

ALABAMA LEGISLATIVE COUNCIL FILES, 2003-2008

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U.S.C. 35). Since its inception in 1979, the PIECP program has certified 38 work pilot projects throughout the country. Prison administrators find PIECP participation an effective way to address idleness among ever-increasing prison populations and as a cost-efficient method for providing inmates with marketable job skills. Taxpayers benefit because PIECP wage deductions result in reductions in incarceration costs. Inmate wages benefit society, generally, in that deducted amounts are authorized to address victim compensation, inmate family support needs and taxes. Lastly, PIECP industries obtain broad market access for their products because they are excepted from the Ashurst-Sumners Act prohibition against the interstate transport of prisoner-made goods and from the Walsh-Healey Act prohibition against certain contract sales of prisoner-made goods to the Federal government. BJA first issued a Final Guideline to implement this program on March 29, 1985, 50 FR 12661-64. After providing an opportunity for public comment on the revised Guideline on July 7, 1998 (63 FR 36710-19), the agency now publishes this Final Guideline to offer updated program clarification. In so doing, the legislative underpinnings of relevant laws are examined and the scope of their applicability is defined. Compliance expectations are explained as program guidance. Refined administrative practices reflect experience gained by BJA over the past 14 years. The background history, guidance definitions and administrative requirements described in this Guideline are specific only to the PIECP and have no bearing on or relationship to the development, goals or administrative practices of any other prison industry program.

## **II. Background of the Prison Industry Enhancement Certification Program (PIECP)**

### **a. Legislative History**

1. Unregulated Prison Labor The 19th Century evolution of industrial capitalism and private sector use of prisoner labor spawned a number of conditions that adversely affected several major segments of society. By the turn of the 20th Century, these segments joined in an organized appeal to Congress and state legislatures nationwide. They collectively asserted that the production and distribution of unregulated prisoner-made goods in interstate commerce needed to be

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eliminated or, at a minimum, controlled. Human rights activists turned the public's attention to poor prison work conditions and inmate exploitation. Organized labor argued that the demand for prisoner-made products, anywhere, necessarily displaced a possible demand for the product of free labor. Free enterprise manufacturers at the time were disturbed because manufacturers of prisoner-made goods did not bear the burden of overhead costs borne by private industry competitors. Prisoner-made goods were sold at below market prices. The viability of private industry competition was thereby undercut. In December 1924, Secretary of Commerce

Herbert Hoover held a conference on the subject of the "ruinous and unfair competition between prison-made products and free industry and labor." 70 Cong. Rec. S656 (1928). Then-Secretary Hoover authorized an advisory committee to study the problem. This committee issued a report to Congress in 1928 wherein Chairman of the Advisory Committee on Prison Industries, Arthur Davenport, submitted the following conclusions:

(1) Certain major factors in the normal cost of production which must be met by all manufacturers are entirely absent in the case of prison industries. If anything approaching normal efficiencies of operation can be attained with the use of prison facilities and labor, the total costs of production are . . . below those of the manufacturer who must meet large overhead expenses as well as employ free labor. (2) It is the universal belief that prisoners should be usefully occupied whether as a part of their punishment or as a means of rehabilitation by teaching them the habits of industry. To this end nearly every State . . . provid[es] productive work for their prisoners . . . (3) The volume of goods produced by prison labor is already very large in some lines, but as more prisoners are put to work, and the industries become more efficient, the output of our prisons will be greatly increased. (4) The effect of placing on the open market a volume of goods which have been produced below normal costs, is to lower prices and disorganize the market \* \* \* The increase in prison production which is predicted will exaggerate this evil and make it difficult if not impossible for manufacturers employing free labor to exist in trade where the prison output becomes heavy. (5) The solution of this problem, if prison production is to continue \* \* \* would seem to be the elimination, in one way or another, of the direct price competition of the prison products with so called "free products" \* \* \*, 70 Cong. Rec. S656 (1928). In closing, Chairman Davenport urged that solutions be found, "[o]therwise either prison industries must cease and prisoners kept in idleness or the manufacture of products competing with prison output will become impossible. Either of these developments would be disastrous \* \* \*." See S. Rep. No. 344, 70th Cong., 1st Sess., reprinted, Cong. Rec. S656 (Dec. 15, 1928), "Statement of Prison Labor Problems as Shown by Report of Senate Committee." Even if a state prohibited its own correctional institutions from producing and marketing prisoner-made goods, that same state had no jurisdiction to control such goods produced in other states, transported in interstate commerce and sold within its boundaries. As an initial solution to this problem, Congress enacted the Hawes-Cooper Act in 1929, Pub. L. 70-669, 45 Stat. 1084, recodified by Pub. L. 95-473, 92 Stat. 1449 (1978) [formerly codified at 49 U.S.C. 11507, omitted in the revision of Title 49 by Pub. L. 104-88, Title I Sec. 102(a), 109 Stat. 804 (effective January 1, 1996); See S. Rep. No. 104-176]. This law divested prisoner-made products of their interstate character upon their arrival in the state of their destination and permitted the laws of that state to become operative with respect to the sale and distribution of such products. It was described, at the time of enactment, as an enabling act because it did not prohibit the transportation of prisoner-made goods or force the enactment of state legislation. In 1935, Congress enacted the Ashurst-Sumners

Act, Pub. L. 74-215, 49 Stat. 494 (1935), which authorized Federal criminal prosecutions of violations of state laws enacted pursuant to the Hawes-Cooper Act. Subsequent amendments to this law, including Pub. L. 76-851, 54 Stat. 1134 (1940), strengthened Federal enforcement authority by making any transport of prisoner-made goods in interstate commerce a Federal criminal offense. As amended, 18 U.S.C. 1761(a) now provides:

Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both [herein referred to as the Ashurst-Sumners Act].

Certain prisoner-made products were excepted, by statute, from the Ashurst-Sumners Act prohibition, including "agricultural commodities or parts for the repair of farm machinery" as well as "commodities manufactured in a Federal, District of Columbia or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State or not-for-profit organizations." Title 18 U.S.C. 1761(b). The Walsh-Healey Act, 49 Stat. 2036 (1936), as amended in 1979 by Pub. L. No. 90-351, Sec. 827(b) and codified at 41 U.S.C. 35, also controls the production of prisoner-made goods. This statute prohibits the use of prisoner labor to fulfill general government contracts which exceed \$10,000. BJA certification pursuant to Sec. 1761(c) excepts prisoner-made goods produced at PIECP work pilot projects from the Walsh-Healey Act contracting restrictions, as well as the Ashurst-Sumners Act interstate transportation restrictions. 2. Prisoner Idleness and Prisoners' Need for Job Skills Training The PIECP exception to the Ashurst-Sumners and the Walsh-Healey Act restrictions was introduced into the Senate in 1979 after the 1978 Pontiac, Illinois prison riot. In the wake of that uprising, Senator Charles Percy (R-Ill.) stated:

[L]ast summer in Pontiac, Illinois, our worst fears about the conditions in the Nation's prisons erupted into a nightmarish reality. The Pontiac prison riot of 1978 ended with three guards dead, three others seriously wounded, and \$4 million in property damage \* \* \*. The shopping list of problems and deficiencies in our prison system is long and well known. Overcrowding, old and obsolete facilities, lack of training or educational programs, crime within prison walls, frustration on the part of guards and inmates are all a part of the dreary picture \* \* \*. Recidivism is now a substantial element in our overall crime rate, and prisons are often accurately characterized as a "school for crime," rather than a deterrent to crime \* \* \*. 125 Cong. Rec. S11834 (1979).

These concerns caused Congress to take measures to encourage prison industries, provided that they not engage in unfair competition with private sector business and labor. Senator Percy's bill, now referred to as the Prison Industries Enhancement Act, Section 827 of

the Justice System Improvement Act of 1979, Pub. L. 96-157, Sec. 827(a), 93 Stat. 1215, was enacted on December 27, 1979. As amended, it now offers 50 certified projects an opportunity to participate in the

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interstate market, provided certain safeguards to free-world labor and industry, and to prisoner-workers themselves, are met. See The Crime Control Act of 1990, Pub. L. 101-647, Sec. 2906, 104 Stat. at 4914. In describing the purpose of his introduced legislation, Senator Percy explained (125 Cong. Rec. S11834 (1979)):

My amendment would do two basic things: First, it would authorize the [BJA] to encourage development of pilot demonstration projects for prison industry at the State level, involving private sector industry \* \* \*. Under this approach, prison programs benefit from the private business, develop access to new markets, and attract needed capital. The goal of these pilot projects would be to create as realistic a working environment as possible within the prison walls, while enabling an inmate to become more self-sufficient to the benefit of himself, the prison system, and the taxpayer. Secondly, my amendment creates a partial exemption to two Federal laws which severely restrict the ability of State prison industries to market their goods \* \* \*. When these laws were enacted decades ago, they represented significant reforms against exploitation of prison labor. Over the years, however, they have developed into heavy-handed roadblocks to growth among \* \* \* prison industry programs \* \* \*. My amendment would provide limited exemptions to these restrictions where inmates have been paid a wage comparable to that paid for similar work in the private sector in the locality \* \* \*. The statutory exception that was enacted to establish PIECP is codified at 18 U.S.C. 1761(c):

\* \* \* [the Federal marketability prohibitions] shall also not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners who-- (1) Are participating in one of not more than 50 non-Federal prison work pilot projects designated by the Director of the Bureau of Justice Assistance; \* \* \*

To become eligible for Bureau of Justice Assistance (BJA) certification, an applicant department of corrections must comply with specified statutory requirements. It must pay participating prisoners "wages not less than that paid for work of a similar nature in the locality in which the work was performed" and cannot take more than 80 percent in deductions from gross wages for specified purposes including taxes, reasonable charges for room and board, family support and victims' compensation. 18 U.S.C. 1761(c) (2). Certain other conditions of employment must also be met. An eligible applicant cannot deprive participating offenders, solely because of their status as offenders, of the right to participate in benefits made available by the Federal or state government to other individuals on the basis of their employment, such as workmen's compensation. Title 18 U.S.C. 1761(c)(3). PIECP inmates must also

participate on a voluntary basis and must have agreed to the specific deductions made from gross wages pursuant to 18 U.S.C. 1761(c) (2), and all other financial arrangements resulting from participation in such employment. Title 18 U.S.C. 1761(c)(4). The note following 13 U.S.C. 1761, although not codified, is public law and adds two additional PIECP requirements on certified prison industries. The note requires participating prison industries to consult with local union organizations prior to initiating any project qualifying for a 1761(c) exemption. Also, the qualifying applicant must ensure that paid PIECP inmate employment will not result in the "displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services." The Justice System Improvement Act of 1979 added these provisions which became Sec. 827(c) of the Omnibus Crime Control and Safe Streets Act of 1968. See Pub. L. 96-157, 93 Stat. 1215, reprinted in 1979 U.S.C.C.A.N. 2471. In 1984, Sec. 827(c) was redesignated Sec. 819 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. See Pub. L. 98-473, 98 Stat. 2093. If all eligibility requirements are met and an applicant acquires BJA certification, the agency is thereafter authorized to operate irrespective of Federal prohibitions on the marketing of state prisoner-made goods. Conversely, non-compliance with these statutory eligibility requirements could expose an industry to criminal prosecution under the Ashurst-Sumners Act. Title 18 U.S.C. 1761(a).

#### b. The PIECP Program

1. Current State of the Program Currently, 38 departments of correction or umbrella authorities are PIECP Certificate Holders. Under the Justice System Improvement Act of 1979, Arizona, California, Idaho, Kansas, Minnesota, Nevada and Utah were certified. In 1984, under the Justice Assistance Act of 1984, 13 prisons work pilot projects were certified in: Alaska, Belnap County (NH), Connecticut, Iowa, Maine, Missouri, Nebraska, New Mexico, Oklahoma, Oregon, South Carolina, Strafford County (NH) and Washington State. Under the Crime Control Act of 1990, the following additional departments of correction were certified: Colorado, Delaware, Florida, Hawaii, Indiana, Louisiana, Maryland, Montana, North Carolina, Ohio, Red River County (TX), South Dakota, Tennessee, Texas, the Texas Youth Commission, Vermont, Virginia, Washington State Jail Industries Board and Wisconsin. About 145 private sector businesses now work in partnership with PIECP certified projects to employ about 2,800 inmates. Either the department of corrections or the private sector enterprise retains project authority to direct and control inmate labor, depending on the management model used. Project implementation has resulted in the production of myriad products including such items as furniture, sheet metal, video equipment, clothing, food products, office products, mattresses, draperies, crutches and road signs. In addition, although service industries were not a threat to the private sector in 1935 and thus, were not included within the scope of the Ashurst-Sumners prohibition, a number of service industries have elected to comply with the PIECP requirements. Between January

1979 and September 1998, PIECP projects generated approximately \$113.7 million in gross inmate wages. Nearly half of this amount was diverted to non-inmate recipients: \$8.9 million was deducted for victims of crime, \$25.7 million was deducted for room and board payments, \$5.8 million was deducted for family support and about \$13.7 million was withheld in local, State and Federal taxes. BJA monitors the performance of PIECP work pilot projects to ensure that they operate in full compliance with all legislative and administrative program requirements. Under a grant to the Correctional Industries Association (NCIA), prison industry and other professionals conduct regular, on-site reviews of all PIECP projects. BJA responds to matters involving possible non-compliance by taking appropriate remedial action such as providing technical assistance or proposing a corrective action plan.

