

STATE OF ALASKA
PERSONNEL BOARD

In re Ethics Complaint
dated August 6, 2008

REPORT OF FINDINGS
AND RECOMMENDATIONS

October 15, 2008

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to the Personnel Board

REPORT OF FINDINGS AND RECOMMENDATIONS

Introduction

On August 6, 2008, Andree McCleod filed an Ethics Complaint with the Personnel Board against Governor Sarah Palin, Michael Nizich, Kristine Perry, Frank Bailey, Kevin Brooks, Nicki Neal and others unknown. The complaint alleges a violations of the Alaska Executive Branch Ethics Act (Ethics Act) and the Alaska Personnel Act (Personnel Act) in the course of the hiring decision made by the Department of Transportation ("DOT") and Department of Administration ("DOA") of Thomas Lamal, who was hired as a Right of Way Agent II in the DOT Northern Region in February 2008.

Independent Counsel for this matter was appointed, as required by AS 39.52.310(c), because the governor was named as a subject of the complaint. Though the complaint alleges violations of various provisions of law, the gist of the matter comes down to an allegation as to whether this hire violated the Ethics Act's provisions that prohibit public officials from intentionally securing or granting unwarranted benefits for any person and from taking official action to benefit a personal interest.¹ To the extent that the allegations of Personnel Act violations set forth conduct that may violate the Ethics Act, the complaint's allegations under the Personnel Act become relevant to the inquiry of Independent Counsel. The allegations are not based upon any personal information asserted by Ms. McCleod, but instead are based upon several e-mails, which are attached to her complaint, and additional information that establishes that Mr. Lamal sponsored a fundraiser for Governor Palin, was a campaign volunteer and supporter of Governor Palin during her election campaign.

¹ See AS 39.52.120(a), (b)(4).

After review, Independent Counsel determined that the e-mails and other information attached to the complaint were ambiguous, but could support an inference of potential violations of the Ethics Act and the Personnel Act. The essence of the allegation under the Personnel Act is that the subjects named in the complaint violated the requirement that a hire in the classified service be based upon merit and not upon political affiliation or endorsement.² Such an allegation is relevant to the inquiry under the Ethics Act to the extent that it describes official action taken to benefit a personal interest or intentional use of official position to secure or grant unwarranted benefits or treatment for a person.³ For this reason, Independent Counsel obtained all pertinent documents pertaining to the hire of Mr. Lamal and reviewed the steps that were taken to modify the Minimum Qualification (MQ) for the position of Right of Way Agent II (a transaction material to the ultimate decision to hire Mr. Lamal) to determine if there was probable cause to believe that a violation of the Ethics Act had occurred by conduct that may have violated the Personnel Act.⁴ This is Independent Counsel's report to the Board of its findings with respect to the existence of probable cause as to this matter.

The investigation included examination of pertinent hiring documents directly related to the position for which Mr. Lamal was hired during 2007 up until the date of Mr. Lamal's hire in February 2008, other relevant hiring decisions that were

² See AS 39.25.160.

³ See AS 39.52.120(a), (b)(4); AS 39.52.960(3), (14), (18); see also 9 AAC 52.040(a)-(b) (prohibiting public officials from granting or securing unwarranted benefits even if the result is in the best interest of the state, and defining unwarranted benefit or treatment under AS 39.52.120(a) as a deviation from normal procedures with improper motivation); 9 AAC 52.020 (prohibiting public officials from taking action based on improper motivation); 9 AAC 52.990(4) (defining improper motive as motive not related to state's best interests).

⁴ The process of rewriting Minimum Qualifications for State positions, whether in the classified service, partially exempt or exempt service is called a Maintenance Request. The process of seeking and completing a Maintenance Request is standardized and follows a set procedure. The Request is normally initiated by the Department determining the need for the action but is handled by the DOA.

made by the Department of Transportation during this timeframe, as well as documents relating to the Maintenance Request that led to the modification of MQ's for the Right of Way Agent positions I – VI that took place between August and December of 2007. Independent Counsel took the sworn depositions of three employees of the DOT Northern Region who were directly involved in either the hiring process or the Maintenance Request to the DOA to modify the MQ's for the Right of Way positions; Mr. Lamal; one employee of DOT in Juneau involved in the Maintenance Request; three employees of the DOA in Juneau directly involved in these matters; and three employees from the Governor's Office. Independent Counsel also met directly with Ms. McLeod and received additional materials from her. Because Ms. McLeod did not have personal knowledge of this matter, but is the Complainant, her statement was not made under oath or on the record but her input was solicited to make sure that Independent Counsel understood the full parameters of the allegations being made. As required by law, this evaluation examines the conduct of each named respondent separately.

