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Nature of lieutenant
governor's duty in
filing regulations

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Question: Does AS 44.62.040 -- 44.62.080 require the lieutenant governor to file duly promulgated administrative regulations, previously approved by the Department of Law, that have been submitted to his or her office for filing?

Short Answer: Yes. The Administrative Procedure Act (APA) (AS 44.62) establishes a comprehensive procedure for review and comment on regulations proposed by an administrative agency. AS 44.62.010 -- 44.62.290. After adoption of the regulation the office of the lieutenant governor performs only the ministerial role of filing the adopted regulation and has no authority to refuse to file a duly adopted regulation.

Discussion

A. Alaska Constitution and Statutes.

The Alaska Constitution states that the lieutenant governor "shall perform such duties as may be prescribed by law and as may be delegated by the governor." Alaska Const. art.

III, • 7. Alaska Statute 44.62.040 requires that agencies "submit to the lieutenant governor for filing a certified original and one duplicate copy of every regulation or order of repeal adopted by it." Alaska Statute 44.62.080 states, "[t]he lieutenant governor shall (1) endorse on the certified copy of each regulation . . . filed, the time and date of filing; and (2) maintain a permanent file of the certified copies of regulations . . . for public inspection." (Emphasis added.)

On their face, these statutes and the constitution do not provide any discretion to the lieutenant governor. "Unless the context otherwise indicates, the use of the word 'shall' denotes a mandatory intent." Fowler v. City of Anchorage, 583 P.2d 817, 820 (1978).

Here, the context indicates that the filing requirement is indeed mandatory. For example, AS 44.62.060(c) mandates that the lieutenant governor "may not accept for filing a regulation . . . unless it is accompanied by [a statement of approval from the Department of Law]." This statute provides no discretion to the lieutenant governor. Moreover, this statute establishes what type of review is to take place for promulgated regulations: review by the Department of Law.¹ No other type of review is

¹ The Department of Law may advise an agency on the need for

provided for. By implication, the lieutenant governor may not refuse to file the regulation for any other reason. See Burrell v. Burrell, 696 P.2d 137, 165 (Alaska 1984) (inclusion of the specific presumptively excludes that not enumerated).

Additionally, AS 44.62.640 states, "In AS 44.62.010 -- 44.62.320, unless the context otherwise requires, (1) 'lieutenant governor' means the office of the lieutenant governor in the executive branch of the state government, or another agency designated by executive order under the constitution." (Emphasis added.) Accordingly, under statute, the filing function could be performed legally by an employee of the lieutenant governor. This supports the conclusion that filing of regulations is a

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the regulations and the policy involved in the particular regulation. AS 44.62.060. A regulation must contain a statement of approval by the Department of Law indicating:

- (1) its legality, constitutionality and consistency with other regulations;
- (2) the existence of statutory authority and the correctness of the required citation of statutory authority following each section;
- (3) its clarity, simplicity of expression, and absence of possibility of misapplication;
- (4) compliance with the drafting manual for administrative regulations.

AS 44.62.060(b). This approval requirement does not allow for additional review of a promulgated regulation. Of course, an agency must consider all substantive comment it receives regarding a proposed regulation. AS 44.62.210.

ministerial function. The legislature would not grant discretionary reviewing authority to an unnamed employee in the lieutenant governor's office.²

Moreover, AS 24.08.310 assigns the lieutenant governor the analogous duty of "fil[ing] the original enrolled copies of all acts and resolutions and all executive orders having the effect of law" The duty to file duly enacted laws is also mandatory; the legislature did not give the lieutenant governor discretion to refuse to file legislation and executive orders. Logically, it follows that the duty to file is a ministerial duty that does not contain a grant of authority to refuse to file properly submitted legislation or regulations.³

² Many statutes allows certain ministerial duties to be performed by the office of the lieutenant governor. See, e.g., AS 14.20.650 (copies of contracts to be kept on file in office of lieutenant governor); AS 15.58.080 (voter pamphlet may be obtained from office of lieutenant governor); AS 22.05.100 -- 22.15.195 (judicial council to provide information to the office of lieutenant governor); AS 24.45.041 -- 24.45.111 (directory and reports regarding lobbyist to be maintained in office of lieutenant governor); AS 38.35.120 (service on lessee with no agent may filed with office of lieutenant governor); AS 39.23.250 (commission on legislative pay shall file recommendations in office of lieutenant governor); AS 44.85.050 (surety bonds shall be filed in the office of the lieutenant governor).