2. Future Challenges PIECP is used nationwide as a cost-efficient way to provide inmates with work experience and training in marketable job skills, as well as to reduce idleness among growing prison populations. Over time, the limit on the authorized number of pilot projects has been raised to meet the demands of interested applicants. When Congress last increased the project ceiling to 50, the House took into consideration a waiting

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list of states and counties that had wanted to participate and noted that "the demand for certification by state and local governments indicates a need for this amendment which will enable the program to expand and other jurisdictions to apply." H.R. (1), 101st Cong. 202 (1990). BJA administers PIECP with the objective of making participation available to as many qualified applicants as possible, within limits imposed by the statutory ceiling. This Guideline provides projects with clarity as to Federal participation requirements, as well as programmatic flexibility to allow for PIECP Project growth in ways that respond to local needs. The Federal requirements are intended to ensure that the interests of local business and organized labor are protected. In this way, BJA's administrative practices address concerns reflected in the legislative history pre-dating the onset of Federal regulation of prisoner-made goods. Finally, this revised Guideline addresses novel issues presented by new PIECP participants, the private sector prisons. These entities are unique in that they render an essential service traditionally undertaken by public agencies and they do so for profit. Thus, BJA has altered some PIECP program requirements to insure program implementation remains consistent with Congressional intent. Congress enacted PIECP to introduce public departments of correction to private sector profit-making enterprises. Therefore, private prisons are invited to participate in PIECP only as Cost Accounting Centers (CACs) designated under the authority of departments of correction.

#### c. Discussion of Comments

BJA published a proposed Guideline in the Federal Register on July 7, 1998 for public comment. Written comments from public and private organizations were received. All comments have been considered by the BJA in this publication. This Guideline is final. The following is a

summary of substantive comments and BJA's response. 1.

**Background on PIECP Comment:** BJA should retain the legislative history and background section. It is informative and useful. BJA should explain that the background section does not accurately describe present day political, social or economic concerns regarding the implementation of prison industry programs. **Response:** BJA provides the background and legislative history section to illustrate social, political and economic concerns that were predominant prior to 1940, before the Federal government first began regulating, as a criminal matter, the interstate transport of prisoner-made goods, as well as such concerns as they existed prior to the 1979 enactment of the PIECP exception to 18 U.S.C. 1761(a). BJA provides this background to inform PIECP Cost Accounting Centers about Congress' intent when developing the program's statutory requirements and exception authority. Accordingly, no substantive change was made in the background section of the Guideline. 2.

**Program Purposes Comment:** BJA should modify its program purposes to add, as a purpose, introducing government to private sector profit-making enterprises. More specifically, BJA should endorse private sector prison options as a specific way to introduce state and local government agencies to private sector profit-making enterprises. **Response:** Consistent with the legislative history of the PIECP, BJA exercises its administrative authority only to endorse PIECP as a cost-efficient means to address inmate idleness and to provide inmates with work experience and training in marketable job skills. Whether private sector partnerships or private prison contracts are suitable prison industry options for any given jurisdiction, is a state and or local matter for determination. State and local interests are uniquely poised to identify appropriate private sector profit-making enterprises, if any, to partner with prison industries. Thus, as a Federal agency, BJA is not prepared to adopt such a program purpose. Accordingly, no change was made in the program purposes provision of the Guideline. 3. **Definitions Comment:** BJA should modify the definitions so that references to departments of corrections include public or not-for-profit agencies sanctioned under state law to administer the Prison Industry Enhancement Certification Program. BJA should add a definition of "chief state correctional officer," as the term is used in reference to the room and board deduction, so that it encompasses umbrella authorities where such models have been certified by BJA as prison work pilot projects. With respect to the minimum wage definition, BJA should state that this PIECP program wage threshold is in no way intended, in and of itself, to ascribe to inmate workers "employee" status for purposes of other state and Federal laws. BJA should re-define the locality definition. The proposed definition, which defers to state agencies for the making of such determinations, is too vague and subjective.

**Response:** BJA concurs with a number of recommendations to enhance the clarity of terms used in the Guideline. A definition for the term "departments of correction" is incorporated to clarify that state and local government agencies, and the instrumentalities thereof, including not-for-profit entities sanctioned under state law to administer PIECP, are eligible as potential PIECP Certificate Holders. A definition of the term "chief state correctional officer" is added to enhance guidance with respect to model specific implementation of the room and board deduction. Also, the scope of the minimum wage

definition is more specifically defined in relation to PIECP purposes and the operation of other laws. The locality definition has implications both with respect to the inmate wage requirement and the prohibition against private sector employee displacement. BJA directs all Cost Accounting Centers to obtain non-displacement projections and prevailing wage determinations from their appropriate state agencies and, in so doing, extends to the states an opportunity to locally influence implementation of the Federally authorized PIECP Project. BJA expects that by extending this opportunity, the states will exercise their authority so as to protect the interests of local labor groups and private sector competition. This approach was adopted to vest state agencies with authority and flexibility to respond to uniquely local economic trends and conditions. Accordingly, no change to the locality definition was made. 4. Eligibility Comment: BJA should allow private prisons to independently qualify as Certificate Holders. Alternatively, restrictions affecting the designation of private prison industries, as Cost Accounting Centers (CAC), should be eased. Umbrella authorities should not be allowed to qualify as eligible Certificate Holders. The certification of umbrella authorities circumvents the 50 project limit imposed on the program by Congress. Response: Title 18 U.S.C. 1761(c)(1) authorizes BJA to exercise broad discretion in certifying PIECP prison work pilot projects. Two significant

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considerations, however, weigh in favor of limiting Certificate Holder eligibility only to departments of correction and not private prisons. First, the legislative history of the PIECP reflects Congress' desire to craft an inmate work vehicle to advance state and local government interests, and specifically their need to gainfully occupy growing prison populations in marketable job skills. Second, as PIECP implementation could impact state and local private sector interests, BJA believes that the protection of those interests would be best served by reserving certification for those agencies which, by their very nature, are accountable to the public. BJA will not authorize any PIECP certified project to designate CACs outside of its jurisdictional boundaries because the Bureau defers to individual state legislatures for determinations as to whether PIECP should be authorized within their jurisdictions. If a state legislature decides not to authorize PIECP implementation in public facilities, private facilities ought not be authorized to implement PIECP, in that same state, through a designation authorized by a Certificate Holder located in another state. BJA, however, incorporates amendments to the Final Guideline to allow any given state Certificate Holder to designate CACs within private prisons operating within that same state, even in the absence of a contract for incarceration services between that state and the private prison seeking to participate in PIECP. The BJA form used to accomplish the designation of a CAC within a private prison must reflect express approval of the designation by the Chief State Correctional Officer for the state in which the private prison CAC is located. See Section IV.(a)(5), *infra*. CACs designated within private prisons must also retain on-file documentation reflecting approval of PIECP inmate worker participation by the state and local jurisdictions

in which the PIECP inmate workers were convicted. In order to issue such approvals, the remanding state and local jurisdictions must also hold PIECP certificates. This requirement insures continuity of the necessary PIECP project authorization vis-a-vis the PIECP inmate workers, and is responsive to the statutory project ceiling number. If inmate workers could not participate in PIECP within the boundaries of the state and local jurisdictions in which they were convicted, they should not be allowed to participate in PIECP in another state or local jurisdiction through an agreement for private prison incarceration services. Alternatively stated, state and local jurisdictions cannot be allowed to participate in PIECP indirectly through a contract with a private prison that has a PIECP-designated CAC, if they choose not to participate in PIECP directly, i.e., had they incarcerated their inmates within their own state and local jurisdictional boundaries. Title 18 U.S.C. 1761(c) offers BJA broad discretion with respect to defining a prison work pilot project for PIECP eligibility purposes. Umbrella authorities may represent a mix of agency members such as state and local departments of correction, and youth authorities. Any of these agency members may, through their respective umbrella authorities, designate CACs within themselves or private prisons located in their jurisdictional areas. In order to qualify for PIECP certification, umbrella authorities must be able to assure BJA that a central administration of the CACs can be accomplished to insure project-wide compliance with the guideline and the statute as well as responsible exercises of designation/undesignation authority. Since the inception of PIECP in 1980, BJA has certified several umbrella authorities. During that same period of time, Congress was advised of such projects and consistently increased the project ceiling. BJA interprets such action as tacit approval of BJA's certification of umbrella authority models. Accordingly, changes are made in the eligibility provisions to ease restrictions on Certificate Holder designation of CACs within private prisons located within the Certificate Holder's jurisdiction. Private prisons are ineligible as independent PIECP Certificate Holders.

5. Inmate Wages Comment: Authors of two comments claim that PIECP wage rates do not equal labor costs: BJA should allow Cost Accounting Centers (CACs) to make adjustments in prevailing wage rates to address the hidden, unusual costs of doing business in a prison environment such as the cost of transportation to rural areas, reduced production levels due to rapid turnover, and added expenses of worker training and start-up. Because these cost variables are significant and inherent in doing business within prisons, the PIECP wage requirement is not necessary to "level the playing field" with private sector competition. From the perspective of one organized labor group, the proposed Guideline is an improvement over the 1985 PIECP guideline. BJA, however, is urged not only to encourage, but to require CACs to implement salary wage plans based on worker competency and seniority. Regarding the wage self-determination option, in the proposed guideline, the following diverse comments were received: this option is an improvement in that it allows for CAC implementation in instances where state agencies are non-responsive to requests for prevailing wage determinations; this option imposes too great of an administrative burden on CACs; this option provides participants with an opportunity to avoid obtaining state agency wage determinations. In instances where a private

sector partner has both a non-inmate operation and a PIECP CAC in the same locality, the partner should be permitted to bypass a state agency's wage determination and use relevant non-inmate wage scales with respect to PIECP inmate workers performing the same job function. BJA should clarify the meaning of the term of "notable tasks," as it is used in the Guideline with respect to identifying which inmate workers should be paid a PIECP wage. Response: Title 18 U.S.C. 1761(c)(1) expressly states that PIECP wages must be paid at a rate which "is not less than that paid for work of a similar nature in the locality in which the work is performed. PIECP wage determinations must be based only on comparable non-inmate worker wages for performing work of a similar nature. Gross wages earned by PIECP inmate workers may be reduced only through an application of the four authorized wage deductions specified in 18 U.S.C. 1761(c)(2). Thus, the plain language of the PIECP exception statute provides BJA with no authority to allow wage deductions in addition to those set forth in 18 U.S.C. 1761(c)(2) and for the purpose of addressing the unusual costs of doing business in a prison environment, however meritorious such proposed adjustments might be. The language of 18 U.S.C. 1761(c)(3) requires PIECP projects to pay wages based only on private sector wage amounts for performing similar work and it does not, as a matter of law, require the implementation of salary plans. BJA added this policy-based encouragement to advance program objectives. The self-determination option, as reflected in the proposed guideline, was presented to address a recurring challenge confronting many PIECP Cost Accounting Centers (CACs). On occasion and through no fault of their own, CACs are unable to obtain timely, state agency responses to requests for wage determinations. The self-

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determination option, which is available only when state non-responsiveness occurs, assists CACs to achieve compliance without relying on a determination by a third party. The method presented requires only the minimum amount of data collection and analysis necessary to yield a defensible, rationally-based wage determination. Availability of the self-determination option prevents CACs from paying a Federal minimum wage--the lowest possible PIECP wage, indefinitely, when payment of such a wage rate is unwarranted and the state remains non-responsive to wage determinations requests. To ease the impact of PIECP implementation on any given locality's economy and labor force, BJA reserves two opportunities for states to affect the implementation of the Federal PIECP program within state boundaries. The requirement that proposed CACs must obtain wage rates from the relevant state agencies, is one of those opportunities. BJA reserves this opportunity for state participation in the program, without exception, to insure CACs respond to relevant, locally-based input from an objective source. BJA introduces the Guideline concept of "notable tasks" as a way to assist CACs in identifying inmate workers to whom a PIECP prevailing wage should be paid. Questions arise as to whether inmates performing support functions, such as janitorial and maintenance services, necessary to CAC operations must be paid a PIECP wage. A more specific

definition, in this regard, is not possible without compromising flexibility in the application. The Guideline offers specific administrative direction by identifying relevant considerations for determining whether a given task is "notable." Accordingly, no change was made in the wage payment provisions of the Guideline.