Background and the First Lamal Job Application to DOT

The e-mails giving rise to the Complaint present the possible inference that the Director of Boards and Commissions of the Governor's Office had either intervened in the hiring process or at least had become sufficiently concerned about the outcome that he sent e-mails informing officials at the highest levels of State government of the ultimate hiring of Mr. Lamal, who was a supporter of the Governor, to a classified position in the Department of Transportation. The e-mails also congratulate Deputy Commissioner Brooks of DOA for having "pushed through the road blocks" "to

get Tom Lamal hired.” The complainant separately and in writing pointed out that, in the abstract, it appeared highly unusual and suspicious that these officials would become directly involved or interested in the hiring of a Right of Way Agent or would take specific action to secure the employment of a particular individual outside of the hiring process. The Complainant asserts that language in the e-mails appears to support the inference that state officials exerted their influence on Mr. Lamal’s behalf and that exertion of influence could be explained by Mr. Lamal’s support of the Governor as opposed to some other legitimate governmental concern.

As stated above, this reading of the e-mails could be supported by the language chosen, but also could have other explanations. As a result, we determined that the Complaint could state a claim for a violation of the Personnel Act and required a plenary investigation to determine if an accusation against anyone was warranted.

Our investigation revealed that the State had been facing significant problems filling vacancies and attracting qualified employees to positions in several departments, across many levels of positions involving numerous aspects of state government. This problem had reached the highest level of concern within State government. It became of such concern that the State issued Administrative Order 237 on August 24, 2007 which made findings regarding recruitment and vacancy issues within the government and ordered the establishment of the Executive Branch Working Group to be chaired by the Commissioner of the Department of Administration to look into making recommendations to solve the problem. Quoting from the order itself, the following, among others, were cited as potential action items the Group was to evaluate:

i. The State of Alaska's current hiring criteria, with the goal of opening recruitment to more potential applicants not currently employed by the State of Alaska;

ii. Any hiring practices of the State of Alaska that may reduce the pool of qualified applicants for state employment;

iii. The State of Alaska's current education requirements and minimum qualifications for state employment, including pertinent certifications, licensure, and supervisory level requirements;

The DOT Northern Region had been a prime example of a working group within State government that had experienced just these problems. In January 2007, the Right of Way Section posted for a Right of Way Agent II position. Only two applicants responded, one withdrew interest and the other, who was selected by the Section for hire, was rejected by DOA because the candidate failed to meet Minimum Qualifications.⁵

Subsequently, on July 31, 2007, the DOT Northern Region posted for a Right of Way Agent I position. Once again the candidate selected by DOT was not approved due to the failure of the candidate to meet MQ's. This led the Right of Way chief to draft a Maintenance Request to the DOA on September 18, 2007, to modify the MQ's for the Right of Way Agent I position. The Chief of the section, John Bennett was interested in an expedited review and was told that it was possible to turn the request

⁵ It is the job of DOA to enforce the published MQ's. Our investigation revealed that there is a natural and healthy tension that exists between the hiring managers in the field and those that give approval in Juneau at DOA. On the one hand, those in the field feel they are in the best position to evaluate the qualifications of those applying to help them serve their mission and are in the best position to evaluate the local available hiring pool. On the other hand DOA personnel point out that their mission is to enforce the MQ's, through which the hiring requirements of the Alaska Personnel Act are enforced. These provisions include the requirements that all hires in the classified service are made based on merit, without discrimination and are in legal compliance with all state laws as well as the State's collective bargaining agreement. Each candidate for hire therefore must pass scrutiny by the Department where the prospective employee will work as well as the DOA. There are professionals in DOA who are trained and assigned to handle the review of proposed hires to ensure they have the minimum qualifications required.

around in around 14 days. The vacancy rate within the Northern Region, according to Section Chief Bennett, was reaching a level where he was concerned that the mission of the Section could be materially affected.

Meanwhile, Mr. Tom Lamal had responded to a posting for a Right of Way II position that had been published on June 21, 2007. At the time the Section Chief sought MQ review for the Right of Way I position, Mr. Lamal's application for a Right of Way II position was pending, but he had not yet been interviewed. No one at the Section knew who the ultimate candidate would be for the Right of Way II position to which Mr. Lamal was applying.⁶ Mr. Lamal was a former employee of the State of Alaska and had an interest in working for the State again because he was an unvested Tier I State employee.⁷ He had tried on numerous occasions to obtain employment in several other state departments and had been unsuccessful.

Mr. Lamal went through the standard and highly structured hiring procedure, which included his response to the posting, submission of written qualifications, references and underwent an interview process, along with all other candidates, conducted by a three-person hiring committee at DOT.⁸ Mr. Lamal was

⁶ Thus the process of seeking a Maintenance Request for the Right of Way I position predated Mr. Lamal's evaluation for the position (he was not interviewed until September 27, 2008) and the Maintenance Request as initially requested had nothing whatsoever to do with Mr. Lamal's application.