³ Similarly, the lieutenant governor or the office of the lieutenant governor has many filing obligations. See, e.g., AS 04.06.070 (file charges against director with lieutenant governor); AS 16.43.030 (file charges against commissioner with lieutenant governor); AS 26.23.020 (file copy of disaster order with lieutenant governor); AS 44.85.050 (file surety bond with

B. The Nature of the Duty to File Regulations.

In the area of initiatives, the Alaska Supreme Court has noted that the lieutenant governor "performs extensive ministerial functions" Warren v. Boucher, 543 P.2d 731, 734 (Alaska 1975) (delegation of ministerial duty to lieutenant governor -- to compare initiative with other legislation -- does not violate constitution). "'Discretionary' acts are those requiring 'personal' deliberation, decision and judgment," while 'ministerial' acts amount 'only to an obedience of orders, or the performance of a duty in which the officer is left with no choice of his own'" State v. Haley, 687 P.2d 305, 316 (Alaska 1984) (quoting W. Prosser, Handbook of the Law of Torts • 132, at 988-89 (4th ed. 1971)).

Filing does not require personal deliberation or judgment; accordingly, it is a ministerial act. See Ex Parte Coker, 575 So.#2d 43, 65 (Ala. 1990) (Maddox, J., concurring) (constitutional provision that secretary of state shall "keep a register of official acts" does not provide any discretionary

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lieutenant governor). The purpose of many of these filing requirement is to provide public notice of governmental action. This purpose would be defeated if the lieutenant governor had discretion to refuse to fulfill his filing obligation.

authority); Black's Law Dictionary 755 (4th ed. 1968) (filing denotes the ministerial action of depositing a document with a clerk or other officer). In Scot Lad Foods, Inc. v. Secretary of State, the Supreme Court of Ohio evaluated the nature of the statutory filing requirement imposed on the secretary of state concerning secured transactions. 418 N.E.2d 1368 (Ohio 1981). The court concluded, "It is clear that the act mandated of the Secretary of State here does not require an exercise by that officer of any degree of discretion or judgment, nor does it require the exercise of authority of a quasi-judicial nature. It may reasonably be concluded that the acts mandated by [the filing requirement] are ministerial in nature" Id. at 1371-72.

The Model State Administrative Procedure Act also requires that regulations be filed with the lieutenant governor/secretary of state. 15 ULA at 53 (1981 Act • 3-115), 196 (1961 Act • 4(a)) (1990). The purpose of this requirement is to provide the public with notice of the regulation. See, e.g., People v. Stock, 390 N.Y.S.2d 367, 369 (N.Y.D.C. 1976); A. Bonfield, State Administrative Rulemaking • 6.14.1 (1986); 1 F. Cooper, State Administrative Law 209-13 (1965). There is no authority for the proposition that the filing requirement gives discretion to reject regulations to the officer or clerk empowered to accept filings.

Conclusion

Alaska's statutes establish that filing of regulations by the office of the lieutenant governor is a mandatory duty. The statutes do not confer discretion on the lieutenant governor to decide not to file the regulations; accordingly, the duty is ministerial. The purpose of the filing requirement is to provide public notice of the regulations, not to provide the lieutenant governor with veto power over regulations adopted in accordance with the APA. In sum, the duty of the lieutenant governor to file regulations adopted by a department is mandatory and nondiscretionary.