6. Non-Inmate Worker Displacement Comment: One representative from organized labor claimed that prisoner labor should never be allowed to compete with free-world labor because it undermines the private sector labor force and inmate rehabilitation. Another representative of organized labor generally endorsed the Guideline and the revised non-inmate worker displacement requirement, stating that it is an improvement over that which was issued in 1985. The presumption of non-compliance, applicable when a private sector partner employs non-inmate and inmate workers in the same locality, is too vague and too restrictive on private sector partners. The general language of this requirement makes it difficult to measure displacement in instances where other non-employee, non-inmate workers perform similar jobs or skills in the same locality. Any PIECP operation is likely to affect the private sector marketplace and, consequently, private sector jobs. The requirement ought not be construed in such a way so as to prohibit PIECP companies from engaging in normal business operations such as bidding for contracts on the open market after they have been designated as participating in a PIECP project. Also, BJA should not impede or discourage successful PIECP operations, already designated, from continuing operations even when there is a subsequent general downturn in the economy and, arguably, de facto displacement of non-inmate workers performing similar work in the locality. This requirement is too restrictive in that it prohibits PIECP partners from outsourcing entry level jobs and redirecting their current private sector workforce toward higher skill level jobs. The Guideline encourages potential Cost Accounting Centers to develop new jobs in a locality; this should not be implemented so as to adversely affect a CAC which decides not to follow the encouragement. Response: Congress directs BJA to implement the PIECP program, a prison industry program that places prison made goods in competition with the private sector. BJA has no discretion to exercise in determining whether or not to implement this program. One BJA purpose in revising the Guideline is to improve the program's responsiveness to organized labor's concerns. The agency is pleased that a segment of the labor community views its interests as better served through the re-issuance of the PIECP Guideline. BJA acknowledges that implementing the non-inmate worker displacement prohibition may appear to work at cross purposes with encouraging the commercial success of PIECP Cost Accounting Centers (CACs). The agency must respond to a broad statutory mandate to insure that PIECP does not impair or displace private sector workers and is not applied in skills in which there is a surplus of available gainful labor. However, BJA cannot accomplish PIECP implementation if CAC's are prevented from attaining commercial success by engaging in typical competitive market practices. To address this concern, the guidance language is modified to reflect BJA's expectation that PIECP CACs will engage in typical business operations, such as bidding for contracts on the open market after project initiation. While compliance is a continuing CAC responsibility, a violation of the non-displacement requirement is

more likely to occur and is more discernable just prior to and immediately following CAC implementation than thereafter. For this reason, BJA will scrutinize CAC compliance with this provision just prior to and within one year following CAC implementation. The agency devised a presumption of displacement which may be applicable in instances where a private sector partner retains non-inmate workers in the same locality. This presumption is modified in this Final Guideline to provide partners with a degree of flexibility to reallocate resources to their optimum use. Specifically, the presumption may be overcome if the private sector partner can demonstrate that non-inmate workers have been retained by the private sector partner in jobs at pay rates equal to or greater than that received in the previous position, that non-inmate employees have been provided an adequate opportunity for effective training in any new job skills and that the subject non-inmate employees are being retained by the private sector partner under reasonably similar or improved employment conditions. BJA policy encouragement regarding the creation of new PIECP jobs is not a mandate. CACs which do not bring new jobs to their localities will not be penalized. For obvious reasons, however, CACs generating new jobs are easier for BJA to evaluate and are less likely to be the subject of local criticism. Accordingly, changes are made in the non-inmate worker displacement provision to clarify the scope of the prohibition and to not unduly impede business decisions that lend themselves to effective commercial management and success of PIECP Cost Accounting Centers.

7. Benefits Requirement Comment: A resolution of inconsistent Social Security requirements imposed on PIECP models should be accomplished at the Federal level between BJA, the Social Security Administration and the Internal Revenue Service. The disparate treatment of customer and employer models is arbitrary. Both models should be treated the same way for purposes of requiring projects to provide inmates with Social Security coverage. BJA should clarify its position with respect to imposing the Federal

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Unemployment Tax Act on PIECP models as a benefits requirement. Response: The benefits requirement, as outlined in the proposed Guideline, elicited the greatest number of comments. Several Federal laws apply to wages earned by inmates in penal institutions. BJA, therefore, sought a Guideline review from both the Social Security Administration (SSA) and the Internal Revenue Service (IRS) to ascertain whether the PIECP benefits requirement, as proposed, was consistent with comparable laws administered by those Federal agencies. Both the IRS and the SSA concluded that BJA's benefits requirement is consistent with comparable laws set forth in the Social Security Act, 42 U.S.C. 410(a)(7) and 418(c)(6)(B), and the Internal Revenue Code. Services performed in an institution by an inmate in the employ of a State, a political subdivision, or a wholly-owned instrumentality are excepted from Social Security employment by 26 U.S.C. 3121(b)(7). Section 3121(u)(2)(B)(ii)(II) also provides that such services are not subject to the Medicare tax. In contrast to those inmate services performed in the employ of a state or governmental entity, there is no IRS or SSA exception for

services of inmates performing services in the employ of a non-governmental entity (for example, a private corporation operating a prison or a private corporation operating under the PIECP employer model). PIECP Employer models must generally provide inmates with Social Security coverage. BJA retains the customer and employer models to implement the PIECP benefits provision, 18 U.S.C. 1761(c)(3), in a manner consistent with other Federal laws addressing inmate wages. Specifically, the models are necessary in order to accord states and other governmental entities the Social Security employment or coverage exception status, as recognized by the IRS and the SSA. BJA will monitor and evaluate Cost Accounting Centers (CACs) in accordance with the guidance set forth in this Guideline, but will defer to the expertise of both the IRS and SSA should either of those agencies reach another conclusion with respect to the appropriate benefits treatment of inmate wages earned at any given CAC. In the case of services performed by PIECP inmates, regardless of whether services are being performed under the customer or employer model, Federal Unemployment Tax Act taxes do not apply to such services. See Section 26 U.S.C. 3306(c)(21) which exempts from employment "service performed by a person committed to a penal institution." Accordingly, no changes are made in the benefits requirement of the Guideline. 8. Deductions Comment: BJA ought to expressly authorize the use of room and board deduction funds for the purpose of lowering costs otherwise incurred to maintain and operate a PIECP program. The term "Chief State Correction Officer" should be amended to also include "responsible umbrella authorities." Private prisons managing PIECP Cost Accounting Centers (CACs) should be required to demonstrate that any benefit derived through the taking of room and board deductions is passed on to states which provide public funds to cover such costs. The authorized deduction for victims compensation ought to be made available to address a PIECP inmate's legal obligations to pay victim restitution. Response: Consistent with the statutory mandate addressing the room and board deduction, BJA defers to state determinations--as reflected in regulation issued by Chief State Correctional Officers--with respect to determining the amounts of such deductions as well as identifying the specific needs to which such deducted amounts may be directed. BJA has authority to review room and board deductions to insure the amounts deducted are reasonable and are used to defray the costs of inmate incarceration. Specific amount determinations and budget line item uses are issues more appropriately determined at the state and local level. In instances where the Certificate Holder is an umbrella authority, possibly composed of diverse state as well as local agencies, the umbrella authority may itself issue policy on this matter to guide its multijurisdictional membership. A definition of "Chief State Correctional Officer" is added to accommodate the administration of this deduction by such models. The room and board deduction was authorized by Congress to lower incarceration costs otherwise borne by the public. Since private prison PIECP inmates' room and board expenses might otherwise be addressed in contracts for incarceration services between private prisons and public agencies, BJA requires private prison CACs to obtain written approval from their respective public agency clients before taking the room and board deduction. In devising this requirement, BJA insures notice of this possible revenue

source is received by appropriate public agencies without unduly burdening contractual relations to which it is not a party. BJA broadens its interpretation of the victims compensation authorized deduction to also include deductions deposited in funds established by law to facilitate victim restitution. Compensation and restitution serve substantially the same purpose in providing victims with financial redress for expenses incurred as a result of crime. Although the statutory PIECP authorization, 18 U.S.C. 1761(c), does not require CACs to make tax deductions, the Internal Revenue Code requires federal income tax withholding if payments of wages are made to employees. BJA encourages all CACs to take whatever deductions, which may be necessary to comply with all Federal laws, including the Internal Revenue Code. As with the PIECP benefits provision, BJA defers to the IRS as the final authority with respect to making CAC tax withholding determinations. Accordingly, changes are made in the deductions provision to clarify that the victims deduction may, in some instances, be used to address a PIECP worker's restitution obligations. Guidance regarding room and board deduction is simplified because of the inclusion of a definition for the term "Chief State Correctional Officer." Clarification is also provided with respect to tax deductions which may be necessary to facilitate CAC compliance with the Internal Revenue Code.

9. Voluntary Inmate Participation Comment: BJA should accept inmate signatures on deduction notices as evidence of voluntary inmate participation. BJA should not require the execution of new inmate voluntary participation agreements each time the deductions affecting inmate wages are changed. Response: The 18 U.S.C. 1761(c) expressly requires not only voluntary inmate employment, but also inmate agreement, in advance, of all deductions and financial arrangements affecting gross wages. While an inmate's signature on a notice form may signify receipt of notice, it does not necessarily reflect inmate agreement. Thus, the proposal is inadequate to insure compliance with the statutory requirement. Accordingly, no change is made to the voluntary participation provision.

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10. Consultation With Local Labor and Business Comment: The consultation requirements reflected in the guideline exceed BJA's statutory authority. The requirements are overly burdensome and should not be implemented so as to compromise the competitive capability of the Cost Accounting Centers (CACs). BJA should accept as compliance with the labor consultation requirement, the presence of an organized labor representative on the board of an umbrella authority PIECP project. With respect to consultation with organized labor, BJA should routinely require CAC consultation with both state and local union representatives. CACs should also be required to maintain documentation of such consultation, on file. Response: BJA's labor consultation requirement is consistent with the mandate reflected in the statutory note to 18 U.S.C. 1761(c). The provision requiring notice to local business, is consistent with a provision reflected in the 1985 guideline as well as the legislative history of the program exception. In this revised Guideline, BJA provides specific guidance on the minimum amount of information necessary to insure

provision of adequate consultation; it includes general information on the scope and nature of the proposed Cost Accounting Center, the proposed initiation date as well as notice of the requirement and an invitation to comment. Implementation of the consultation requirements is not intended to compromise the market competitiveness of a CAC, but to advise local economic interests which may be impacted by the project. Labor consultation cannot automatically be achieved through labor participation on the board of a PIECP project. Such representation does not necessarily insure notice of the proposed CAC activities to the relevant local union representative in the locality to be affected. While BJA issues this guidance to insure provision of consultation to a labor organization (i.e., notice to a state labor organization, in the event a local organization cannot be identified or does not exist), BJA has no statutory authority to require notice to both state and local labor organizations on a routine basis. Accordingly, no change is made to the consultation provisions. 11. Compliance With the National Environmental Policy Act (NEPA) BJA should allow PIECP projects to defer to state environmental requirements and not impose a new national requirement. BJA should provide Cost Accounting Centers (CACs) with technical assistance to facilitate compliance with this program requirement. Response: BJA has no authority to allow CAC applicants to defer to state environmental requirements as a substitute for implementing the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4347 (NEPA). BJA decisions on proposed PIECP certifications and designations constitute "Federal actions" as defined by 40 C.F.R. 1508.18 of the Council on Environmental Quality's (CEQ) regulations for implementing NEPA. As such, BJA has a federal obligation to insure that prior to decisions being made on requested certifications and designations, BJA implements the appropriate provisions of the CEQ regulations. These Federal implementation responsibilities, which can be shared with but cannot be delegated to Federal program applicants, have existed since the enactment of NEPA. The technical assistance needs of CACs will be addressed through BJA, itself, as well as its contractor, the National Correctional Industries Association. Accordingly, no change was made to the proposed PIECP provision implementing the NEPA. As a result of public review and comment, the final "Prison Industry Enhancement Certification Program" Guideline is revised to read as follows:

### III. Program Guidance

#### a. PIECP Purposes

- <bullet> To provide a cost-efficient means to address inmate idleness and to provide inmates with work experience and training in marketable job skills. BJA encourages private sector PIECP partners to consider post-incarceration employment to PIECP inmate workers.
- <bullet> Through inmate wage deductions, to increase advantages to the public by providing departments of correction with a means for collecting taxes and partially recovering inmate room and board costs, by providing crime victims with a greater opportunity to obtain compensation, as well as by promoting inmate family support.

- <bullet> Through PIECP participation conditions, to prevent unfair competition between prisoner-made goods and private sector goods.
- <bullet> To prevent the exploitation of prisoner labor.

#### b. Definitions

Benefits refers to inmate benefit coverage required by 18 U.S.C. 1761(c)(3). PIECP projects must provide inmate workers appropriate benefits comparable to those made available by the Federal or state government to private sector employees. The scope of appropriate benefits coverage is impacted by whether the Cost Accounting Center is structured as an employer or customer model and whether the inmate labor work force is controlled by a public agency or the private sector. BJA refers to the Bureau of Justice Assistance within the Office of Justice Programs, U.S. Department of Justice. Certificate Holder refers to a department of corrections, or an alternate umbrella authority, which is approved by BJA for PIECP Project certification. Certificate Holders assume monitoring and designation responsibilities with respect to their designated Cost Accounting Centers. All PIECP prisoner-made goods are produced within Cost Accounting Centers that a Certificate Holder designates within itself, private prisons located in the same state or jurisdiction or, in the case of an umbrella authority, within its membership agencies. Certification refers to an exercise of BJA's discretionary authority to designate a Prison Work Pilot Project pursuant to Title 18 U.S.C. 1761(c). BJA may issue either standard or provisional certifications to applicant projects. BJA certified projects are excepted from certain Federal marketability restraints on the transport of prisoner-made goods in interstate commerce, as provided in 18 U.S.C. 1761(a), and sales to the Federal government in excess of \$10,000, 41 U.S.C. 35. Chief State Correctional Officer refers either to the highest correctional officer for the jurisdiction in which the certified work pilot project is located or, with respect to umbrella authorities that control PIECP CACs within a mix of state and local jurisdictions, the authorities themselves. Cost Accounting Center (CAC) refers to a distinct PIECP goods production unit of the industries system that is managed as a separate accounting entity under the authority of a Certificate Holder. All PIECP production activities are conducted within the context of a designated CAC which, generally, is structured either as a customer or employer model for purposes of determining PIECP inmate benefits. All CACs must operate in compliance with the provisions set forth in 18 U.S.C. Sec. 1761(c) and this Guideline.