⁷ State employees who began their service with the state years ago are entitled to more generous retirement related benefits than are now currently available. As a person who worked for the State while these benefits were available (called Tier I), Mr. Lamal could work for the State until his total years available from his prior and current employment, combined, reach the amount of service required to vest and at which point he would be entitled to the benefits in place as of the time of his previous employment with the State. Such applicants were euphemistically called "Tier I retreads." Applications from this group are reported to be somewhat common.

⁸ One of the functions of DOA is to review and approve standard hiring questions to ensure that no improper hiring questions or inquiries are made. The questions asked put to each of the applicants were standardized. Each applicant was scored by the hiring committee. The candidates were then ranked by

interviewed on September 27, 2007. His evaluative score was the highest among a field of several other candidates and he was submitted to DOA for approval to hire in early October of 2007.

Around the same time, the Section was pursuing its Maintenance Request for a rewrite of MQ's for the position of Right of Way Agent I. Totally unconnected to the Lamal hiring matter, DOA came to the conclusion that the MQ's for all levels of the Right of Way positions needed to be reviewed at once. The DOA employees charged with the responsibility of processing Maintenance Requests report that this is not uncommon. The reason why all levels of a position may need to be considered simultaneously is that a change to MQ's at one level can skew or make illogical the promotion system. The various levels of a position are interrelated and should result in a promotional "ladder" that is logical, makes sense and provides incentives for advancement based upon training, experience and performance.

When the DOA initially made the rather routine decision to review MQ's for all levels of Right of Way Agents, Section Chief Bennett was at first dismayed because of his concern that it might cause additional delay in obtaining the Right of Way I modifications. It is clear, in any event, that the decision by DOA and the response to the decision at DOT with respect to reviewing the MQ's for all levels of the Right of Way position had nothing whatsoever to do with Lamal's pending employment application.

When Mr. Lamal's name was sent to DOA, his recommended hire was rejected because he did not satisfy the MQ's for the Right of Way II position. When Mr. Lamal was informed of this, the Right of Way Chief explained what had happened

score and the highest scoring candidate approved for submission to DOA for its review of such things as compliance with the published MQ's and to verify that the hiring process was conducted properly.

and provided him with information on his right to appeal the decision. Mr. Lamal did so through a letter sent to DOA on October 29, 2007.⁹ Mr. Lamal's appeal was unsuccessful. Mr. Lamal was told by the Section Chief that he had been selected by the Hiring Manager and was approved for hire by DOT but that he was found not to meet the published MQ for the position. At the same time, the process for rewriting the MQ's for all Right of Way positions was beginning, with ample reference to Administrative Order 237 cited above. Mr. Lamal was made aware that this process was underway.

Thus, though Mr. Lamal was DOT's candidate, it did not mean that Mr. Lamal had qualified on for the position on merit. That determination is not DOT's alone to make. DOA, in every case, must concur in the choice after examining it for compliance with published and specified requirements. Indeed, in this case, DOA determined that Mr. Lamal did not even qualify to be cleared for interview because he did not meet MQ's.

The Involvement of the Governor's Office

Mr. Lamal was acquainted with the Director of Boards and Commissions in the Governor's Office, Mr. Frank Bailey. Mr. Lamal knew the Director because Mr. Bailey was a paid official in the Palin campaign and he had met him as a consequence of having volunteered in the Governor's campaign. In addition, the Director had asked Mr. Lamal to serve on several boards/commissions and Mr. Lamal's wife had also been selected to serve on at least one board that was under the Director's jurisdiction. Mr. Lamal states that he contacted the Director to try to better understand

⁹ DOA has an informal appeal process to the head of the section that reviews these matters. Either the hiring manager or someone else from the hiring department, or the applicant himself, can appeal to the supervisor of the person making the decision at DOA.

what had happened with his hire because in his mind he thought he was being "blackballed" by the State as a consequence of his numerous unsuccessful attempts to secure State employment.

Mr. Bailey was asked whether his involvement in this process was in any way connected with his job description and job responsibilities and he conceded that it was not. He went on to explain that he covered the matter with Mr. Nizich of the Governor's Office who authorized him to look into it. Mr. Nizich did not support this version of the events. He testified that Mr. Bailey inquired of him how the process worked, he attempted to answer his questions and referred him to Deputy Commissioner Brooks if he needed additional information. Mr. Nizich denied authorizing Mr. Bailey to be speaking on behalf of the Governor's Office or authorizing Mr. Bailey to be intervening in the matter in any way. Mr. Bailey did not offer any other source of his authority to be involved in this matter.

