1988), the court held that a decision of the Colorado Civil Rights Commission upholding the dismissal of a claim, based on a finding that no probable cause existed to sustain a claim of discrimination on basis of handicap, did not constitute final agency action and was therefore not subject to judicial review. *Id.* at 1072. The court cited federal cases involving claims brought before the Equal Employment Opportunity Commission (EEOC). *Id.* at 1071. The court found the reasoning of *1372 those cases--that an EEOC investigation is merely preparatory to further proceedings--persuasive because the complainant can bring a private cause of action in federal court if the EEOC finds no probable cause. *Id.* at 1072.

ADF & G also cites EEOC cases for the proposition that the proper response to an agency's determination of no probable cause at the agency level is filing a *de novo* claim in district court rather than seeking review of the agency's adverse determination. The EEOC cases note that Title VII provides no express or implied cause of action against the EEOC to challenge its investigation and processing of a charge, *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir.1984), and that the federal Administrative Procedure Act (APA) provides no right to judicial review of an adverse EEOC determination, *Stewart v. EEOC*, 611 F.2d 679, 683-84 (7th Cir.1979).

Alaska law is similar to federal law in giving the complainant the right to file an original action in superior court. See *supra*, note 4. However, Alaska's statutory anti-discrimination scheme materially differs from the federal scheme. First, Alaska's anti-discrimination statute gives the Commission a more aggressive mandate than that held by the EEOC. "Clearly the legislature intended the Commission to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in employment...." *Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976). Therefore, the limited role of the federal EEOC is of dubious assistance in ascertaining the scope of powers conferred by the Alaska legislature on the Alaska Commission for Human Rights:

A cursory comparison reveals that the anti-discrimination legislation enacted in Alaska is not substantially similar to comparable federal laws.... Congress limited the adjudicatory and coercive enforcement of the EEOC powers in favor of reliance on private citizen action....
Id. at 945.

Second, under Alaska law a hearing is mandatory when the Commission's executive director or designated investigator determines that substantial evidence supports a complainant's allegations and informal efforts to eliminate discrimination fail. AS 18.80.120. In comparison, under federal law the EEOC is only required to use informal methods such as private conference, conciliation and persuasion, and "may" bring a civil action if these efforts fail. 42 U.S.C. § 2000e-5(b), (f).

[9] Finally, Alaska's APA potentially provides for more expansive judicial review than the federal APA. AS 44.62.560(e). See note 5, *supra*. Because the case-closing order was the final action taken by the agency and because the Alaska legislature intended to allow the courts to determine whether an agency's withholding of action is unreasonable or unlawful, the decision of the Commission staff or executive director in this case is ripe for judicial review. AS 44.62.560(e).

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906 P.2d 1365

Page 10

906 P.2d 1365, 68 Empl. Prac. Dec. P 44,164

(Cite as: 906 P.2d 1365)

3. *The determination as an enforcement decision committed to agency discretion*

[10] Citing *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), and *Vick v. Board of Electrical Examiners*, 626 P.2d 90 (Alaska 1981), ADF & G and the Commission argue that the agency's determination that Meyer's case is not supported by substantial evidence is presumptively unreviewable because that determination is an exercise of prosecutorial discretion. This presumption was first articulated by the Supreme Court in *Heckler*, where the Court reasoned that even where the legislature has expressed no intent to preclude review, review is not available under the federal APA if the statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 831, 105 S.Ct. at 1655. According to the Court, this presumption helps avoid the problem of how to apply an "abuse of discretion" standard when there are "no judicially manageable standards available for judging how and when an agency should exercise its discretion." *Id.* We reject the argument of ADF & G and the Commission *1373 that the presumption of unreviewability applies here.

In *Vick* the question was whether a board decision not to process an accusation against a licensee was subject to judicial review. We stated concerning this issue: "Questions of law and fact, of policy, of practicality, and of the allocation of an agency's resources all come into play in making such a decision. The weighing of these elements is the very essence of what is meant when one speaks of an agency exercising its discretion." 626 P.2d at 93. We further stated that "[w]hen a matter falls within an area traditionally recognized as within an agency's discretionary power, courts are less inclined to intrude than when the agency has acted in a novel or questionable fashion." *Id.* Unlike *Vick* or *Heckler*, Meyer's case does not involve the exercise of prosecutorial discretion at all. The statute here provides that if the executive director or designated staff member conducting the investigation finds substantial evidence of discrimination, the investigator "shall ... try to

eliminate the discrimination complained of by conference, conciliation, and persuasion." AS 18.80.110. If the problem is not eliminated informally, the Commission "shall" conduct a hearing and issue an order at the completion of the hearing. AS 18.80.120, .130(a). Thus, the statute grants no discretion to discontinue the process once the investigator finds substantial evidence of discrimination, unlike the statutes at issue in *Vick* and *Heckler*. [FN10]

FN10. In *Vick*, the complainant conceded that the Board had discretion whether to revoke a license even after it found a regulatory violation. 626 P.2d at 92. Likewise, in *Heckler*, the statute did not require the Food and Drug Administration (FDA) to investigate the unapproved use of an approved drug even when that use became widespread or endangered public health. 470 U.S. at 835-36, 105 S.Ct. at 1657-58 (holding statute granted FDA unreviewable discretion to refrain from enforcement despite policy statement stating FDA was obligated to investigate such uses which were widespread or endangered public health).

This case is instead closely akin to *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975), which the Supreme Court reaffirmed in *Heckler*. The statute at issue in *Dunlop* provided:

The Secretary [of Labor] shall investigate such complaint [by a union member] and, if he finds probable cause to believe that a violation ... has occurred, ... he shall ... bring a civil action.... 421 U.S. at 563 n. 2, 95 S.Ct. at 1855 n. 2. After investigating the complainant's claims, the Secretary of Labor declined to file suit and the complainant sought judicial review under the APA. The Supreme Court held that review was available and that the Secretary's decision not to file suit was *not* "an unreviewable exercise of prosecutorial discretion." *Id.* at 567 n. 7, 95 S.Ct. at 1858 n. 7. The *Heckler* Court stated that in *Dunlop*, "[t]he statute being administered quite clearly withdrew discretion from the agency and provided guidelines

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