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Customer Model is a form of a PIECP Cost Accounting Center management structure. In this model, the private sector is engaged in a CAC enterprise only to the extent that it purchases all or a significant portion of the output of a prison-based business owned and operated by a governmental entity, political subdivision or an instrumentality thereof. A customer model private sector partner assumes no major role in industry operations, does not direct production and has no control over inmate labor. These functions are

performed, rather, by a department of corrections. Deductions. CACs may elect to take deductions from a PIECP inmate worker's wages for certain authorized items. Deductions from PIECP inmate gross wages, if taken, may be made only for those items specified in 18 U.S.C. 1761(c)(2), including: payment of taxes, reasonable charges for room and board, allocations for family support and contributions to any funds established by law to compensate victims of crime (no less than 5 percent and no more than 20 percent). In no event may a PIECP inmate worker's total deductions exceed 80 percent of gross wages and each and every PIECP inmate worker must agree, in advance, to all deductions from gross wages. Department of Corrections refers to state or local governmental entity or a political subdivision or instrumentality thereof, including not-for-profit entities, that are legally sanctioned by state legislatures to administer prison industries. Designation is an exercise of a Certificate Holder's discretionary authority to bring a CAC within its certified PIECP Project. This exercise of authority results in an extension of PIECP exception status and an imposition of compliance requirements on an identified CAC operating within the certified PIECP Project. Employer Model is a form of a PIECP management structure. In this model, the private sector owns and operates the CAC by controlling the hiring, firing, training, supervision, and payment of the inmate work force. The department of corrections assumes no major role in industry operations, does not direct production, and exercises minimum control over inmate labor performance. These functions are performed, rather, by the private sector. Goods include tangible items, wares, and merchandise. Locality means the geographic area impacted by the presence of a PIECP CAC operation. For PIECP CACs, it is relevant with regard to: determining inmate wages, providing consultation to appropriate labor and private sector organizations, and determining whether a PIECP CAC operation will displace the private sector labor force. All locality determinations must be documented as part of a Notice of Designation. As used in the calculation of CAC wage rates, locality is usually a matter for definition by the appropriate state agency which normally determines wage rates (i.e., the State Department of Economic Security). Minimum wage refers to the Federal minimum wage which is the lowest possible wage that can be paid to private sector employees under the Fair Labor Standards Act, 29 U.S.C. 206. Any special wage program, excepted by law from the minimum wage requirement in the private sector, may be used by a PIECP CAC as long as the CAC meets the same program participation conditions as private sector participants. The requisite payment of at least a minimum wage, by a CAC, is in no way intended by BJA to imply that PIECP inmate workers are employees for purposes of the PIECP statute or any other Federal law. Monitoring refers to the process of examining Prison Work Pilot Project activities to ensure continuing compliance with 18 U.S.C. 1761(c) and this Guideline. It includes, at a minimum, BJA's receipt and analysis of performance reports and on-site CAC monitoring visits by BJA, BJA contractors and Certificate Holders. NEPA means the National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. 4321-4347; implemented under 40 C.F.R. pt. 1500). Participation means engaging in the activities and operations of an 18 U.S.C. 1761 (c) excepted PIECP Project. PIECP means the Prison Industry

Enhancement Certification Program as authorized by 18 U.S.C. 1761 (c). PIECP Exception Status. Any PIECP Project which produces prisoner-made goods pursuant to 18 U.S.C. 1761(c) is excepted from certain Federal restraints imposed on the marketability of prisoner-made goods, including 18 U.S.C. 1761(a) and 41 U.S.C. 35. PIECP Inmate Worker is a convict or prisoner who performs notable tasks necessary to produce or transport goods in interstate commerce and for a Prison Work Pilot Project certified under 18 U.S.C. 1761(c). The PIECP Inmate Worker benefits from PIECP by receiving training and work experience. Prevailing wage is a wage rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed, 18 U.S.C. 1761(c) (2). Prison Industry means an organized utilization of inmate labor to produce goods or render services. Prison Work Pilot Project (PIECP Project) refers to one of 50 non-Federal prison work pilot projects which may be designated by the Director of BJA under 18 U.S.C. 1761(c). This term encompasses the operations of the Certificate Holder's designated Cost Accounting Centers (CACs). Any Prison Work Pilot Project may consist of one or more CACs. Prisoner includes prison and jail inmates, convicts and incarcerated juvenile offenders, and does not include prisoners on parole, probation, or supervised release. Title 18 U.S.C. 1761(a) does not regulate the transport of goods produced by prisoners on parole, supervised release, or probation. Prisoner-made goods include all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners (except convicts or prisoners on parole or probation). Production is the forming anew or transforming of marketable goods. The term includes mining and manufacture and excludes services. Provisional Certification is issued by BJA in instances where an applicant has not yet come into full compliance with all PIECP requirements, but such compliance appears imminent. It entitles the holder to PIECP exception status for an identified period of time, may be made contingent upon the occurrence of identified conditions, and may or may not be renewed by BJA. Statutory Exception Status refers to a prison industry which meets the statutory requirements set forth in 18 U.S.C. 1761(b), and is thereby entitled to an exception from the prohibition set forth in 18 U.S.C. 1761(a). Supervised Release. 18 U.S.C. 1761(a) states that the Ashurst-Sumners Act prohibition does not apply to "convicts on parole, supervised release, or probation." The reference to "supervised release" was added to 1761(a) in 1984, Pub. L. 98-473, 223, and is responsive to changes made at that same time in state and Federal Sentencing Guidelines. Policy statements issued by the U.S. Sentencing Commission explain that supervised release is a "new form of post-imprisonment supervision created by the Sentencing Reform Act." See Federal Sentencing Guidelines, 18 U.S.C.A. ch. 7, pt. A (1997). Umbrella Authority refers to a type of Certificate Holder which is authorized by law to administer a PIECP Project and which consists of state and/or local departments of correction located

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within the same state. A certified umbrella authority may designate

CACs within its membership agencies, as well as within members' private prisons, and assumes responsibility for monitoring CAC compliance.

c. BJA's Initial Considerations for Determining Propriety of Work Pilot Project Certification

1. BJA's Exercise of Discretionary Authority To Define and Certify 50 Work Pilot Projects (A) BJA may exercise discretionary authority to designate up to 50 non-Federal work pilot projects, 18 U.S.C. 1761 (c). (B) BJA may define PIECP eligibility qualifications and, in accordance with its own definitions, may exercise agency discretion to extend or withdraw certification privileges, as it deems appropriate. 2. Threshold Inquiry for Determining Applicability of PIECP Exception Status Appropriate PIECP participants include prison industries whose activities would likely violate the 18 U.S.C. 1761(a) prohibition and would likely not fit within an 18 U.S.C. 1761(b) exception. BJA has devised an administrative approach for identifying such industries. This approach incorporates relevant sections 1761 (a) and (b) considerations, including whether a given prisoner-made item qualifies as an exempted agricultural product, whether a given prison industry activity qualifies as an unregulated service, and whether a product distribution activity qualifies as an intrastate distribution of goods. These considerations are reflected in the following threshold inquiry, which BJA will use to determine whether a prison industry should be encouraged to apply for PIECP exception status:

(A) Is a statutory exception applicable under 18 U.S.C. 1761(b)? The following prisoner-made items are excepted from the prohibition set forth in section 1761(a):

<bullet> Parts for the repair of farm machinery; or <bullet> Commodities manufactured in a Federal, District of Columbia, or state institution for use by the Federal Government, or by the District of Columbia or by any state or political subdivision of a state or not-for-profit organizations. This exception is intended to inure to the benefit of the public; or <bullet> Agricultural commodities grown or cultivated on a farm which retain continuing substantial identity through processing stages, if any. In making the determination as to whether a processing stage changes a product from an agricultural commodity to a manufactured commodity, a relevant consideration is whether the processing is incidental or ancillary to agricultural commodity growth and or cultivation. If the processing is incidental or ancillary in nature and is commonly undertaken by agricultural enterprises, then it would likely fall within the scope of the statutory exception.

(B) Could the contemplated activity trigger 18 U.S.C. 1761(a) by resulting in a production of goods by inmates in any penal or reformatory institution? The production of goods, which is regulated by 18 U.S.C. 1761(a), must be distinguished from inmate services which are not regulated by the criminal prohibition. The following factors are relevant in determining whether a given activity results in

that paid for work of a similar nature in the locality in which the work is to be performed. This requirement benefits society by allowing for the development of prison industries while protecting the private sector labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace. PIECP participants must, therefore, implement the prevailing wage requirements under like conditions experienced by private sector competition. Toward this end, the following requirements are applicable:

(A) Section 1761(c) requires that the PIECP wage amount be set exclusively in relation to the amount of pay received by similarly

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situated non-inmate workers. In deriving the appropriate PIECP wage, 18 U.S.C. 1761(c)(2) does not allow other cost variables to be taken into consideration, such as unique expenses incurred as a result of undertaking production within the prison environment. (B) Prevailing wage verification must be obtained by the appropriate state agency which determines wage rates (usually the Department of Economic Security). (C) When making PIECP prevailing wage verifications and annual re-verifications, the responsible state agency should recommend the utilization of a non-inmate wage scale which will not result in the displacement of non-inmate workers performing similar work in the relevant locality. (D) The PIECP prevailing wage must be received by those inmate workers performing notable tasks necessary to produce and/or transport goods in interstate commerce. If a similarly situated, private sector company is paying wages to obtain services that are necessary to production, e.g. refuse pickup, then the PIECP CAC must also pay such wages to the inmate provider of like services. In determining which tasks are covered, the following considerations are relevant: the amount of inmate time involved, effort and skill necessary to accomplish the task, the regularity of task performance, and whether the task would have been performed by the inmate absent PIECP production. (E) The prevailing wage must be verified prior to the initiation of PIECP participation. Annually, thereafter, the PIECP participant must re-verify the adopted wage to ensure that it continues to be comparable to wages paid for work of a similar nature in the locality in which the project is located. (F) If no such verification can be obtained from the State Department of Economic Security, or other similar department, the PIECP participant is responsible for establishing a reasonable prevailing wage. In such instances, the participant should retain on file, for BJA's review: (1) relevant wage data from a sufficient number of competitors in the locality; (2) data analyses for determining a reasonable prevailing wage result; and (3) if possible, a written assessment of the reasonableness of the resulting prevailing wage determination by an appropriate state agency which normally determines wage rates. (G) The PIECP prevailing wage can not be set below the Federal minimum wage, as defined in the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq. Payment of the Federal minimum wage, however, does not automatically achieve compliance with the

prevailing wage requirement unless the prevailing wage for the comparable private sector industries is, in fact, the Federal minimum wage. (H) Overtime, at one and a half times the rate of regular or prevailing wage, must be paid for prisoner hours worked in excess of 40 hours per week. See 29 U.S.C. 207(a) (a payment standard imposed on private sector competition). (I) If a CAC pays a wage based on piece work, the project must apply a calculation to convert regular wages paid into a comparable hourly wage. The calculation should be used as a routine check to ensure that inmate workers, paid according to piece rate work, do not receive less than the Federal minimum wage. In instances where the CAC is paying Federal minimum wage and such a wage is less than the industry standard for the prevailing wage, the CAC must be able to identify inmate worker performance variances as justification for the wage rate. (J) BJA strongly encourages the use of wage plans that take into consideration a PIECP worker's experience, seniority, and performance.

3. Non-Inmate Worker Displacement. PIECP CAC operations must not result in displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or significantly impair existing contracts. The term "displacement," as used in this provision, includes all such prohibited activities, as well as the inappropriate transfer of private sector job functions to PIECP inmates. This prohibition is intended to protect the private sector partner's non-inmate employees, as well as all other non-inmate workers who perform work of a similar nature in the same locality in which the CAC is located. This prohibition is not, however, intended to prohibit PIECP CACs from engaging in typical business operations, such as competing for business or bidding on contracts on the open market after their designation as Cost Accounting Centers.

(A) Regarding the possibility of displacement among non-inmate employees of private sector partners in the same locality as the CAC:

(1) BJA will presume non-compliance where there is a non-inmate worker's job function replacement by a PIECP inmate worker or where a non-inmate worker's job function is eliminated or adversely impacted, to a significant degree, and there is a concomitant assumption of a similar job function by a PIECP inmate worker. This presumption may be overcome if it can be demonstrated that the non-inmate workers have been retained by the private sector partner in jobs at pay rates equal to or greater than that received in previous positions, that non-inmate employees have been provided an adequate opportunity for effective training in any new job skills and that the subject non-inmate employees are being retained by the private sector partner under reasonably similar or improved employment conditions. When making this compliance evaluation, BJA will not consider the private sector partner's intent or economic viability. (2) Prior to CAC initiation, the CAC applicant must provide BJA with written documentation reflecting the private sector partner's agreement not to displace its non-inmate employees with PIECP inmate labor in violation of the 18 U.S.C. 1761(c) statutory note. (B) Prior to project initiation, all CAC applicants must show through written verification by the State Department of Economic Security (or other appropriate state agency) that the PIECP project will not result

in displacement of non-inmate workers performing the same work, regardless of wage rate. In cases where an appropriate state agency cannot provide this service, the applicant CAC should propose to and confer with BJA as to alternative measures to address this requirement. (C) While compliance is a continuing CAC obligation, BJA will scrutinize CAC compliance with the non-displacement requirement just prior to and within one year after the initiation date of CAC operations. (D) In instances where BJA finds that CAC implementation results in private sector worker displacement, the CAC must either cease its operations or comply with a BJA-approved corrective action plan, if BJA proposes such a plan under Section IV. f. of this Guideline, infra.

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(E) BJA strongly recommends that CAC job development be oriented toward the creation of new jobs within the locality. 4. Benefits. PIECP projects must provide inmate workers appropriate benefits comparable to those made available by the Federal or State Government to private sector employees, including workers' compensation and, under certain circumstances, Social Security.