Director Bailey made inquiries of Section Chief Bennett who informed the Director that indeed Mr. Lamal had been the highest scoring candidate coming out of DOT and had been submitted to DOA for approval to hire, but had been rejected by DOA for failing to meet MQ's. Mr. Bennett vented his frustration with this result and his disagreements with the DOA over this and other hires, as well as the strain on his section that vacancies were causing. The Director Bailey then contacted Deputy Commissioner Kevin Brooks, who had authority over personnel matters, to make inquiries on Mr. Lamal's, and the Section Chief's behalf. The Deputy Commissioner in turn inquired of the staff more directly involved and learned the facts as recited here; that Mr. Lamal's candidacy had been forwarded to DOA, that DOA had determined that

Mr. Lamal did not meet MQ's but that the MQ's for the position were to be reviewed and rewritten at the request of DOT.¹⁰

Section Chief Bennett continued to be an advocate for the hire of Mr. Lamal and for a rewrite of the MQ's. He is adamant that he did so on the basis of Mr. Lamal's merit, his confidence that Mr. Lamal was the best candidate for the job and the fact that he was needed. He testified as to a continuing frustration with respect to his inability to hire the most qualified people, fill his vacancies and provide for personnel advancement. All parties, at DOT and DOA, recognized that the MQ's needed revision since they had not been rewritten in many, many years. Moreover, DOA personnel reported that this situation was not unique to this Section, or the DOT generally, but is a problem that has pervaded several State departments. They reported that over the years the State has had difficulty competing with the private sector, and has found it necessary to broaden the MQ's to maintain an applicant pool adequate to meet its needs. Indeed, this was part of the genesis of Administrative Order 237 and the problem had the interest of State Officials at the highest levels.

The Section Chief also acknowledged that there was another candidate who met MQ's who scored lower than Mr. Lamal. Others in the hiring process stated that this person was not forwarded for hire because her score was dramatically lower than Mr. Lamal's. Mr. Bennett stated that this person may have been qualified for the position, but he was less concerned with this particular hire than with dealing with the

¹⁰ The inquiries made by the Director of Boards and Commissions were not within the purview of his responsibilities in the Governor's Office. Director Bailey reported that he obtained the authority of the Governor's Chief of Staff to inquire into this matter. The Chief of Staff has testified that the Director approached him with questions about the process, that he had provided information to the Director as to how the process worked and that Deputy Commissioner Brooks at Administration might know more, but he did not give the Director the authority to intervene in the process or to represent that Mr. Bailey was officially speaking on behalf of the Governor's Office.

larger problem of antiquated MQ's and a restricted hiring pool, and saw the brewing controversy as an opportunity to rectify the situation which was more important to his mission than any particular hire.

The role of the Director from the Governor's Office with DOA is not clear. It could have been limited to monitoring the progress of the process of revising the MQ's and reporting the progress back to the Section Chief and to Mr. Lamal. That is the conclusion that one reaches in speaking with employees at DOA. The e-mails and communications from Section Chief Bennett appear to tell a different story. In them, Mr. Bennett thanks Mr. Bailey for his intervention and bringing DOA around. DOA personnel responsible for rewriting the MQ's are adamant that no intervention by Director Bailey effected the way in which the MQ revision process was completed or how promptly the DOA processed the request. The contact between Director Bailey was exclusively through Deputy Commissioner Brooks who testified that his only act was to report, from time to time, what progress was being made. Deputy Commissioner Brooks was aware of Mr. Lamal's assistance to the Governor's campaign. The staff at DOA responsible for drafting the MQ's, working with DOT Section Chief Bennett, were at the most aware that the Governor's Office had made a status inquiry (which was not uncommon), but no one at DOA in the position to revise or pass on the changes to the MQ's was aware that Mr. Lamal had volunteered on the Governor's campaign nor were they aware of any relationship between Mr. Lamal and the Governor or his support of her. Moreover, the staff at the DOA responsible for handling the Maintenance Request

report that the process was done no quicker, and in exactly the same manner, as all routine Maintenance Requests were handled.¹¹

Director Bailey was not experienced in state government. He had previously worked in the Department of Administration for a short time, but admitted to being unfamiliar with the requirements of the Alaska Personnel Act. The Governor's Office trains personnel about the Alaska Ethics Act, but not the Alaska Personnel Act.

Mr. Bailey wrote several e-mails that suggest his focus was on seeing to it that Mr. Lamal be hired as opposed to merely monitoring the process. There are numerous contacts between Mr. Lamal, Section Chief Bennett and Mr. Bailey throughout the late fall and winter of 2007-2008. There are times when it appears that Mr. Bennett's communications and ongoing disputes with DOA are shared with Mr. Bailey without DOA knowing about it. Mr. Bennett testified that he was using the Governor's Office (Mr. Bailey's) interest in this process as "tool" to get the MQ's modified and his hiring concerns addressed.

The MQ's were officially revised in final form on December 24, 2007. Some of Mr. Bailey's communications about this process are focused specifically on Tom Lamal as opposed to the process. On December 26, 2007, two days after the MQ's were modified, Mr. Bennett informed Mr. Bailey of that fact and thanked him for his "phone calls which I'm sure contributed to bringing them [DOA] to the table." Mr. Bailey responds asking when recruitment might conclude. Mr. Bennett responds that the MQ's just got posted and Mr. Bennett had just sent Tom Lamal an e-mail to "letting Tom know that we intent to repost the Agent II position for the 10 day minimum and get

¹¹ Indeed the actual decision maker on the Maintenance Request in question did not even know that inquiries from the Director of Boards and Commissions had been made.

back on track.” Mr. Bailey then forwarded an e-mail string to Kristina Perry of the Governor’s Office in Anchorage and stated:

“Fyi on getting Tom Lamal hired.”

