



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

CIVIL DIVISION

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April 2, 2020

The Honorable Mike Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HB 309: Confirmation of Appointments
(SCS HB 309(RLS))
Our file: 2020200305

Dear Governor Dunleavy:

At the request of your legislative director, we have reviewed HB 309, relating to confirmation of appointments.

The state constitution requires that certain gubernatorial appointments be “subject to confirmation by a majority of the members of the legislature in joint session.” Art. III, sec. 26, Constitution of the State of Alaska. This bill amends uncodified law to make temporary changes to the confirmation provisions for appointments presented by the governor during the Second Regular Session of the Thirty-First Alaska State Legislature.

Section 1 of the bill amends the uncodified law of Alaska in three substantive ways:

1. Extends time for legislative confirmation.

Section 1 of the bill extends the time period in which the legislature must act on appointments presented by the governor during the Second Regular Session of the Thirty-First Alaska State Legislature. Under current law, the legislature shall, before the end of the regular session, act on appointments by a majority vote. If the legislature fails to act on an appointment during that time, it is considered a declination of confirmation on the day the legislature adjourns. This section extends this time period and allows the legislature to act on appointees at a later time following regular session. The section also allows appointees who the legislature has not yet acted on to continue carrying out the duties of their office pending action at a future joint session.

2. Deems failure to act a declination of appointee.

Section 1 further provides that if the legislature fails to act to confirm or decline to confirm an appointment by either January 18, 2021, 30 days after expiration of the governor's March 11, 2020, declaration of a public health disaster emergency, or 30 days after issuance of a proclamation that the public health disaster emergency no longer exists – whichever is earlier – the legislature's failure will be tantamount to a declination of confirmation. We believe this provision presents legal issues. Unless an appointee withdraws, the Department of Law has consistently maintained that an appointee is entitled to hold office “[p]ending confirmation or rejection” by the legislature. *Cook v. Botelho*, 921 P.2d 1134 (citing AS 39.05.080(4)). Appointees are therefore entitled to an up or down vote of the legislature and cannot be deemed rejected through mere legislative inaction.

Our view comports with the current plain language of AS 39.05.080(2)(B), which clearly provides that “the legislature shall, before the end of the regular session in which the appointments are presented, in joint session assembled, act on the appointments by confirming or declining to confirm by a majority vote of all of the members the appointments presented.” And, regardless of the terms of the statute, the legislature must act in conformity with the Alaska Constitution when considering appointment of department heads. According to the Alaska Supreme Court in *Bradner v. Hammond*, art. III, sec. 25, of the Alaska Constitution sets the maximum – not the minimum – authority of the legislature regarding executive appointments, “mark[ing] the full reach of the delegated, or shared, appointive function to Alaska’s legislative branch of government.”¹

Convening a joint session to consider gubernatorial appointments is, in our view, a constitutional obligation of the legislature under *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976). We believe that under *Bradner*, the court would likely reject any reliance on the text of AS 39.05.080 (or similar text in this bill) for the proposition that an appointee may be deemed rejected by the legislature if the legislature did not hold a joint session to either confirm or not confirm the appointee.²

¹ *Bradner*, 553 P.2d 1, 7 (Alaska 1976).

² *See, Cook v. Botelho*, the “constitution delegates a part of the appointment power to the legislature” and “[t]his delegation implies both a power, and a duty, to investigate the status of appointed offices.” 921 P.2d 1128, 1131 (Alaska 1996). *See also*, 1983 Inf. Op. Att’y Gen. (June 3; 366-648-83) (stating the Department of Law had “serious questions” concerning the validity of any provision of AS 39.05.080 that permits blanket rejection of gubernatorial appointments if the legislature fails to act, and that such rejection constitutes an unwarranted intrusion upon the governor’s executive authority to enforce the law and supervise the executive branch).

Because this same language is found in both the current text of AS 39.05.080(4) and the bill, however, the debate over this language may be somewhat theoretical.

3. Appointee to the Alaska Mental Health Trust Authority.

Section 1 also allows the governor's appointee to the Alaska Mental Health Trust Authority to carry out the functions and duties of the office pending confirmation under subsections (a) and (b). Under current law, Alaska Mental Health Trust Authority board members are unlike other gubernatorial appointees in that they continue to serve until a successor is confirmed, and gubernatorial appointees are prohibited from exercising the functions of their office pending legislative confirmation or declination. This bill ensures that a trust authority board member whose term expired March 1, 2020, may no longer continue to serve, and that a person appointed to the board during this regular session may assume the functions, powers, and duties of the office pending confirmation.

Finally, sec. 1 provides that if an appointee awaiting confirmation resigns the position, or the position becomes vacant for any reason other than the expiration of the person's term of office, the governor may not appoint that person to the same position until the First Regular Session of the Thirty-Second Alaska State Legislature convenes.

Section 2 of the bill provides for an immediate effective date.

Except as identified above, this bill presents no other legal problems or other concerns.

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:

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