(A) By statute, in some states, inmates are not eligible to participate in workers' compensation programs. Provision of comparable workers' compensation benefits is acceptable as long as the CAC can demonstrate comparability of such benefits with those secured by the Federal or state Government for private sector employees. (B) The PIECP CAC management model impacts whether the CAC must provide Social Security benefits to PIECP inmate workers. Where the employer model is utilized and the private sector directs and controls the PIECP inmate worker, the PIECP participant must provide PIECP inmate workers with Social Security benefits. Where a customer model is utilized and a governmental, or instrumentality thereof, directs or controls the PIECP inmate worker, BJA recognizes the applicability of other provisions of Federal law which may operate to preclude the provision of PIECP inmates with certain benefits, including Social Security. 5. Deductions. Participating CACs are not required under 18 U.S.C. 1761(c) to take deductions from PIECP inmate wages. Deductions, however, may be required under other Federal statutes, such as the Internal Revenue Code. If a CAC elects to take deductions from a PIECP inmates' gross wages, such deductions can be taken only under the following conditions:

(A) Deductions from gross wages, if made, may be withheld only for the following authorized purposes: (1) taxes (Federal, state, local); (2) in the case of a state prisoner, reasonable charges for room and board as determined by regulations issued by the Chief State Correctional Officer; (3) allocations for support of family pursuant to state statute, court order, or agreement by the offender; and (4) contributions of not more than 20 percent, but not less than 5 percent of gross wages to any fund established by law to compensate the victims of crime.

Such deductions, in aggregate, cannot exceed 80 percent of gross

wages.

(B) PIECP inmate workers must be paid, credited with, or otherwise benefit legally from, the 20 percent gross remainder. In this regard, the CAC may direct the 20 percent gross remainder to a PIECP inmate worker's expense accounts, savings accounts, or toward the settling of the worker's legal obligations, including the payment of fines and restitution. (C) Each Certificate Holder, through its respective Chief State Correctional Officer, retains flexibility in determining appropriate room and board charges that may be deducted from PIECP inmate workers' gross wages. Except as to CACs within private prisons, the applicable regulations for determining this deduction are those issued by the Chief State Correctional Officer of the state in which the PIECP inmate is incarcerated. (D) The legislative history of 18 U.S.C. 1761(c) reflects a Congressional intent to permit the use of the room and board deduction to lower costs otherwise incurred by the public for inmate incarceration. Thus, prior to making room and board deductions, private prison CACs must obtain written approval of any such proposed deductions from the Chief State Correctional Officers for those states from which the PIECP inmate workers were remanded. (E) A PIECP inmate's gross wages may be subjected to a deduction for the purpose compensating crime victims if the deducted amount is deposited into a fund established by law for the purpose of providing crime victim compensation. State crime victim compensation funds typically qualify as authorized recipients of such deducted amounts. The victims compensation deduction may also be used to address victim restitution as long as the deducted amounts are deposited into a fund established by law to address such victim interests. Amounts deducted by private prison CACs should be deposited in those crime victim compensation or restitution funds in states from which the PIECP inmates were remanded.

6. Voluntary PIECP Inmate Worker Participation The Inmate Worker must indicate, in writing, that he or she: (A) agrees voluntarily to participate in the PIECP project, and (B) agrees voluntarily, and in advance, to specific deductions made from gross wages, as well as all other financial arrangements made as to earned PIECP wages.

7. Consultation With Organized Labor PIECP CACs must:

(A) consult with representatives of local union central bodies or similar labor union organizations prior to the initiation of any certified or designated CAC project. CACs should consult with as many of such organizations as may have an interest in the trade or skill to be performed by the PIECP inmates. If there are no local union bodies or labor organizations, consultation must be made with the state union bodies or similar state-wide labor organizations. (B) provide adequate information about the contemplated PIECP participation such as, at a minimum, an identification of the scope of the intended CAC and projected initiation date, as well as an explanation of the fact that statutory consultation is required and comments are invited. CACs should retain documentation reflecting provision of adequate consultation.

8. Consultation With Local Private Industry PIECP CACs must:

(A) consult with representatives of local business that may be economically impacted by CAC production prior to beginning operations, and (B) provide adequate information about the contemplated PIECP participation such as, at a minimum, an identification of the scope of the intended CAC and projected initiation date as well as an explanation of the fact that consultation is required and comments are invited. CACs should retain documentation reflecting provision of adequate consultation. 9. Compliance With the National Environmental Policy Act (NEPA) The review and approval of PIECP certification applications as well as the designation of PIECP CACs must comply with NEPA and other related Federal environmental review requirements. See NEPA, 42 U.S.C.

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4321-4347 and 40 CFR pt. 1500. See also 28 CFR pt. 61 (Department of Justice procedures for implementing NEPA); 28 CFR pt. 61 App. D (procedures specific to Federal actions undertaken by the Office of Justice Programs).

(A) A BJA PIECP certification, or a CAC designation under an issued certification, constitutes a "Federal action," as defined by 40 CFR 1508.18 of the Council on Environmental Quality's (CEQ) regulations for implementing NEPA. Consistent with CEQ regulations, PIECP applicants and CACs are required to submit for BJA review environmental data and information regarding their proposed activities and, if necessary, environmental assessments. Applicants and CACs must also assist BJA in the preparation of any required environmental impact statements. (B) Title 28 CFR Part 61 App. D provides NEPA compliance guidance to PIECP applicants and CACs, including the following: (1) Actions entailing minor renovation projects or remodeling do not normally require an environmental impact statement or an environmental assessment, unless, for example the actions would be located in or potentially affect a floodplain; a wetland; a listed species or critical habitat for an endangered species; or a property that is listed on or may be eligible for listing on the National Register of Historic Places. (2) Actions that normally require an environmental assessment, but not necessarily an environmental impact statement, include: renovations and expansions that change the basic prior use of a facility or substantially change its size; change in use of an existing facility that results in the increased production of liquid, gaseous, or solid wastes; new construction; research and technology whose anticipated and future application could be expected to have an effect on the environment; and new operations involving the use of hazardous, toxic, radioactive, or odorous materials. Assessments of such activities which result in BJA "findings of significant impact" will necessitate the preparation of environmental impact statements in compliance with NEPA and its implementing regulations. (3) Additionally, no certification will be approved nor can any designation be provided or maintained if the application or designation includes a facility in non-compliance with any Federal, state, or local environmental law or regulation.

#### IV. PIECP Administration

##### a. Certificate Holders

BJA may exercise its discretionary authority to certify up to 50 Non-Federal PIECP Projects. Eligible applicants may seek certification by submitting an application to BJA in accordance with the requirements set forth in BJA's PIECP Certification Application, which will be provided upon request, and subpart IV.a.2, *infra*. BJA's review of submitted applications will be conducted as outlined in subparts IV.a.3 and a.4, *infra*. Once a certificate is issued, the holder assumes the authority and responsibilities set forth in subparts IV.a.5 and a.6, *infra*.

1. Project Structure All departments of correction, authorized by law to administer prison industry programs, are eligible to apply for BJA certification. Certified applicants may designate one or a number of Cost Accounting Centers (CACs) under their authority. Certificate Holders may also under certain conditions designate CACs within private prisons located in their respective states or jurisdictions. BJA will consider alternative program structures suggested by certification applicants, including, but not limited to, applicant umbrella authorities, as described in subpart III. d.1, *supra*.

2. Application Content All applications for PIECP Project Certification shall include the following:

(A) Assurances of Authority. The Certificate Holder must provide written assurance to BJA that it has in place appropriate statutory and administrative authority to meet all mandatory program criteria and, in particular, to monitor CAC compliance throughout the proposed PIECP Project.

(B) Documentation to Show Compliance With Mandatory Program Criteria. The applicant must submit all documentation necessary to show CAC compliance with the nine mandatory program criteria outlined in Section III. d., *supra*.

(C) Project Description. The applicant must describe key project elements, including the process to be used to designate and monitor compliance of CACs with 18 U.S.C. 1761(c) and this Guideline.

3. BJA Review PIECP applications will be reviewed by BJA on a first-come, first-served basis. Awards of certification are discretionary exercises of authority by BJA under 18 U.S.C. 1761(c). No certification will be awarded, however, unless there is a determination that the applicant has met the mandatory participation criteria outlined in this Guideline. Applicants will be notified in writing of BJA's award or denial of certification. The hearing and appeal procedures set forth in 28 C.F.R. Part 18 do not apply to denied PIECP applicants. Certified applicants will be informed of the effective date of BJA's certification.

4. Standard or Provisional Certification A standard certification may be issued by BJA to an approved Certificate Holder applicant when all mandatory program criteria have been met. When one or more mandatory program criteria have not been met, but when steps have been taken to ensure that those criteria will be met within a reasonable period of time, then a provisional certification may be issued by BJA in instances where the withholding of certification would significantly impair the applicant's ability to further develop its project. The terms of the provisional certification will be made specific to the nature of the unmet mandatory criteria and may be

made contingent upon the occurrence of identified conditions. Provisional certifications may be issued for no longer than one year from the date of issuance and may be subject to renewal, at BJA's discretion. 5. Certificate Holder Designation Authority (A) The Certificate Holder may exercise CAC designation authority with respect to department of correction prison industries operating under its jurisdiction, including in private prisons which are located in its respective state or jurisdiction. CACs designated within private prisons must also retain on-file documentation reflecting approval of PIECP inmate worker participation by the state and local jurisdictions in which PIECP inmate workers were convicted. In order to issue such approvals, the remanding state and local jurisdictions must also hold PIECP certificates. To exercise this authority, a Certificate Holder must first determine that a proposed CAC has complied with the requirements set forth in this Guideline and in 18 U.S.C. 1761(c).

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Whenever the Certificate Holder elects to exercise this authority after certification application approval, it must submit a Notice of Designation Form to BJA that provides the following information and documentation: (1) Cost Accounting Center Name and Location; (2) Proposed number of workers; (3) Item(s) to be produced; (4) Proposed consumer market (including anticipated geographic distribution); (5) Description of private sector involvement, including models that will be used in working with private enterprise; (6) Locality determination, and supporting justification; (7) Description of inmate compensation plans; (8) Documentation of prevailing wage verification; (9) Identification of deductions and percentage of each to be taken from PIECP inmates' gross wages; (10) Documentation of private sector partner's agreement not to displace its non-inmate employees in the same locality with PIECP inmate labor, if applicable; (11) Documentation of non-displacement verification; and (12) As to any CACs within private prisons, written approval from remanding jurisdiction of any proposed room and board deduction, in compliance with Section III.d.5.(E) of this Guideline, supra; (13) As to any CACs within private prisons, written approval of the designation by the Chief State Correctional Officer for the jurisdiction in which the CAC is located; and (14) Documentation of the environmental impacts of the CAC's existing and proposed activities. (B) The Certificate Holder may, in its own discretion, undesignate any previously designated CAC. In such instances, the Certificate Holder must submit to BJA an Undesignation Form providing the following information: (1) Cost Accounting Center Name and Location; (2) Reasons for Undesignation; and (3) Effective Date of Undesignation. (C) BJA may, at any time deemed necessary to resolve compliance concerns and upon the issuance of written notice, suspend a Certificate Holder's authority to designate additional Cost Accounting Centers. 6. Certificate Holder Monitoring Responsibilities As to all designated CACs, the Certificate Holder must assume the following monitoring responsibilities:

(A) Undertake all reporting and evaluation activities deemed necessary to ensure continuing designated CAC compliance; and (B)

Respond to all BJA requests for information and cooperation aimed at ensuring Project compliance.

b. Cost Accounting Centers' PIECP Exception Status

A CAC is entitled to operate under PIECP exception status.

1. To retain this status, the CAC must comply with all PIECP participation obligations to its Certificate Holder and to BJA, including: (A) Maintaining continuous compliance with the requirements set forth in 18 U.S.C. 1761(c) and in III.d), supra, of this Guideline; and (B) Responding to all monitoring requests for information and cooperation aimed at maintaining continued compliance with this Guideline. 2. The CAC must promptly report to the Certificate Holder any contemplated change in operations which may affect its ability to maintain statutory and Guideline compliance.

c. Compliance Reviews

1. Performance Reports Within 30 days following the close of each calendar quarter, each CAC must submit a quarterly performance report to its Certificate Holder in a form prescribed by BJA. The performance report describes activities undertaken during the prescribed period. A consolidated report of all CAC activity must be submitted to BJA by the Certificate Holder within 45 days following the close of each calendar quarter. 2. On-Site Monitoring Reviews BJA and BJA technical assistance contractors are authorized to perform desk and on-site reviews of all PIECP participants, including all CACs, as deemed necessary. On-site reviewers may request access to any and all documentation necessary to assist in determining compliance with the requirements of this Guideline and 18 U.S.C. 1761. Monitored participants will be advised in writing of the results of any such reviews. Immediate corrective action must be taken to address determinations of non-compliance and/or to respond to issues that raise compliance related-concerns for BJA.

d. BJA's PIECP Administration

BJA's PIECP responsibilities include the following:

1. Review and approval of Certificate Holder PIECP applications; 2. Monitoring to determine compliance status of operations within all CACs; 3. PIECP exception status termination or suspension for cause related to substantial non-compliance; 4. Liaison with other Federal agencies that may affect PIECP operations; 5. Provision of compliance-related technical assistance; and 6. Any and all other functions necessary to administer the program in compliance with 18 U.S.C. 1761(c).

e. PIECP Exception Status Suspension/Termination

1. Notice of Possible Compliance Violation Alleged facts indicative of non-compliance shall be communicated in writing by BJA to the

involved Certificate Holder and the involved designated CAC. These parties must respond to the allegations, in writing, within 15 days after receipt of the notice of non-compliance determination. Immediate corrective action must be taken to address determinations of non-compliance. 2. Voluntary Compliance Agreements If BJA determines that noncompliant practices persist, BJA may, in its discretion, propose a voluntary compliance agreement to the involved Certificate Holder. 3. Failure To Achieve Compliance and Effect of Non-Compliance If a voluntary compliance agreement is not presented by BJA or is not accepted or adequately implemented by the Certificate Holder within 30 days after receipt of such an agreement, BJA may suspend the Certificate Holder's certification and/or CAC exception status. 4. PIECP Exception Status Suspension and Termination A certification may be terminated by BJA if it has been inactive (no production within a designated CAC) or suspended for six consecutive months. A certification and/or designation may be suspended, and six months thereafter, terminated upon: (1) issuance of a notice of a determination that the Certificate Holder and/or designated CAC is not acting in compliance with

[[Page 17014]]

the requirements of 18 U.S.C. 1761, this Guideline or the conditions set forth in its certificate; or (2) in the discretion of the Director of BJA and upon a re-definition of a PIECP Project authorized under 18 U.S.C. 1761(c). Termination or suspension of the exception status of one designated CAC will not automatically impact the PIECP exception status of other CACs under the same certification unless the PIECP Project certification is suspended or terminated. The hearing and appeal procedures set forth in 28 C.F.R. Part 18 do not apply to PIECP applicants or participants who have had PIECP exception status suspended or terminated under this provision.