All of this occurred before the public posting of the position for the “minimum” 10 day time period required. While other applicants received form letters notifying them of the reposting, only Tom Lamal appears to have received nearly contemporaneous e-mail notification and periodic updates on the process. The minimum time for posting was selected despite the fact the whole point of revising the MQ’s was to encourage a broader hiring pool to apply to these positions.

The Lamal Hiring

The position was reposted on January 8, 2008. Mr. Lamal, and others who had previously applied, were re-interviewed and went through the same scoring process by the hiring committee and submitted qualifications information anew.¹² Mr. Lamal once again was scored highest by the Hiring Committee. He was selected as the best candidate for the position and his name was forwarded to DOA for approval as before. When his selection was presented to the DOA, with the new MQ’s for the position in place, they were applied to Mr. Lamal’s qualifications. His hiring was approved by DOA in early February 2008.¹³ The DOA personnel that approved the hire did not know about Mr. Lamal’s prior support of the Governor.

¹² In the interim, in the fall of 2007, Mr. Lamal applied for a different Right of Way II position. He was not invited to interview because the Section knew that he did not meet the MQ’s for the position as a result of the previous DOA decision.

¹³ There is evidence that Mr. Lamal did not believe that any perceived intervention by the Governor’s Office would result in his hiring. While his approval with DOA for this position was pending, Mr. Lamal applied and was interviewed for a Right of Way I position with the Section. His application was withdrawn when DOA communicated its approval of the Lamal hire to the Right of Way II position originally posted June 21, 2007 and reposted January 8, 2008.

However, prior to any decision being made by DOA, on January 28, 2008, Mr. Bailey wrote to Ivy Frye in the Governor's Office inquiring as to whether Mr. Lamal could serve on the AELS land surveyors seat, "if he indeed gets hired by the State as a Land Surveyor for DOT?" He further asserts, "He hasn't actually been hired yet but it's expected to happen within the next few weeks I believe."

The E-mails In Question

Complainant McCleod references e-mails that were sent at the end of this process and after Mr. Lamal had been selected. The Complainant had no reason to know the facts and circumstances that took place that led to these e-mails being sent. The first e-mail cited in the Complaint is an e-mail report of Mr. Lamal's hire dated February 3, 2008, from Director of Personnel Nicki Neal to Deputy Commissioner Brooks, who in turn was keeping Director of Boards and Commissions Bailey advised of the progress of the Maintenance Request pending on the Right of Way Agent positions. In it she reports the single fact that Mr. Lamal has been hired as a result of the re-posting. Deputy Commissioner Brooks forwarded that information to Director Bailey. The Director in turn notified the Governor's Chief of Staff of that fact. In addition, Mr. Bailey sent an e-mail to Governor Palin, Kristina Perry and Todd Palin advising that this was a "long battle" but "[The Deputy Commissioner of DOA] pushed it through the road blocks to get Tom Lamal hired into a classified posn [sic] in FAI with DOT."¹⁴

¹⁴ In the public records request by which Ms. McCleod received this e-mail, the State redacted the e-mail addresses for Governor Palin and Todd Palin and someone wrote in pen that the redacted e-mail addresses were for Governor Palin and Frank Bailey. In fact, the redacted addresses were for Governor Palin and Todd Palin at private e-mail addresses. Ms. McCleod asked Independent Counsel to determine whether she had been given correct information (unfortunately, she had not) and why Mr. Palin would be part of this communication as to a decision to hire someone to a classified position since she suspected Todd Palin was the true recipient of the e-mail. Our investigation revealed that the reason Mr. Palin received this e-mail is because Mr. Lamal had shared with Mr. Palin his experience with attempting state hire in a private discussion he had with him about airplanes. This discussion took place

The evidence is overwhelming that Deputy Commissioner Brooks did little or nothing to affect either the hiring decisions with respect to Mr. Lamal or the processing of the Maintenance Request for the Right of Way Agent positions. Deputy Commissioner Brooks gave sworn testimony that his participation consisted of acquainting the Director of Boards and Commissions of the process involved and advising him of the status of the matter from time to time as Mr. Bailey would inquire. The personnel at DOA directly responsible for the hire or for handling the processing of the Maintenance Request did not feel pressure, did not know of Mr. Lamal's connection with the gubernatorial campaign, and to the extent that the Governor's Office's [the Director of Boards and Commissions] was interested, they understood it to be inquiries about status only and consistent with the overall policy interests that existed more generally as a consequence of Administrative Order 237 and the Executive Working Group on Recruitment and Retention. The individual who worked in the ultimate final draft of the Maintenance Request did not know who Mr. Lamal was and did not know of, or could not recall, a single inquiry from the Governor's Office, even to inquire as to the status of matters. All State workers directly involved in the process were adamant that they received no pressure or influence outside the chain of command and did not alter or change the manner in which they carried out their duties in any way.