Dated: March 31, 1999. Nancy Gist, Director, Bureau of Justice Assistance. [FR Doc. 99-8575 Filed 4-6-99; 8:45 am] BILLING CODE 4410-18-P

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AMENDMENT #2 ad-118

OFFERED IN THE HOUSE

TO: SB 310

1 Page 3, lines 6 - 17:

2 Delete all material and insert:

3 **\*\* Sec. 2. AS 33.30.191(b) is amended to read:**

4 (b) The commissioner may enter into contracts or cooperative agreements with  
5 any public agency for the performance of conservation projects. **After the effective**  
6 **date of this Act, the** [THE] commissioner may enter into a contract with an individual  
7 or **private organization** [AGENCY] for the employment of prisoners if the  
8 **commissioner consults with local union organizations before contracting and**  
9 **ensures that the contract will not result in the displacement of employed workers,**  
10 **be applied in skills, crafts, or trades in which there is a surplus of available**  
11 **gainful labor in the locality, or impair existing contracts for services** [WORK TO  
12 BE PERFORMED WILL HAVE MINIMAL NEGATIVE IMPACT ON AN  
13 EXISTING PRIVATE INDUSTRY OR LABOR FORCE IN THE STATE AS  
14 DETERMINED BY THE CORRECTIONAL INDUSTRIES COMMISSION UNDER  
15 AS 33.32.015]."

Conceptual Amendment to SB310\G  
By Elkins  
4/11/06

H/ Adopted

Page 5 line 20  
Move (6) to line 16 and renumber it (4)  
Move (4) to line 18 and renumber it (5)  
Move (5) to line 20 and renumber it (6)

**SB**

**132**

HB 202

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 18.90.100. 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.

SB132

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STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

March 3, 2005

The Honorable Ben Stevens  
President of the Senate  
Alaska State Legislature  
State Capitol, Room 111  
Juneau, AK 99801-1182

Dear President Stevens:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would amend the investigation and procedure laws of the State Commission for Human Rights (commission). The bill would amend the investigation and hearing procedures to enhance fairness and efficiency and to give the commission more enforcement discretion to increase its effectiveness in combating unlawful discrimination.

The bill would add a new statutory provision, AS 18.80.112, to provide the staff of the commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The purpose of the amendment 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 state human rights laws 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. Providing the commission with genuine prosecutorial discretion would allow the commission to commit its resources to complaints it determines merit pursuit, 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, or the complaint's value in establishing precedent guiding future conduct.

COMMITTEE COPY

The Honorable Ben Stevens

March 3, 2005

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The discretion of the staff of the commission would also be expanded to allow it to compromise a claim for damages in the conciliation (or prehearing) phase of the procedures. The bill would avoid conflicts between staff's exercise of its expanded discretion to compromise, dismiss, or pursue a complaint and the concerns of the victims of unlawful discrimination by allowing a complainant to opt out of commission procedures. A complainant may withdraw the complaint at any time before the executive director of the commission makes the decision to go to hearing and, after withdrawal, pursue the claim independently of the commission in another forum.

The bill would expand on a procedural change made in 2004 when the power to appoint the individuals who conduct commission hearings was moved from the commission to the chief administrative law judge in the Department of Administration. The bill would apply all of the statutes regarding hearings of the office of administrative hearings to the commission (including statutes addressing the qualifications of the persons who would conduct the commission's hearings) except for the statutes establishing hearing procedures. The commission's hearing procedures would be any specific procedures set out in AS 18.80 and the uniform procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630. The bill would eliminate from AS 18.80 some duplicative procedural requirements that are addressed in the Administrative Procedure Act, such as the admissibility of evidence and the requirement that testimony be under oath. Another change would be the addition of a provision similar to a motion for summary judgment in the civil rules of court to allow a summary decision on the law if the facts are not disputed. The reason for allowing a summary decision is that it is a faster procedure than a hearing, and it would provide a sufficient opportunity to be heard on the legal issues when the facts are not in dispute. The bill would add a provision tying the rate of interest on commission economic awards to the rate of interest on judgments in AS 09.30.070, to conform the commission's rate to the rate awarded by other administrative agencies and the courts. It would continue to allow the commission to amend an accusation after a case is referred for hearing, but it would require that each new claim be supported by substantial evidence and that the commission provide a respondent with the opportunity to address new claims informally before being required to defend them in a formal hearing. The bill would move the statute of limitations for bringing a claim from regulation (6 AAC 30.230) to statute.

The bill would identify the specific relief available to remedy discrimination, to make the process more open and predictable and, thus, fairer. The bill would incorporate into statute the Alaska Supreme Court's conclusion that the commission lacks the authority to award punitive or

The Honorable Ben Stevens  
March 3, 2005  
Page 3

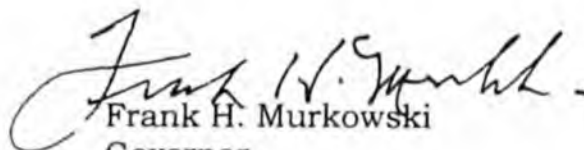
noneconomic damages. The bill would amend AS 18.30.130 to establish restoration of the benefit that was deprived -- hiring, promotion, or reinstatement to a position with back pay -- as the customary remedy for unlawful employment discrimination. The bill would define "pay" broadly to mean all compensation for service, including the cost of employee benefits. In the unusual case of an employee who is unable to return to work, the bill would allow an award of up to one year of future compensation. For any pay that the commission awards, the bill would require the commission to offset the amount an employee should have been able to earn after making a reasonable effort to find similar work.

Very importantly, under the bill the commission would retain the authority to order affirmative action to correct unlawful discrimination and to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination.

By increasing the commission's discretion in handling complaints, the bill would enable the commission to allocate its diminishing resources to cases in which the commission could be the most effective in addressing and eliminating unlawful discrimination. By streamlining commission procedures, the bill would help contain costs and ensure that the procedures are equitable to both complainants and the persons, businesses, labor organizations, and employment agencies charged before the commission with unlawful discrimination.

I urge your prompt and favorable action on this bill.

Sincerely yours,

  
Frank H. Murkowski  
Governor

Enclosure

*as amended*

SENATE BILL NO. 132(cfd fld)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Amended: 4/20/05  
Introduced: 3/4/05

A BILL

FOR AN ACT ENTITLED

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

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

5 \* Section 1. AS 18.80.100 is amended to read:

6           Sec. 18.80.100. Complaint; time limitations. A person who is aggrieved by  
7           a [ANY] discriminatory practice [CONDUCT] prohibited by this chapter may sign  
8           and file with the commission a written, verified complaint stating the name and  
9           address of the person alleged to have engaged in the discriminatory practice  
10           [CONDUCT], and the particulars of the discrimination. A complainant may  
11           withdraw the complaint at any time before the service of an accusation under  
12           A<sup>c</sup> 18.80.120. A withdrawal must be signed by the complainant and be in  
13           writing. A withdrawal does not limit the discretion of the executive director  
14           provided in (b) of this section [THE EXECUTIVE DIRECTOR MAY FILE A

1 COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION  
2 COMES TO THE ATTENTION OF THE DIRECTOR].

3 \* Sec. 2. AS 18.80.100 is amended by adding new subsections to read:

4 (b) The executive director may file a complaint in the manner provided in (a)  
5 of this section when a discriminatory practice comes to the attention of the executive  
6 director.

7 (c) A complaint may be filed not later than 180 days after the alleged  
8 discriminatory practice occurred or, for a continuing discriminatory practice, not later  
9 than 180 days after the alleged discriminatory practice stopped.

10 \* Sec. 3. AS 18.80.110 is amended to read:

11 **Sec. 18.80.110. Investigation and conciliation.** The executive director or a  
12 member of the commission's staff designated by the executive director shall  
13 informally investigate the matters set out in a filed complaint, promptly and  
14 impartially. If the investigator determines that there is [THE ALLEGATIONS ARE  
15 SUPPORTED BY] substantial evidence of an unlawful discriminatory practice  
16 under this chapter, the investigator shall immediately try to eliminate or remedy the  
17 discriminatory practice through an agreement reached [DISCRIMINATION  
18 COMPLAINED OF,] by conference, conciliation, and persuasion. If an agreement is  
19 reached, it must be reduced to writing and signed by the complainant, executive  
20 director, and respondent. The agreement is binding and enforceable under this  
21 chapter as an order of the commission. An agreement reached under this section  
22 may include the compromise of damages authorized under this chapter.

23 \* Sec. 4. AS 18.80 is amended by adding a new section to read:

24 **Sec. 18.80.112. Dismissal of complaint without prejudice.** (a) If an  
25 investigation of a complaint under AS 18.80.110 fails to discover substantial evidence  
26 of an unlawful discriminatory practice under this chapter, the executive director shall  
27 issue an order dismissing the complaint without prejudice. The commission, in its  
28 discretion, may <sup>and is not required to,</sup> review the executive director's order of dismissal and may affirm the  
29 order, remand the complaint for further investigation, or refer the complaint for  
30 conference, conciliation, and persuasion as provided in AS 18.80.110 if it concludes  
31 that substantial evidence supports the complaint of an unlawful discriminatory

1 practice.

2 (b) At any time before the issuance of an accusation under AS 18.80.120, the  
3 executive director may dismiss without prejudice a complaint if the executive director  
4 determines, in the executive director's discretion, that

5 (1) the complainant's objection to a proposed agreement under  
6 AS 18.80.110 is unreasonable;

7 (2) the complainant is unavailable or unwilling to participate in a  
8 hearing;

9 (3) relief is precluded by the absence of the person alleged to have  
10 engaged in the discriminatory practice;

11 (4) the person aggrieved by the discriminatory practice has initiated or  
12 wants to initiate an action or proceeding in another forum based on the same facts;

13 (5) a hearing will not represent the best use of commission resources;

14 (6) a hearing will not advance the purposes stated in AS 18.80.200; or

15 (7) the probability of success of the complaint on the merits is low.

16 (c) Dismissal under this section does not prevent a complainant from

17 (1) initiating an action or proceeding in another forum; or

18 (2) filing a new complaint under AS 18.80.100 that resolves the  
19 grounds for the dismissal under this section.

20 \* Sec. 5. AS 18.80.120 is repealed and reenacted to read:

21 **Sec. 18.80.120. Hearing.** (a) If no agreement is reached under AS 18.80.110  
22 and the executive director determines, in the executive director's discretion, to refer  
23 the complaint for hearing, the executive director shall issue an accusation based on the  
24 investigator's determination of substantial evidence and serve the person charged in  
25 the accusation and the complainant with notice of the referral and a copy of the  
26 accusation. The executive director's decision to refer the complaint to hearing is not  
27 reviewable by the commission under this chapter. The location of the hearing is the  
28 commission office unless the commission designates another location. The executive  
29 director, or the executive director's designee, shall present the case in support of the  
30 accusation before the commission. The person charged in the accusation may file a  
31 written answer and may appear at the hearing, with or without counsel, and submit

1 evidence.

2 (b) The commission shall request the chief administrative law judge to appoint  
3 under AS 44.64.020 an administrative law judge employed or retained by the office of  
4 administrative hearings to preside over a hearing conducted under this section.  
5 AS 44.64.040, 44.64.050, 44.64.055, 44.64.070, 44.64.080, 44.64.090, 44.64.095, and  
6 44.64.200, and the procedures in AS 44.62.330 - 44.62.630 (Administrative Procedure  
7 Act), apply to the hearing except as otherwise provided in this chapter.

8 (c) An accusation may be reasonably and fairly amended by the commission.  
9 An amendment to name a different discriminatory practice must be supported by  
10 substantial evidence, and the discriminatory practice must be referred for conference,  
11 conciliation, and persuasion as provided in AS 18.80.110, before a hearing may  
12 proceed.

13 (d) In a hearing on an accusation, each element of an accusation or defense  
14 must be proven by a preponderance of the evidence.

15 (e) At any time after the issuance of an accusation, the executive director or  
16 the person charged in the accusation may petition for a summary decision on the  
17 accusation. The commission shall grant a petition if the record shows that there is no  
18 genuine issue of material fact and the petitioner is entitled to an order under  
19 AS 18.80.130 as a matter of law.

20 \* Sec. 6. AS 18.80.130(a) is amended to read:

21 (a) At the completion of the hearing or after consideration of a petition for  
22 summary decision under AS 18.80.120(e), if the commission finds that a person  
23 charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has  
24 engaged in the discriminatory practice [CONDUCT] alleged in the accusation  
25 [COMPLAINT], it shall order the person to refrain from engaging in the  
26 discriminatory practice [CONDUCT]. The order must include findings of fact [,] and  
27 may order the person to take affirmative action to correct the discriminatory  
28 practice [PRESCRIBE CONDITIONS ON THE ACCUSED'S FUTURE CONDUCT  
29 RELEVANT TO THE TYPE OF DISCRIMINATION]. The commission may not  
30 order an award of noneconomic or punitive damages in any case. In a case  
31 involving a discriminatory practice [DISCRIMINATION] in

1 (1) employment, the commission may order any appropriate relief,  
 2 including [BUT NOT LIMITED TO,] one or more of the following: training of an  
 3 employer, labor organization, or employment agency, and its employees  
 4 concerning discriminatory practices; an accommodation for a person with a  
 5 disability; removal of or changes to a personnel record; posting of signs;  
 6 backpay; the hiring, reinstatement, or upgrading of an employee with or without back  
 7 pay; the payment of front pay for a period of not more than one year if hiring,  
 8 reinstatement, or upgrading of an employee is inappropriate because no vacancy  
 9 exists, the employer's discriminatory practice rendered the employee incapable of  
 10 returning to work, or the relationship between the employer and employee has so  
 11 deteriorated as to make working conditions intolerable; [,] restoration to  
 12 membership in a labor organization; [, or] admission to or participation in an  
 13 apprenticeship training program, on-the-job training program, or other retraining  
 14 program; or restoration of seniority; however, an order for back pay or front pay  
 15 must be reduced by the amount the employee could have earned or could earn by  
 16 making reasonably diligent efforts to obtain similar employment;

17 (2) housing, the commission may order the sale, lease, or rental of the  
 18 housing accommodation to the aggrieved person if it is still available, or the sale,  
 19 lease, or rental of a like accommodation owned by the person charged in the  
 20 accusation [AGAINST WHOM THE COMPLAINT WAS FILED] if one is still  
 21 available, or the sale, lease, or rental of the next vacancy in a like accommodation,  
 22 owned by the person charged in the accusation [AGAINST WHOM THE  
 23 COMPLAINT WAS FILED]; the commission may award actual damages, which shall  
 24 include [, BUT NOT BE LIMITED TO,] the expenses incurred by the complainant for  
 25 obtaining alternative housing or space; for storage of goods and effects; for moving,  
 26 and for other costs actually incurred as a result of the unlawful practice or violation.

27 \* Sec. 7. AS 18.80.130(c) is amended to read:

28 (c) If the commission finds that a person charged in an accusation  
 29 [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the  
 30 discriminatory practice [CONDUCT] alleged in the accusation [COMPLAINT], it  
 31 shall issue and cause to be served on the complainant an order dismissing the

1 complaint.

2 \* Sec. 8. AS 18.80.130 is amended by adding a new subsection to read:

3 (f) The interest rate for an award under this section is determined in the  
4 manner provided in AS 09.30.070.

5 \* Sec. 9. AS 18.80.135(b) is amended to read:

6 (b) commission may obtain a court order for the enforcement of any of its  
7 orders by filing a complaint with the superior court in the judicial district in which the  
8 unlawful practice [CONDUCT] is alleged to have occurred.

9 \* Sec. 10. AS 18.80.140 is amended to read:

10 **Sec. 18.80.140. Effect of compliance with order.** Immediate and continuing  
11 compliance with all the terms of a commission order is a bar to criminal prosecution  
12 for the particular instances of discriminatory practice [CONDUCT] described in the  
13 accusation issued under AS 18.80.120 [FILED BEFORE THE COMMISSION].

14 \* Sec. 11. AS 18.80.270 is amended to read:

15 **Sec. 18.80.270. Penalty.** A person, employer, labor organization, or  
16 employment agency, who or that wilfully engages in an unlawful discriminatory  
17 practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents,  
18 impedes, or interferes with the commission or any of its authorized representatives in  
19 the performance of duty under this chapter, or who or that wilfully violates an order of  
20 the commission, is guilty of a misdemeanor and, upon conviction by a court of  
21 competent jurisdiction, is punishable by a fine of not more than \$500, or by  
22 imprisonment in a jail for not more than 30 days, or by both.

23 \* Sec. 12. AS 18.80.300 is amended by adding new paragraphs to read:

24 (17) "complainant" means a person who is aggrieved by a  
25 discriminatory practice prohibited by this chapter and who has filed a complaint as  
26 provided in AS 18.80.100;

27 (18) "pay" means wages; salaries; commissions; amounts an employer  
28 contributes to retirement, health, or other fringe benefit plans; and other forms of  
29 remuneration paid to an employee for personal services.

30 \* Sec. 13. AS 44.62.330(a) is amended by adding a new paragraph to read:

31 (45) State Commission for Human Rights, where procedures are not

1 otherwise expressly provided in AS 18.80.

2 \* Sec. 14. The uncodified law of the State of Alaska is amended by adding a new section to  
3 read:

4 TRANSITION: REGULATIONS. The State Commission for Human Rights may  
5 proceed to adopt regulations necessary to implement the changes made by this Act. The  
6 regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the  
7 effective date of the statutory change.

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

10 APPLICABILITY. This Act applies to all complaints filed on or after the effective  
11 date of secs. 1 - 13 of this Act.

# 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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: \_\_\_\_\_ Component No.: \_\_\_\_\_  
Requester: Governor

**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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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 1/28/05 2:48 PM  
Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date 1/28/2005  
Agency: Department of Law

## Conceptual Motion

Motion that the NSTA Comm requests the Administration ~~to~~ to provide a written response to the following questions concerning all boards and commissions, compensated and non-compensated:

1. Should any <sup>of</sup> non-compensated boards and commissions be compensated?
2. Should the compensation rate(s) be adjusted or standardized and, if so, at what rate(s)?
3. Should the following language be added to those statutes that provide compensation at a daily rate "or part of a day"?

If legislation is warranted, the

committee would welcome proposed legislation.

## **COMPARISON OF CSSB 354(STA) with SB 132 (ASCHR)**

SB 132 is very similar to last year's bill, SB 354. Some changes were made, however, in response to concerns raised in committee. Because the House State Affairs Committee did consider SB 354 last year, to assist the committee, this memorandum compares SB 132 with the committee's substitute for SB 354.

- Section 4 of SB 132 adds subsection (a). This subsection answers the question what happens to a complaint if, after investigation, the executive director concludes that substantial evidence did not support the complaint. AS 18.80 is silent on this question. Proposed AS 18.80.112(a) would answer the question by providing for the executive director to dismiss the complaint and by allowing, but not requiring, the commission to review the dismissal. The commission previously did review a dismissal for failure of substantial evidence upon the request of the complainant (under former 6 AAC 30.370) (repealed). Providing the commission with the discretion to review such dismissals would allow (but not require) the commission to adopt a similar procedure in the future.
- Because a new subsection is added to section 4, the section also renumbers the previous subsections (b) and (c). Paragraph (1) of subsection (b) adds "under AS 18.80.110" for the sake of clarification. No change is intended.
- Section 5 in AS 18.80.120(a) (addressing hearings) substitutes "If no agreement is reached under AS 18.80.110" for "if informal efforts under as 18.80.110 to eliminate or remedy the alleged discriminatory practice are unsuccessful" for clarity. No change in the meaning is intended.
- Section 5, which addressed conforming commission procedures to the procedures of other administrative agencies by bringing the commission into the Administrative Procedure Act, coordinates the bill's changes with sec. 36, ch. 163, SLA 2004. In 2004 the legislature adopted a bill creating the Office of Administrative Hearings (OAH) and section 36 of that bill assigned to the chief

administrative law judge the authority to appoint a hearing officer (now called an administrative law judge) to preside over commission hearings. This bill incorporates additional provisions from the OAH: (1) the qualifications of administrative law judges, (2) hearing officer conduct, (3) reimbursement to OAH for the cost of its services, (4) when an administrative law judge can be disqualified, (5) agency cooperation, (6) hearing records, (7) applicability of federal provisions and (8) definitions. This bill, however, retains from previous versions the requirement to follow the Administrative Procedure Act rather than OAH's procedural requirements in AS 44.64.060.

- Section 6, once again, makes changes to the remedial powers of the commission. CSSB 354(STA) amended the bill to remove these changes. Although SB 132 addresses this subject, an effort was made to address the concerns raised in the House State Affairs Committee. Although AS 18.80.130(a) would prohibit the commission from ordering noneconomic or punitive damages (incorporating into statute the Alaska Supreme Court's ruling in *Johnson v. Alaska State Department of Fish & Game*, 836 P.2d 896, 914 (Alaska 1991) (limiting commission's power to award money to damages for "direct, calculable, pecuniary loss")), it retains language providing the commission with the authority to order "any appropriate relief" to remedy unlawful employment discrimination. The bill continues to list the types of remedies that can be awarded in an employment discrimination case, but because of a concern that the list and the repeal of the phrase "any appropriate relief" too narrowly limited the powers of the commission, SB 32 retains the phrase. Thus, the list illustrates, rather than limits, the commission's powers. The bill provides that the usual remedy is to make the employee whole through reinstatement and the award of back pay, although the commission can speculate and award one year's compensation for future lost wages under the circumstances listed instead of returning the employee to work.

- Section 6 also incorporates into statute the judicial rule that an employee seeking to recover wages for lost employment must mitigate the employee's losses by making a reasonably diligent effort to obtain similar employment. *E.g., City of Fairbanks v. Rice*, 20 P.3d 1097, 1111 (Alaska 2000) (applying mitigation requirement to an employee whistleblower suing for constructive wrongful discharge).
- Section 11 adds a definition of "pay" to address the concern that the commission's power to award pay cover all of the compensation paid to an employee.
- The bill adds sections 15 and 16, addressing the effective date of the changes. In section 15, the bill provides that the effective date is July 2, 2005. The reason for a July 2 date is to make the changes effective one day following the amendments to AS 18.80.120(b) in sec. 36, ch.163, SLA 2004. If both effective dates were July 1, 2005, there might be confusion about the final version of the statute. The immediate effective date in section 16 for section 13 is intended to give the commission an opportunity to adopt regulations in advance so that the regulations are effective on the same date as the statutory changes.

"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; making conforming amendments; and providing for an effective date."

\* Section 1. AS 18.80.100 is amended to read:

**Sec. 18.80.100. Complaint; time limitations.** A person who is aggrieved by a [ANY] discriminatory practice [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 the discriminatory practice [CONDUCT], and the particulars of the discrimination. A complainant may withdraw the complaint at any time before the service of an accusation under AS 18.80.120. A withdrawal must be signed by the complainant and be in writing. A withdrawal does not limit the discretion of the executive director provided in (b) of this section [THE EXECUTIVE DIRECTOR MAY FILE A COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION COMES TO THE ATTENTION OF THE DIRECTOR].

\* Sec. 2. AS 18.80.100 is amended by adding new subsections to read:

(b) The executive director may file a complaint in the manner provided in (a) of this section when a discriminatory practice comes to the attention of the executive director.

(c) A complaint may be filed not later than 180 days after the alleged discriminatory practice or, for a continuing discriminatory practice, not later than 180 days after the alleged discriminatory practice stopped.

\* Sec. 3. AS 18.80.110 is amended to read:

**Sec. 18.80.110. Investigation and 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 there is [THE ALLEGATIONS ARE SUPPORTED BY] substantial evidence of a discriminatory practice under this chapter, the investigator shall immediately try to eliminate or remedy the discriminatory practice through an agreement reached [DISCRIMINATION COMPLAINED OF,] by conference, conciliation, and persuasion. If an agreement is reached, it must be reduced to writing and signed by the complainant, executive director, and respondent. The agreement is binding and enforceable under this chapter as an order of the commission. Any agreement reached under this section may include the compromise of damages authorized under this chapter.

\* Sec. 4. AS 18.80 is amended by adding a new section to read:

**Sec. 18.80.112. Dismissal of complaint without prejudice.** (a) If an investigation of a complaint under AS 18.80110 fails to discover substantial evidence of an unlawful discriminatory practice under this chapter, the executive director shall issue an order dismissing the complaint without prejudice. The

commission, in its discretion, may review the executive director's order of dismissal and may affirm the order, remand the complaint for further investigation, or refer the complaint for conference, conciliation, and persuasion as provided in AS 18.80.110 if it concludes that substantial evidence supports the complaint of an unlawful discriminatory practice.

(b) At any time before the issuance of an accusation under AS 18.80.120, the executive director may dismiss without prejudice a complaint if the executive director determines, in the executive director's discretion, that

(1) the complainant's objection to a proposed conciliation agreement under AS 18.80.110 is unreasonable;

(2) the complainant is unavailable or unwilling to participate in a hearing;

(3) relief is precluded by the absence of the person alleged to have engaged in the discriminatory practice;

(4) the person aggrieved by the discriminatory practice has initiated or wants to initiate an action or proceeding in another forum based on the same facts;

(5) a hearing will not represent the best use of commission resources;

(6) a hearing will not advance the purposes stated in AS 18.80.200;

or

(7) the probability of success of the complaint on the merits is low.

(c) Dismissal under this section does not prevent a complainant from

(1) initiating an action or proceeding in another forum; or

(2) filing a new complaint under AS 18.80.100 that resolves the grounds for the dismissal under (a) of this section.