Thus, it does not appear that any ultimate act by the state was tainted by any efforts to provide preferential hire to a person based upon their political affiliation in

some time during the fall of 2007. Mr. Palin in turn shared this discussion with Mr. Bailey. Mr. Bailey was thus aware of Mr. Palin's potential interest in the matter and included him as a recipient of the public information that Mr. Lamal had been hired. There appears to be no violation of any law stemming from this communication. We found no evidence that Mr. Palin spoke to anyone else about the matter, Mr. Bailey does not indicate that he was kept apprised about the pending personnel matters and no one else involved with the process for the State had any contact with Mr. Palin.

violation of the Alaska Personnel Act, which would also constitute conferring the benefit of employment in violation of the Alaska Ethics Act.¹⁵ The question presented is whether there was an attempt to do so or if the situation was taken advantage of in order to effectuate a preferential hire.¹⁶

Findings and Recommendations

A. Governor Palin. There is absolutely no evidence to support a finding of probable cause for violation of the Executive Ethics Act against the Governor. Director of Boards and Commissions Bailey testified he never spoke to the Governor about this matter, prior to sending the Governor the e-mail informing her that Mr. Lamal had been hired. No other state official or employee in the entire process received even one communication from the Governor with respect to this matter, and no one sent any communication to her about either Mr. Lamal or the Maintenance Request at any time prior to Mr. Lamal's hire. There is no probable cause, and indeed there is not a scintilla of evidence, to support an Ethics Act claim against the Governor and the complaint against her should be dismissed for lack of probable cause.¹⁷

B. Chief of Staff Michael Nizich. Mr. Nizich's connection to the foregoing was that he was approached by Director Bailey about the difficulty Mr. Lamal was having getting hired and the difficulty the Section Chief Bennett was having getting positions filled at Fairbanks DOT. Mr. Nizich was not familiar with Mr. Lamal's connection to the Governor's campaign but was familiar with the State's difficulties in

¹⁵ See *supra* notes 2-3 and accompanying text.

¹⁶ An attempt to confer an improper benefit, though no improper benefit was actually conferred, may constitute official action in violation of the Ethics Act. See AS 39.52.120(a), (b)(4); AS 39.52.960(14); 9 AAC 52.020.

¹⁷ See AS 39.52.320.

recruitment and its efforts represented by the Executive Working Group. Mr. Nizich did not authorize intervention by the Governor's Office in any of these personnel matters and did not know that the Director of Boards and Commissions was monitoring the progress of the Maintenance Request. In the conversation with Mr. Bailey he provided Mr. Bailey with some information as to how the system works and referred him to Deputy Commissioner Brooks if he needed to better understand the decision making process. His only affirmative act was to acknowledge the e-mail from Director Bailey's somewhat celebratory e-mail when he was informed, along with several others, that Mr. Lamal had been hired. There is no probable cause for any improper involvement by the Mr. Nizich that would be prohibited under the Ethics Act and the complaint against him should be dismissed based upon a lack of probable cause.¹⁸

C. **Director of Boards and Commissions Frank Bailey.** Mr. Bailey received the complaint of Mr. Lamal and inquired of the Section Chief of the status of the hiring decision and the reasons for it. He learned that the Section Chief favored hiring Mr. Lamal and still maintained that Mr. Lamal should have been hired on the merits. He learned that DOA disagreed given the MQ's for the position as written. He therefore understood, or should have understood, that Mr. Lamal did not have the qualification for hire on merit at that time. He inquired further of Deputy Commissioner of Administration Brooks about the process under way with respect to the Maintenance Request to modify the MQ's and monitored its progress by periodic calls to Mr. Brooks. He requested and received reports culminating in the report from Deputy Commissioner Brooks, through the Director of Personnel Neal that Mr. Lamal had been hired. He thereupon advised the Governor, Chief of Staff and Todd Palin of the outcome and

¹⁸ See *id.*

thanked Deputy Commissioner Brooks for having "pushed it through the road blocks" to "get Tom Lamal hired." The e-mails written by Mr. Bailey appear to reflect an improper motivation by Mr. Bailey to specifically get Mr. Lamal hired. It is not clear what other reason he took to inject himself into a process which seemed on track to reach a result with respect to the Maintenance Request and consistent with the stated policy of Administrative Order 237. The decision to undertake the Maintenance Request in the first instance was unrelated to the Lamal hire. Indeed, the decision to review the Right of Way Agent II MQ's was made by DOA as part of its practice to review all levels at once of a particular job classification and the impetus for starting the review in the first place at DOT related to a previous rejection of a candidate for a Right of Way I position to which Mr. Lamal had not applied. As described above, the first request with respect to the Right of Way I position was made before Mr. Lamal was interviewed or selected for the Right of Way I position. When DOA first informed the Section Chief of its decision to review MQ's at all levels, which eventually allowed Mr. Lamal to be selected, the Section Chief at DOT initially actually objected because of the delay he feared would ensue to securing modification of the Right of Way I position.

There is substantial evidence that there was a statewide, policy level interest in finding solutions to hiring difficulties in part caused by antiquated MQ's around the State, which helps explain why there was a general interest by higher officials with respect to the topic. There was a generally perceived urgent need to find ways to expand the hiring pool of state employment applicants. There was no improper influence brought to bear upon the decision makers. Mr. Lamal was legitimately rated the most qualified among available candidates based on merit and the Maintenance

Request was processed in the normal course without outside political influence or with the motive to hire a particular employee.

However, Mr. Bailey's e-mails are troubling. Mr. Bennett's perception that his influence was being used to cause DOA to treat this matter differently than other matters could only have come from Mr. Bailey's description of his own contacts with DOA or from DOA itself. This presents a close case for a violation of the Alaska Ethics Act by Mr. Bailey. The law prohibits Mr. Bailey from conferring a benefit on an individual he knows from the campaign process in the form of any "leg up" or advantage over another hire.¹⁹ It is not clear if he was doing so or not, but he may have been. Therefore, pursuant to AS 39.52.330, Independent Counsel recommends that in order to prevent a potential future violation of the Alaska Ethics Act, this matter should be referred to the Ethics Supervisor for the Office of the Governor for the purpose of providing counseling and training for the Director of Board and Commissions to prevent a potential future violation of the Ethics Act or Personnel Act.²⁰ Independent Counsel recommends that this referral be disclosed to the complainant, as required by law,²¹ and

¹⁹ See AS 39.52.120(a), (b)(4); 9 AAC 52.020; see also AS 11.56.850(a)(1) (criminal law prohibits public servants from performing acts relating to their office but constituting unauthorized exercise of their official functions in order to confer a benefit). Note further a regulation promulgated under the Ethics Act defines unwarranted benefits or treatment as an improperly motivated deviation from normal procedures for the award of a benefit. See 9 AAC 52.040(a). The prohibition against public officials' knowingly granting unwarranted benefits or treatment under 39.52.120(a) can be violated regardless of whether the outcome is in the best interests of the state. See 9 AAC 52.040(b).

²⁰ Independent Counsel is mindful of the fact that the scope of assignment of Independent Counsel is to investigate complaints under the Executive Ethics Act, not the Alaska Personnel Act. See AS 39.52.310(c). However, the provisions of the Alaska Personnel Act are administered by the director of personnel, who enforces the Personnel Act and resolves complaints made by the public. See AS 39.25.050(a); 2 AAC 07.980; 2 AAC 07.450. Moreover, in this context, an alleged violation of the Alaska Personnel Act of this nature, which involves potentially procuring a private benefit to another (state employment), through the use of public office would appear to constitute a potential violation of the Executive Ethics Act. See *supra* note 3. Therefore, Independent Counsel believes that this recommendation is within the scope of its authority to submit under AS 39.52.330.

²¹ See AS 39.52.330.

because the complainant is not a state employee and subject to the Personnel Board's supervision, the Board may wish to issue a report containing a recommendation that the matter be made public.²²

The matters that should be covered in the recommended ethics training include ensuring that the Director understands the potential problems that arise in deviating from normal procedures to confer a benefit on another, even if the benefit may result in a positive outcome to the state.²³ Mr. Bailey should also be counseled that when taking action outside the scope of his ordinary authority as Director of Boards and Commissions, he should have the express authority of the Governor's Office unless the Governor herself otherwise directs.²⁴ He needs to be made aware that his actions and interventions as a member of the Governor's immediate staff carry with it the imprimatur of substantial governmental authority and power and should only be exercised when such authority is clearly delegated to him.

Second, the Director should undergo some training on the important provisions of the Alaska Personnel Act.²⁵ It is apparent that the Director's involvement in monitoring the matter was at times perceived as an opportunity that could be used by the Section Chief as a "tool" (his word) to assist the Section Chief in reaching his objectives in his interactions with the DOA. However mistaken that belief was, given the

²² See AS 39.52.335(f).

²³ See *supra* note 19.

²⁴ See AS 11.56.850(a)(1) (criminal law prohibits unauthorized exercise of official functions, knowing that the act is unauthorized, with intent to obtain a benefit); AS 11.81.900(a)(4) (benefit defined broadly to include gain or advantage for a third person).