\* Sec. 5. AS 18.80.120 is repealed and reenacted to read:

**Sec. 18.80.120. Hearing.** (a) If no agreement is reached under AS 18.80.110 [SUBSTITUTED FOR " IF INFORMAL EFFORTS UNDER AS 18.80.110 TO ELIMINATE OR REMEDY THE ALLEGED DISCRIMINATORY PRACTICE ARE UNSUCCESSFUL] and the executive director determines, in the executive director's discretion, to refer the complaint for hearing, the executive director shall issue an accusation based on the investigator's determination of substantial evidence and serve the person charged in the accusation and the complainant with notice of the referral and a copy of the accusation. The executive director's decision to refer the complaint to hearing is not reviewable by the commission under this chapter. The location of the hearing is the commission office unless the commission designates another location. The executive director, or the executive director's designee, presents the case in support of the accusation before the commission. The person charged in the accusation may file a written answer and may appear at the hearing, with or without counsel, and submit evidence.

(b) The commission shall request the chief administrative law judge (AS 44.64.020) to appoint an administrative law judge employed or retained by

the office of administrative hearings to preside over a hearing conducted under this section. AS 44.64.040, 44.64.050, 44.64.055, 44.64.070, 44.64.080, 44.64.090, 44.64.095, and 44.64.200 and [FOLLOW] the procedures in AS 44.62.330 - 44.62.630 (Administrative Procedure Act) [APPLY] to the hearing except as otherwise provided in this chapter.

(c) An accusation may be reasonably and fairly amended by the commission. An amendment to name a different discriminatory practice must be supported by substantial evidence, and the discriminatory practice must be referred for conciliation as provided in AS 18.80.110, before a hearing may proceed.

(d) In a hearing on an accusation, each element of an accusation or defense must be proven by a preponderance of the evidence.

(e) At any time after the issuance of an accusation, the executive director or the person charged in the accusation may petition for a summary decision on the accusation. The commission shall grant a petition if the record shows that there is no genuine issue of material fact and the petitioner is entitled to an order under AS 18.80.130 as a matter of law.

\* Sec. 6. AS 18.80.130(a) is amended to read:

(a) At the completion of the hearing or after consideration of a petition for summary decision under AS 18.80.120(e), if the commission finds that a person charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has engaged in the discriminatory practice [CONDUCT] alleged in the

accusation [COMPLAINT], it shall order the person to refrain from engaging in the discriminatory practice [CONDUCT]. The order must include findings of fact [,] and may order the person to take affirmative action to correct the discriminatory practice [PRESCRIBE CONDITIONS ON THE ACCUSED'S FUTURE CONDUCT RELEVANT TO THE TYPE OF DISCRIMINATION]. The commission may not order an award of noneconomic or punitive damages in any case. In a case involving a discriminatory practice [DISCRIMINATION] in

(1) employment, the commission may order any appropriate relief, including [BUT NOT LIMITED TO,] one or more of the following: training of an employer, labor organization, or employment agency, and its employees concerning discriminatory practices; an accommodation for a person with a disability; removal of or changes to a personnel record; posting of signs; backpay; the hiring, reinstatement, or upgrading of an employee with or without back pay; the payment of front pay for a period of not more than one year if hiring, reinstatement, or upgrading of an employee is inappropriate because no vacancy exists, the employer's discriminatory practice rendered the employee incapable of returning to work, or the relationship between the employer and employee has so deteriorated as to make working conditions intolerable; [,] 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; or restoration of seniority; however, an

order for back pay or front pay must be reduced by the amount the employee could have earned or could earn by making reasonably diligent efforts to obtain similar employment:

(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 charged in the accusation [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 charged in the accusation [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.

\* Sec. 7. [Sec. 6 in HSTA bill] AS 18.80.130(c) is amended to read:

(c) If the commission finds that a person charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the discriminatory practice [CONDUCT] alleged in the accusation [COMPLAINT], it shall issue and cause to be served on the complainant an order dismissing the complaint.

\* Sec. 8. AS 18.80.130 is amended by adding a new subsection to read:

(f) The interest rate for an award under this section is determined in the manner provided in AS 09.30.070.

\* **Sec. 9.** AS 18.80.140 is amended to read:

**Sec. 18.80.140. Effect of compliance with order.** Immediate and continuing compliance with all the terms of a commission order is a bar to criminal prosecution for the particular instances of discriminatory practice [CONDUCT] described in the accusation issued under AS 18.80.120 [FILED BEFORE THE COMMISSION].

\* **Sec. 10.** AS 18.80.270 is amended to read:

**Sec. 18.80.270. Penalty.** A person, employer, labor organization, or employment agency, who or that wilfully engages in an unlawful discriminatory practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents, impedes, or interferes with the commission or any of its authorized representatives in the performance of duty under this chapter, or who or that wilfully violates an order of the commission, is guilty of a misdemeanor and, upon conviction by a court of competent jurisdiction, is punishable by a fine of not more than \$500, or by imprisonment in a jail for not more than 30 days, or by both.

\* **Sec. 11.** AS 18.80.300 is amended by adding new paragraphs to read:

(17) "complainant" means a person who is aggrieved by a discriminatory practice prohibited by this chapter and who has filed a complaint as provided in AS 18.80.100;

(18) "pay" means wages, salaries, commissions, amounts an employer contributes to retirement, health, or other fringe benefit plans, and other forms of remuneration paid to employees for personal services.

\* **Sec. 12.** AS 44.62.330(a) is amended by adding a new paragraph to read:

(61) State Commission for Human Rights, where procedures are not otherwise expressly provided in AS 18.80.

\* **Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The State Commission for Human Rights may proceed to adopt regulations necessary to implement the changes made by this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date of the statutory change.

\* **Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to all complaints filed on or after the effective date of secs. 1 - 12 of this Act.

\* **Sec. 15.** Sections 1 - 12 of this Act take effect July 2, 2005.

\* **Sec. 16.** Except as provided in section 15, this Act takes effect immediately.

HOUSE CS FOR CS FOR SENATE BILL NO. 354(STA)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered: 5/9/04

Referred: Judiciary

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

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

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

4 \* Section 1. AS 18.80.100 is amended to read:

5       **Sec. 18.80.100. Complaint; time limitations.** A person who is aggrieved by  
6       a [ANY] discriminatory **practice** [CONDUCT] prohibited by this chapter may sign  
7       and file with the commission a written, verified complaint stating the name and  
8       address of the person alleged to have engaged in the discriminatory **practice**  
9       [CONDUCT], and the particulars of the discrimination. A complainant may  
10       withdraw the complaint at any time before the service of an accusation under  
11       AS 18.80.120. A withdrawal must be signed by the complainant and be in  
12       writing. A withdrawal does not limit the discretion of the executive director  
13       provided in (b) of this section [THE EXECUTIVE DIRECTOR MAY FILE A  
14       COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION

1 COMES TO THE ATTENTION OF THE DIRECTOR].

2 \* Sec. 2. AS 18.80.100 is amended by adding new subsections to read:

3 (b) The executive director may file a complaint in the manner provided in (a)  
4 of this section when a discriminatory practice comes to the attention of the executive  
5 director.

6 (c) A complaint may be filed not later than 180 days after the alleged  
7 discriminatory practice or, for a continuing discriminatory practice, not later than 180  
8 days after the alleged discriminatory practice stopped.

9 \* Sec. 3. AS 18.80.110 is amended to read:

10 **Sec. 18.80.110. Investigation and conciliation.** The executive director or a  
11 member of the commission's staff designated by the executive director shall  
12 informally investigate the matters set out in a filed complaint, promptly and  
13 impartially. If the investigator determines that there is [THE ALLEGATIONS ARE  
14 SUPPORTED BY] substantial evidence of a discriminatory practice under this  
15 chapter, the investigator shall immediately try to eliminate or remedy the  
16 discriminatory practice through an agreement reached [DISCRIMINATION  
17 COMPLAINED OF,] by conference, conciliation, and persuasion. If an agreement is  
18 reached, it must be reduced to writing and signed by the complainant, executive  
19 director, and respondent. The agreement is binding and enforceable under this  
20 chapter as an order of the commission. Any agreement reached under this  
21 section may include the compromise of damages authorized under this chapter.

22 \* Sec. 4. AS 18.80 is amended by adding a new section to read:

23 **Sec. 18.80.112. Dismissal of complaint without prejudice.** (a) At any time  
24 before the issuance of an accusation under AS 18.80.120, the executive director may  
25 dismiss without prejudice a complaint if the executive director determines, and the  
26 commission concurs, that

27 (1) the complainant's objection to a proposed conciliation agreement is  
28 unreasonable;

29 (2) the complainant is unavailable or unwilling to participate in a  
30 hearing;

31 (3) relief is precluded by the absence of the person alleged to have

1 engaged in the discriminatory practice;

2 (4) the person aggrieved by the discriminatory practice has initiated or  
3 wants to initiate an action or proceeding in another forum based on the same facts;

4 (5) a hearing will not represent the best use of commission resources;

5 (6) a hearing will not advance the purposes stated in AS 18.80.200; or

6 (7) the probability of success of the complaint on the merits is low.

7 (b) Dismissal under this section does not prevent a complainant from

8 (1) initiating an action or proceeding in another forum; or

9 (2) filing a new complaint under AS 18.80.100 that resolves the  
10 grounds for the dismissal under (a) of this section.

11 \* **Sec. 5.** AS 18.80.120 is repealed and reenacted to read:

12 **Sec. 18.80.120. Hearing.** (a) If informal efforts under AS 18.80.110 to  
13 eliminate or remedy the alleged discriminatory practice are unsuccessful and the  
14 executive director determines, in the executive director's discretion, to refer the  
15 complaint for hearing, the executive director shall issue an accusation based on the  
16 investigator's determination of substantial evidence and serve the person charged in  
17 the accusation and the complainant with notice of the referral and a copy of the  
18 accusation. The executive director's decision to refer the complaint to hearing is not  
19 reviewable by the commission under this chapter. The location of the hearing is the  
20 commission office unless the commission designates another location. The executive  
21 director, or the executive director's designee, presents the case in support of the  
22 accusation before the commission. The complainant may be represented by counsel,  
23 at the complainant's discretion. The person charged in the accusation may file a  
24 written answer and may appear at the hearing, with or without counsel, and submit  
25 evidence.

26 (b) The commission shall follow the procedures in AS 44.62.330 - 44.62.630  
27 (Administrative Procedure Act) except as otherwise provided in this chapter.

28 (c) An accusation may be reasonably and fairly amended by the commission.  
29 An amendment to name a different discriminatory practice must be supported by  
30 substantial evidence, and the discriminatory practice must be referred for conciliation  
31 as provided in AS 18.80.110, before a hearing may proceed.

1 (d) In a hearing on an accusation, each element of an accusation or defense  
2 must be proven by a preponderance of the evidence.

3 (e) At any time after the issuance of an accusation, the executive director or  
4 the person charged in the accusation may petition for a summary decision on the  
5 accusation. The commission shall grant a petition if the record shows that there is no  
6 genuine issue of material fact and the petitioner is entitled to an order under  
7 AS 18.80.130 as a matter of law.

8 \* Sec. 6. AS 18.80.130(c) is amended to read:

9 (c) If the commission finds that a person charged in an accusation  
10 [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the  
11 discriminatory practice [CONDUCT] alleged in the accusation [COMPLAINT], it  
12 shall issue and cause to be served on the complainant an order dismissing the  
13 complaint.

14 \* Sec. 7. AS 18.80.130 is amended by adding a new subsection to read:

15 (f) The interest rate for an award under this section is determined in the  
16 manner provided in AS 09.30.070.

17 \* Sec. 8. AS 18.80.140 is amended to read:

18 **Sec. 18.80.140. Effect of compliance with order.** Immediate and continuing  
19 compliance with all the terms of a commission order is a bar to criminal prosecution  
20 for the particular instances of discriminatory practice [CONDUCT] described in the  
21 accusation issued under AS 18.80.120 [FILED BEFORE THE COMMISSION].

22 \* Sec. 9. AS 18.80.270 is amended to read:

23 **Sec. 18.80.270. Penalty.** A person, employer, labor organization, or  
24 employment agency, who or that wilfully engages in an unlawful discriminatory  
25 practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents,  
26 impedes, or interferes with the commission or any of its authorized representatives in  
27 the performance of duty under this chapter, or who or that wilfully violates an order of  
28 the commission, is guilty of a misdemeanor and, upon conviction by a court of  
29 competent jurisdiction, is punishable by a fine of not more than \$500, or by  
30 imprisonment in a jail for not more than 30 days, or by both.

31 \* Sec. 10. AS 18.80.300 is amended by adding a new paragraph to read:

1                   (17) "complainant" means a person who is aggrieved by a  
2           discriminatory practice prohibited by this chapter and who has filed a complaint as  
3           provided in AS 18.80.100.

4   \* **Sec. 11.** AS 44.62.330(a) is amended by adding a new paragraph to read:

5                   (61) State Commission for Human Rights, where procedures are not  
6           otherwise expressly provided in AS 18.80.

7   \* **Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to  
8   read:

9           **APPLICABILITY.** This Act applies to all complaints filed on or after the effective  
10   date of secs. 1 - 11 of this Act.

11   \* **Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to  
12   read:

13           **TRANSITION: REGULATIONS.** The State Commission for Human Rights may  
14   proceed to adopt regulations necessary to implement the changes made by this Act. The  
15   regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the  
16   effective date of the statutory change.



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**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 employee'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 this constituted final agency action. AS 18.80.135(a), 4 AS 2.560(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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**[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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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, MATTHEWS, 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

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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

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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 and cause to be served on the complainant an order dismissing the complaint.

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(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. *Fandley 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 537, 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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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

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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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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, *McCottrill 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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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