²⁵ Our investigation revealed that personnel in the Governor's Office, who often are not experienced public employees, routinely receive training on the Executive Ethics Act but do not receive training on the Alaska Personnel Act. As indicated *supra*, Mr. Bailey appeared unfamiliar with the basic proposition that classified employees can be hired only on the basis of merit, not political affiliation, even at the time of this investigation.

fact that Deputy Commissioner Brooks was careful not to apply any pressure or influence on the process within the DOA, the Director needs to understand how the imprimatur of the Governor's Office was perceived. Moreover, Mr. Bailey's lack of familiarity with the requirements of the Alaska Personnel Act, as reflected in his deposition, while he was engaging in dialogue with the DOA, the DOT and the applicant for hire on regulated personnel matters created a serious risk that a violation of the Personnel Act could have occurred.

Finally, the unfortunate wording of the February 2008 e-mails, authored by Director Bailey, to the Governor, Chief of Staff and other officials led to the perception that the Personnel Act and the Ethics Act may have been violated, which led to a needless and somewhat protracted and expensive investigation of this matter. These e-mails led to an inaccurate, undeserved and negative reflection on all of the State officials involved in the communication, including the Governor, and reflected unfairly and poorly on the career officials involved in the hiring and Maintenance Request process, who did nothing improper.

On the other hand, the matter is mitigated by the fact that no actual preferential hire occurred (though this is not a defense to violations of the Ethics Act) and there is ambiguity as to whether Mr. Bailey's intent was primarily to assist Mr. Lamal or to monitor and facilitate processes called for by Administrative Order 237. The appearance created, however, was unfortunate.

D. Kristine Perry Director of the Governor's Office, Anchorage.

There is no evidence that Ms. Perry did anything other than receive the e-mail from Mr. Bailey of February 3, 2008 informing her of Mr. Lamal's hire. There is no probable

cause as to any action on her part whatsoever, let alone in violation of the Alaska Personnel Act or the Executive Ethics Act, and dismissal of the complaint is appropriate.²⁶

E. **Deputy Commissioner Kevin Brooks.** Mr. Brooks received the request for status reports from Mr. Bailey and educated him on the process that was ongoing. Mr. Brooks would make inquiries on the status of the matter to Ms. Neal, the DOA Director of Personnel and Labor Relations and forward them to Mr. Bailey. At no time did Mr. Brooks communicate to anyone in the DOA that they should consider this matter in any way different than any other. There is no evidence that Mr. Brooks communicated Mr. Lamal's previous affiliation with the Palin campaign to anyone in DOA. There is no probable cause of any violation of the Alaska Ethics Act on the part of Deputy Commissioner Brooks and the complaint should be dismissed.²⁷

F. **DOA Director of Personnel and Labor Relations Nicki Neal.** Ms. Neal communicated the status of matters regarding the Maintenance Request and the ultimate hiring decision of Mr. Lamal to Deputy Commissioner Brooks. Staff at DOA involved in the process are adamant that no supervisor or other official asked them to do anything different in connection with these matters than would occur in any other case. The complaint against Ms. Neal should be dismissed.²⁸

²⁶ See AS 39.52.320.

²⁷ See *id.*

²⁸ See *id.*

Summary

The complaint filed by Ms. McCleod dated August 6, 2008 should be dismissed as to all but Mr. Bailey in their entirety as there is a lack of probable cause to believe that any of the Respondents violated the Alaska Personnel Act, or derivatively the Alaska Ethics Act or any other applicable law.

To prevent the potential for future violation of the Act, Independent Counsel recommends, as to Director of Boards and Commissions Bailey, that a referral be made to the Ethics Supervisor for the Governor's Office for training and counseling of Director of Boards and Commissions Bailey consistent with these recommendations and the grounds for them, as contained in this report.²⁹ If the Board concurs in these recommendations, Independent Counsel requests the authority to draft and provide summaries of this disposition to the complainant and the subjects of the complaint.³⁰ As to Mr. Bailey, further proceedings and follow up should be referred to the State of Alaska Department of Law since the grounds for appointment of Independent Counsel pursuant to AS 39.52.310(c) no longer exist if the Board concurs that the dismissal of the complaint as to the Governor is appropriate.

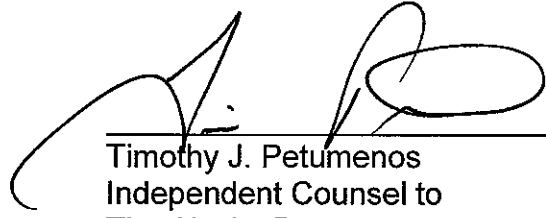
When the Department of Law receives this file back, it should examine the material for potential violations of the Alaska Personnel Act. Included in this referral is the conduct and coordination of the Section Chief with the Director of Boards and Commissions on this matter, which is better left to the Department of Law and DOA personnel responsible for enforcing the provisions of the Alaska Personnel Act directly.

²⁹ See AS 39.52.330; AS 39.52.335(c).

³⁰ See *id.*

This investigation has been conducted confidentially pursuant to the requirements of AS 39.52.340. No Respondent has waived confidentiality pursuant to AS 39.52.340(c).

DATED this 15th day of October, 2008



Timothy J. Petumenos
Independent Counsel to
The Alaska Personnel Board